

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 135

Approved September 23, 1993

Issue: In a contingent-fee case, what are the ethical considerations for a judgment-creditor's attorney where the judgment-debtor agrees to name the judgment-creditor as the beneficiary of an insurance policy on the life of the judgment-debtor in order to satisfy the judgment?

Opinion: With proper written disclosure by the attorney of the terms, conditions and obligations of the participants, there is no ethical proscription of this type of arrangement.

Factual Background. The plaintiff retained the attorney on a contingent-fee basis. The plaintiff's attorney obtained a judgment which, with interest, is worth approximately \$40,000. The defendant, who is also represented by counsel, cannot pay the amount of the judgment.

The parties, through their counsel, have negotiated a method through which the judgment creditor could recover \$25,000 of the judgment through a term life insurance policy on the life of the judgment-debtor. The judgment-debtor has agreed to purchase, in satisfaction of the judgment, a six-year term life insurance policy for \$3,000. (fn1) The judgment-creditor will own the policy and be its beneficiary.

Upon expiration of the term of the policy, the judgment-creditor may extend the term by paying additional premiums. In addition, the judgment-creditor's attorney may pay a portion of those premiums based on the attorney's interest in the proceeds of the policy. (fn2)

ANALYSIS

1. May the attorney assist in a transaction where a judgment-debtor satisfies a judgment by purchasing, on his own life, a term life insurance policy naming the judgment-creditor as owner and beneficiary?

2. May the attorney assist in such a transaction if the judgment-creditor may pay the premiums upon the

expiration of the initial term?

3. Does the contingent-fee arrangement create a conflict of interest that bars the attorney from assisting the judgment-creditor in the transaction.

Whether the attorney may properly assist the judgment-creditor in this transaction depends on two considerations. The first is whether the Utah Rules of Professional Conduct prohibit assistance in a transaction where the proceeds of a life insurance policy on the judgment-debtor funds payment of a judgment and where the policy premiums, at least in part, are paid by the judgment-creditor. If the Rules do not prohibit such assistance, the second consideration is whether the Rules prohibit the attorney's assistance when the attorney has an interest in the life insurance proceeds because of a contingent-fee contract with the judgment-creditor. Each of these considerations is discussed below.

Rule 1.2(c) of the Rules of Professional Conduct prohibits an attorney from counseling or assisting a client in any conduct that the attorney knows is criminal or fraudulent. Because the facts do not suggest anything fraudulent or criminal in this transaction, Rule 1.2(c) would not prohibit the attorney from advising his client on this matter. (fn3)

The question, however, remains whether the rules prohibit the attorney from advising a judgment-creditor in connection with such a transaction when the attorney has a contingent-fee arrangement with the judgment-creditor. The resolution of this issue turns on whether the contingent-fee arrangement creates a conflict of interest between the judgment-creditor and the attorney.

Rule 1.7 identifies situations in which conflicts of interest prevent an attorney from accepting or continuing to represent a client. Rule 7.1(b) precludes an attorney from representing a client if the lawyer's own interest materially limits his representation of the client, unless (1) "the lawyer reasonably believes the representation will not be adversely affected"; (fn4) and (2) the client consents after consultation. The purpose of this rule is to insure that the lawyer's own interests do not adversely affect the advice given to the client and that the client is informed of any potential risk.

In light of the facts presented, Rule 1.7(b) would not prohibit the attorney with a contingent fee from assisting in the transaction. The facts do not suggest that the attorney's interest in being paid from the insurance proceeds would "materially limit" his ability to advise the judgment-creditor in connection with the life insurance arrangement. In fact, the attorney and judgment creditor apparently share the

same interest in being paid as much as possible. (fn5) Since the attorney's interest does not materially limit the attorney's representation, Rule 1.7 does not apply.

Since Rule 1.7 does not prohibit the attorney from representing the judgment-creditor, the next question is whether Rule 1.8 prohibits the attorney from entering into this type of transaction with a client. Rule 1.8(a) prohibits an attorney from entering any "business transaction" with a client unless the attorney fulfills each of the following conditions:

- a. The transaction must be "fair and reasonable to the client."
- b. The attorney must fully disclose the transaction to the client in writing in a manner which can reasonably be understood by the client.
- c. The client must be given a reasonable opportunity to obtain independent legal advice.
- d. The client must consent in writing. (fn6)

Rule 1.8(a) governs here because the transaction involving the insurance policy is a business arrangement through which the judgment-creditor and the attorney agree to share the insurance proceeds and the cost of future premiums. (fn7) The facts presented do not provide the Committee with a basis for assessing whether this transaction is "fair and reasonable," although the facts do not suggest a problem in this regard. At the time of the request to the Committee, the attorney had apparently not made the written disclosures nor obtained the written client consent required by the rule. The attorney must fulfill these conditions to satisfy the requirements of Rule 1.8(a).

4. May the attorney properly pay a portion of the life insurance premiums to obtain payment of his fees under a contingent fee arrangement?

The Rules of Professional Conduct do not prohibit the attorney's payment of a portion of the premiums. Rule 1.8(j) does prohibit the acquisition of a proprietary interest in a cause of action or the subject of litigation. The intent of this rule is to prohibit champerty or maintenance. It is not intended to prohibit payments, such as these, that essentially are payments on a contract under which the attorney obtains a right to payment upon the death of the judgment-debtor.

Although the payments do not violate Rule 1.8(j), the attorney's agreement with the judgment-creditor to make a portion of the payment must satisfy the requirements of Rule 1.8(a) which governs business transactions between attorneys and clients. The earlier discussion describes these

requirements and will not be repeated here.

5. Should the agreement of the attorney and judgment-creditor be reduced to writing?

In essence, the transaction in issue is a business agreement between client and attorney by which the client seeks to recover a portion of his judgment and the attorney seeks to recover a portion of his contingent fee. (fn8) Rule 1.8(a), among other things, requires full written disclosure by the attorney and written consent by the client. To satisfy Rule 1.8(a) and to avoid or minimize the risk of future conflicts between the judgment-creditor and the attorney, these writings should include the following:

- a. If it is their intent, the attorney and the judgment-creditor should expressly state that the attorney has a specified interest in the proceeds of the policy. (fn9)
- b. The writing should state whether the judgment-creditor is required to pay the premiums after the expiration of the initial term or whether the judgment-creditor is permitted simply to let the policy lapse if he should so choose.
- c. The writing should state whether the attorney is required to pay a portion of the premiums or forgo payment from the proceeds of the policy.
- d. The writing should describe how the attorney and the judgment-creditor would pay the costs associated with enforcement of the policy in the event of a challenge by the insurer or the judgment-debtor's heirs or creditors.
- e. The writing should inform the judgment-creditor of the right to obtain independent legal or financial advice (fn10) concerning the use of the insurance policy to pay the judgement.

This list of possible items to be included in the disclosure and written consent is not exhaustive. The facts presented in the opinion request were not sufficiently detailed to permit the Committee to provide a complete list of items which should be disclosed. The attorney is responsible for insuring that the disclosure satisfies the requirements of Rule 1.8(a) in light of the attorney's detailed understanding of the facts.

Footnotes

1. The request for this advisory opinion implicitly, but not expressly, indicates that the policy satisfies the judgment. This fact was not material to the Committee's analysis of the ethical issues.
2. The request for this advisory opinion does not unambiguously describe the agreement between the attorney and the client for paying the premiums. For example, the request does not clearly state whether either

the attorney or the judgment-creditor is obligated to pay the additional premiums or whether this is optional.

3. Also, as previously noted in other opinions, this Committee does not interpret questions of law. It is, therefore, assumed that the subject transaction is not in violation of any duly enacted state or federal legislation or lawfully promulgated regulation. *See, e.g.*, Utah Ethics Op. No. 111, at 6 (July 29, 1993).

4. In the context of the Rules of Professional Conduct, the phrase "reasonably believes" means "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Rules of Professional Conduct, Terminology.

5. It should, however, be noted that a situation could arise where the interests of a client and an attorney under a contingent-fee contract may diverge. For example, a client may have an interest in discounting the amount paid by the judgment-debtor in order to obtain an immediate payment for some special purpose; whereas, the attorney may have an interest in deferring payment in hope of recovering a larger amount in the future. In such a case, the attorney would have to satisfy the requirements of Rule 1.7 before advising the client in connection with a transaction affecting the payment of the judgment.

6. Rule 1.8(a) also applies when the attorney knowingly acquires an ownership or other pecuniary interest adverse to the client. The attorney's interest in the proceeds of the insurance policy does not appear to be adverse to the client's since the interests do not conflict but are rather separate interests in different portions of the insurance proceeds. However, because the proposed transaction is a "business transaction" with a client and the attorney here must fulfill the applicable Rule 1.8(a) conditions in any event, the Committee need not address this issue.

7. In finding that this arrangement is a "business transaction," the Committee expresses no opinion on whether other arrangements for the payment of accrued attorney fees are "business transactions" within Rule 1.8(a).

8. The post-judgment agreement between the attorney and the judgment-creditor is not a contingent-fee arrangement under Rule 1.5(c). Except for collection of the judgment, the attorney has completed his representation, and the agreement does not require the attorney to provide legal services in the future. However, even if the new agreement were treated as a contingent-fee contract, the result here may not be changed, because Rule 1.5(c) requires a writing quite similar to that required by Rule 1.8(a).

9. Although not required by the Rules of Professional Conduct, designating the attorney as a beneficiary may

avoid the possibility of future misunderstandings between the attorney and the judgment creditor as to the payment to of the insurance proceeds to the attorney.

10. In this case, as in others, the attorney should assist the client in becoming fully informed of the economic benefits and risks of the client's actions. *See generally* Rule of Professional Conduct 2.1 & Comment: "[B]usiness matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation." *See also* Rule of Professional Conduct, Comment to Rule 1.5, Terms of Payment: "[A] fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property."

Rules Cited:

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1.7

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