

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 01-04

Issued May 10, 2001

¶ 1 **Issue:** Is it ethical for lawyers to charge clients an annual fee for estate planning and asset-protection legal services based on a percentage of the value of the assets involved?

¶ 2 **Opinion:** Charging clients an annual fee for estate planning and asset protection legal services based on a percentage of the value of the assets involved is likely to be ethical only in extraordinary circumstances.

¶ 3 **Facts:** A law firm desires to bill clients for legal services (fn1) for estate planning and asset protection on an annual basis using a percentage, not to exceed 1%, of "assets owned" by clients or client entities. The percentage fee would cover "initial design and implementation of client's estate and asset protection plan and firm's commitment to ongoing annual services including several hours of annual office and telephonic conferences, annual gifting programs, additional document preparation, and review of documents related to the purchase or sale of the client's principal residence."

¶ 4 **Applicable Rules of Professional Conduct:** Rule 1.5(a) of the Utah Rules of Professional Conduct provides, in pertinent part:

A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other

employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, and it is reasonably foreseeable that total attorneys fees to the client will exceed \$750.00, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

Also, Rule 1.4(b) of the Utah Rules of Professional Conduct provides: "A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation."

¶ 5 **Analysis:** The fundamental requirement of the Utah Rules of Professional Conduct with respect to attorneys fees is that they must be reasonable. (fn2) The ethical propriety of hourly, contingency, retainer, fixed-fee and other arrangements for payment for legal services must be determined with reference to the provisions of Rule 1.5. (fn3) A percentage fee is no exception. (fn4) Accordingly, whether the annual percentage fee proposed is ethically proper must be determined with reference to the provisions of Rule 1.5.

¶ 6 There are likely to be very few circumstances where application of the provisions of Rule 1.5 would justify an annual percentage fee as proposed in the request. First, services for estate planning and asset protection are not normally billed on a percentage-fee basis. Further, because the percentage fee proposed in the request is not contingent on the outcome of the matter, the reasonableness of this percentage fee cannot be justified using considerations of risk applicable to contingent-fee arrangements. (fn5) In ordinary circumstances, therefore, an annual percentage fee based upon the value of the client's assets would not be appropriate. However, a percentage fee may be reasonable in extraordinary circumstances, such as for an unusually complex estate, where the anticipated time and labor

required, the anticipated novelty and difficulty of the questions involved, the skill requisite to perform the legal services properly, and other particular circumstances, make a percentage fee "reasonable." A lawyer and client with a substantial history of significant estate planning transactions may, for example, be in a position to implement a percentage fee as a reasonable substitute for prior fee arrangements.

¶ 7 Under Rule 1.4(b), a law firm must explain its fee arrangements to the extent reasonably necessary to enable the client to make informed decisions regarding the representation. In the case of an annual percentage fee arrangement, the explanation would have to include the advantages and disadvantages of this fee arrangement as compared to others. (fn6) Further, under Rule 1.5(b), when the lawyer has not regularly represented the client and it is reasonably foreseeable that total attorneys' fees to the client will exceed \$750, the basis or rate of the fee shall be communicated to the client in writing before or within a reasonable time after commencing the representation.

¶ 8 Attempting to charge a percentage fee based on vague concepts such as "assets owned" without specifying important details, such as how and by whom asset values will be determined and whether 100% ownership is required, is likely to lead to disputes. Entering into such an arrangement without a clear understanding of what services are included, what services are not included, the duration of the arrangement, and the client's right to terminate the arrangement, could also lead to disputes. (fn7)

¶ 9 Another area that could present a difficult ethical problem for the lawyer attempting to use a percentage-based fee: If the client desires to deplete or dispose of major portions of the assets, an arrangement for an annual fee based on a percentage of the value of the client's assets must not have an adverse influence on the lawyer in providing independent professional advice to the client. (fn8)

¶ 10 **Conclusion:** An arrangement for an annual fee for legal services for estate planning or asset protection that is based on a percentage of the value of the assets involved is likely to be appropriate only in unusual circumstances.

Footnotes

1. The request involves legal services, as opposed to non-legal services such as investment advice. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has concluded that an attorney who provides financial services through a law firm should not charge a fee in which the compensation is based upon the total value of a fund, based in part upon the possibility that such compensation might open the attorney and the

attorney's records to state regulation and inspection under the Ohio Securities Act. Supreme Court of Ohio board of Commissioners on Grievances and Discipline, Op. 2000-4 (Dec. 1, 2000).

2. Utah Rules of Professional Conduct 1.5(a).

3. *See, e.g.*, Utah Ethics Advisory Op. 136, 1993 WL 755253, (Utah St. Bar) (advance payment characterized as fixed fee or "nonrefundable retainer"); *In re Babilis*, 951 P.2d 207 (Utah 1997) (contingent fee agreement); Utah Ethics Advisory Op. No 114, 1992 WL 685248 (Utah St. Bar) (contingent fee, where recovery includes personal injury protection or no "fault payments" from an insurer); Utah Ethics Advisory Op. No. 98-13, 1998 WL 863904 (Utah St. Bar) (agreements for a financial interest, such as stock in a client company in return for performing legal services); Utah Ethics Advisory Op. No. 97-05, 1997 WL 223851 (Utah St. Bar) (agreements for payment for legal services in a form other than money, such as through a barter exchange).

4. *See* Ala. Ethics Op. RO-94-07 (It is improper for a lawyer to charge a set percentage fee in a foreclosure sale without regard to the factors for determining a reasonable fee as contained in Rule 1.5 of the Rules of Professional Conduct); Kans. Ethics Op. 92-13 (Dec. 1, 1992) (construing Kansas Rule 1.5 not to prohibit, *per se*, a percentage fee for collection of support arrearages, but imposing several conditions on the lawyer in connection with the arrangement).

5. For example, a higher percentage of plaintiff's recovery may be justifiable as a reasonable contingent fee if the risk of obtaining recovery is relatively smaller at the outset of the case.

6. *Cf.* Utah Rules of Professional Conduct 1.5, cmt.: "When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications."

7. *Cf. Archuleta v. Hughes*, 969 P.2d 409 (Utah 1998) (to avoid cumbersome litigation and confusion over contingency fees involving personal injury protection payments, retainer agreements should be specific as to fee calculation and provide explicit disclosures concerning client's options).

8. Utah Rules of Professional Conduct 1.7, cmt. states:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. . . . The critical questions are the likelihood that a conflict

will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . . The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

Rule Cited:

1.5(a)