Ethics Advisory Opinion Committee
Opinion No. 19-01
Issued March 8, 2019

ISSUE

1. Is it permissible for a firm to charge the cost of a litigation insurance policy to the client if the firm recovers funds for the client, through a settlement or positive trial verdict, and the client's liability for payment of costs is contingent on a recovery?

OPINION

2. A firm may charge the cost of a litigation insurance policy to the client if the firm recovers funds for the client, through settlement or positive trial verdict, and the client's liability for payment of costs is contingent on a recovery, as long as:

> (1) the terms are fair and reasonable to the client, fully disclosed to the client, and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction;
>
> (3) the client agrees, in a writing signed by the client, to assume the cost of the litigation insurance policy upon recovery; and
>
> (4) the insurance company has no decision-making power in the client's case and the insurance policy does not in any way interfere with the law firm's independence of professional judgment or the attorney-client relationship.

BACKGROUND

3. Typically, attorneys who undertake cases on a contingency fee basis do not charge the client "costs," but recover costs if there is a recovery. Such attorneys often advance large sums of money as "costs" during the litigation. Some attorneys have purchased insurance to cover these costs in the event of a loss or a recovery too small to cover the costs. Now the question arises whether the attorney may ethically charge the cost of this insurance to the client if

the firm recovers funds for the client through a settlement or positive trial verdict and the client's liability for payment of costs is contingent on a recovery.

ANALYSIS

4. The Utah Rules of Professional Conduct ("**URPC**") implicated in this opinion are the following:

- Rule 1.2(a). Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.4. Communication
- Rule 1.5. Fees
- Rule 1.6. Confidentiality of Information
- Rule 1.7. Conflict of Interest: Current Clients
- Rule 1.8(a). Conflict of Interest: Current Clients: Specific Rules
- Rule 1.8(f). Conflict of Interest: Current Clients: Specific Rules

5. The proposed agreement between firm and client is not specifically prohibited by the Utah Rules of Professional Conduct. A contingent fee agreement must comply with Rule 1.5, which states, in pertinent part: "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." URPC Rule 1.5(a). Pursuant to Rule 1.5(c), a contingent fee agreement shall be in writing signed by the client, stating the method by which the fee is to be determined, and when and to what extent litigation and other expenses are to be deducted from the recovery. URPC Rule 1.5(c). Upon conclusion of a contingent fee matter, the firm shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

6. The firm's purchase of an insurance policy to cover expenses in the event of a loss and contracting with the client to reimburse the premiums paid by the firm in the event of a recovery, may also invoke Rule 1.8(a) of the Utah Rules of Professional Conduct, as a business transaction with the client or the knowing acquisition of an ownership, possessory, security or

other pecuniary interest adverse to the client. If so, the transaction and terms on which the firm acquires its interest must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. The client may need to be advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and given a reasonable opportunity to seek said counsel. And the client may need to give informed consent,[1] in writing signed by the client, to the essential terms of the transaction and the firm's role in the transaction.

7. In the case of a loss, the firm is effectively accepting monies for its representation of a client from one other than the client, and Rule 1.8(f) of the Utah Rules of Professional Conduct applies. In this instance, the client must give informed consent, there shall be no interference with the firm's independence of professional judgment or with the attorney-client relationship, and information relating to representation of a client shall be protected as required by Rule 1.6 of the Utah Rules of Professional Conduct. As such, the firm shall ensure that the insurance company has no decision-making power in the client's case and that the policy itself does not interfere with the firm's independence of professional judgment or the attorney-client relationship.[2]

8. The ultimate amount the client is required to pay upon recovery for the insurance premium must be reasonable both when charged and when collected pursuant to Rule 1.5 of the Utah Rules of Professional Conduct. For example, if, in a particular case, the client settles or

[1] "Informed Consent" denotes the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation of the material risks of and reasonably available alternatives to the proposed course of action. *See* URPC Rule 1.0(f).
[2] *Accord* Utah Ethics Advisory Op. Comm. ("**EAOC**"), Op. 02-01 Appx. (2002) (citing Ga. State Bar, Formal Op. 92-1 (1992) (lawyer to ensure that bank understands that its contractual arrangement can in no way affect or compromise lawyer's obligation to client)).

prevails at trial but is awarded a lesser sum than expected, such that charging the premium in addition to the contingent fee and expenses would substantially deplete the amount the client recovers, charging the premium to the client may be unreasonable. If the amount calculated in the fee agreement for the premium is thereby unreasonable, the firm must not enforce this part of the agreement. This is true even if the litigation costs and the percentage used to calculate the premium are reasonable and/or agreed as reasonable by the client.

9. The insurance coverage that protects monies advanced by the firm in a contingent fee arrangement may provide an indirect benefit to the client,[3] because it gives the firm greater confidence in incurring costs litigating a client's case in a way that would maximize the results for the client. The client may well be willing to pay for this benefit in the form of reimbursement for the cost of insurance in the event of recovery.

10. Alternatively, such an insurance policy may encourage the firm to go to trial rather than accept a settlement offer for the client. For example, if costs in a particular case are

[3] Although the purchase of an insurance policy by the firm may provide an indirect benefit to the client, the policy itself, in the scenario presented to the EAOC, rather provides financial assistance to the firm in the event of a loss. Rule 1.8(e) of the Utah Rules of Professional Conduct states: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (e)(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . . ." Comment 10 to Rule 1.8(e) states: "Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses . . . because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts." An insurance policy that covers the costs of litigation in the event of a loss may reduce the lawyer's financial stake in the litigation, by reducing the lawyer's losses. The client's agreement to cover the cost of the insurance premium in the event of recovery may further reduce the lawyer's losses and financial stake in the litigation.

substantial, this may motivate the firm itself to push for going to trial. This raises the possibility of a conflict of interest between the firm and the client.[4] However, certain conflicts of interest are inherent in contingency fee cases. For instance, a firm may prefer the client accept a low settlement offer so the firm receives some fees, while the client may desire to reject the offer and go to trial. As there is always the potential for such conflicts, the safeguards of Rules 1.2(a) and 1.4, Utah Rules of Professional Conduct, unless excepted otherwise, direct lawyers to abide by a client's decisions concerning the objectives of representation, consult with the client as to the means by which they are to be pursued, and abide by a client's decision whether to settle a matter. The purchase of litigation cost protection insurance does not alter this dynamic of the lawyer-client relationship.

CONCLUSION

11. The Utah Rules of Professional Conduct do not preclude a firm from purchasing a litigation insurance policy and charging the cost of the policy to the client upon recovery, as long as the terms are fair and reasonable, fully disclosed in writing in a manner that can be reasonably understood by the client, the client is advised to seek independent counsel and given the opportunity to do so, the client agrees in writing to the terms of the agreement, the insurance company has no decision-making power in the client's case, and the policy does not interfere with the firm's independence of professional judgment or the attorney-client relationship.[5]

[4] If a conflict arises from the added component of litigation insurance, the firm would need to perform an analysis under Rule 1.7 of the Utah Rules of Professional Conduct.

[5] *Accord* Utah EAOC, Op. 02-01 Appx. (2002) (citing Tex. Comm'n on Prof'l Ethics, Op. 465 V. 54 Tex. B.J. 76 (1991) (attorney may borrow money from a lending institution for case expenses, and charge or pass on to the client the actual out of pocket interest or finance charges)).