

Ethics Advisory Opinion Committee
Opinion No. 20-01
Issued May 19, 2020

ISSUE

1. May a lawyer permissibly renegotiate the terms of a flat fee agreement if, after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer unilaterally contemplated at the commencement of the representation?

BACKGROUND

2. Opinion 12-02 of the Utah Ethics Advisory Opinion Committee (“**EAOC**”) states: “The permissibility of flat-fee agreements in Utah is well established, subject always to the requirements of the Utah Rules of Professional Conduct,” including Rule 1.5(a), which requires all fees to be reasonable under the circumstances. Opinion 12-02 and the case law it cites state that a flat fee arrangement may be subject to review and alteration if circumstances arise that render the arrangement unfairly lucrative for the attorney. *See, e.g., McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985) (holding that fees paid to an attorney are subject to review to ensure they do not offend the court’s sense of fundamental fairness and equity); *Long v. Ethics & Discipline Comm. of the Utah Supreme Court*, 2011 UT 32, ¶ 48 (noting that, while a flat fee agreement was reasonable when signed, it was still improper to demand payment if such fee was unreasonable given the outcome of the representation); *In re Powell*, 953 N.E.2d 1060, 1063-1064 (Ind. 2011) (“Even if a fee agreement is reasonable under the circumstances at the time entered into, subsequent developments may render collection of the fee unreasonable. . . . We do not suggest that a contingent fee must be reduced every time a case turns out to be easier or more lucrative than contemplated by the parties at the outset. But collection of a fee under the

original agreement is unreasonable when it gives the attorney an unconscionable windfall under the totality of the circumstances.”).

OPINION

3. The fact that after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer contemplated at the time of commencement of the representation does not permit a renegotiation of the fee agreement, unless the lawyer complies with Rule 1.8(a) of the Utah Rules of Professional Conduct (“URPC”) regarding a transaction with the client.

ANALYSIS

4. Rule 1.8, *Conflict of Interest: Current Client: Specific Rules*, in subpart (a), prohibits a lawyer from entering into a business transaction or acquiring a pecuniary interest adverse to the client, among other things, unless certain conditions are first satisfied. Rule 1.8(a) states:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(a)(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(a)(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;¹ and

(a)(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

URPC Rule 1.8(a).

¹ There may be circumstances that dictate in fairness that the attorney pay the costs for the client to consult with independent counsel. *See also* Rule 1.8(f) and 5.4(c) regarding payment of fees by a third party.

5. It is the EAOC's opinion that the renegotiation of a flat fee agreement or any fee agreement after commencement of the representation for the advantage of the lawyer because the scope of the engagement is greater than anticipated by the lawyer is subject to Rule 1.8(a), and the conditions set forth in rule 1.8(a) must be satisfied before the fee agreement may be renegotiated and enforced. The EAOC's opinion would be different if the scope of the engagement is actually enlarged by the client, or was not foreseeable or contemplated by the lawyer and client as included in the original scope of work contemplated at the time of the original fee agreement was made. Another situation that would alter the EAOC's opinion would be where the client has misrepresented the facts or issues, there is a mutual mistake of fact, or other grounds exist for termination of a contract.²

6. The EAOC acknowledges that Rule 1.5 of the Utah Rules of Professional Conduct generally governs fees charged or collected by a lawyer, which provides a lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses, and that normally Rule 1.8(a) does not apply to fees. Even Comment 1 to Rule 1.8 of the Utah Rules of Professional Conduct provides that Rule 1.8(a) does not apply to "ordinary fee arrangements."³ However, it is the EAOC's view that the renegotiation of an initial fee agreement is not an "ordinary fee arrangement," and the conditions that safeguard the interest of the client under Rule 1.8(a) must be satisfied. *See, e.g., In re Richmond's Case*, 904 A.2d 684,

² The EAOC is aware of Opinion No. 679 of the Professional Ethics Committee for the State Bar of Texas. However, the Opinion is based in part on Texas case law that recognizes that a fee agreement can be modified, but is subject to a presumption of unfairness and the attorney has the burden to demonstrate fairness. Opinion No. 679 also is based upon a mutual misunderstanding of the proposed scope of the representation.

³ Comment 1 to Rule 1.8 of the Utah Rules of Professional Conduct states: "[Rule 1.8(a)] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee."

690 (N.H. 2006) (“Thus, while Rule 1.5 did not prohibit the respondent from accepting property as a fee and knowingly acquiring a pecuniary interest that may be adverse to Alvis’, the respondent was still required to comply with the procedural requirements of Rule 1.8(a) by communicating the risks and consequences of such an arrangement to Alvis at the outset of the transaction.”); *Perez v. Pappas*, 659 P.2d 475, 478-79 (Wash. 1983) (“Therefore, when a structured settlement is reached the attorney and client may have to reconsider and discuss the calculation of fees. However, in doing so an attorney must continually be aware that the attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client.”); *In re Lauter*, 933 N.E.2d 1258, 1263 (Ind. 2010) (“The Court has found lawyers guilty of violating Rule 1.8(a) when they changed the terms of a fee agreement to be more advantageous to them without providing clients with the safeguards mandated by this rule’); *In re Krasnoff*, 78 N.E.3d 657, 661 (Ind. 2017) (affirming, “Finally in Count 1, the Commission alleged, and the hearing officer found, that Respondent violated Professional Conduct Rule 1.8(a) by renegotiating his fee agreement with Client on terms more advantageous to Respondent without adhering to the safeguards required by the rule, including the need to advise the client in writing of the desirability of seeking independent counsel and to give the client a reasonable opportunity to do so. Respondent disputes the notion that the renegotiated terms disadvantaged Client, arguing that a settlement was better for Client than losing the case outright.”).

7. The EAOC’s opinion that Rule 1.8(a) of the Utah Rules of Professional Conduct applies to a renegotiated fee agreement is based in part on the fact that at the time of renegotiation the parties are not in an equal bargaining position, as at the time of the original fee agreement. After the lawyer has been engaged and provided services, the lawyer then is clearly

in a superior position to renegotiate since it can be difficult for the client not to agree to a modification since changing attorneys after the commencement of representation can be difficult and an economic burden. Additionally, the client may not know all of the client's options.

8. If a lawyer is unable to renegotiate the initial engagement agreement because of a client's refusal, the attorney may seek to withdraw under Rule 1.16(b), which provides that a lawyer may withdraw from representing a client if "the representation will result in an unreasonable financial burden on the lawyer" URPC Rule 1.16(b)(6). However, if a lawyer could withdraw under those circumstances, the lawyer would be in effect denying the client the benefit of the contract and could have a coercive effect of forcing the client to agree to the modification of the initial engagement agreement. Further, the financial burden is arguably not "unreasonable" to the lawyer, since the lawyer voluntarily entered into the flat fee agreement. But if the lawyer could make the client financially and strategically whole, then perhaps withdrawal would be appropriate under Rule 16(b)(1), which provides: "a lawyer may withdraw from representing a client if ... withdrawal can be accomplished without material adverse effect on the interests of the client." URPC Rule 1.16(b)(1). For example, if the attorney refunded fees paid by the client to the extent services would be duplicated by new counsel, and addressed any other harm sustained by the client, then withdrawal might be appropriate.

9. This opinion is limited to circumstances where the lawyer unilaterally underestimated the scope of the engagement in establishing the fee. The Committee is not rendering an opinion regarding the situation where there is a mutual misunderstanding of the scope of the engagement.