

## Utah Ethics Opinion

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### 12-02. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE Opinion Number 12-02

Opinion No. 12-02

Issued May 1, 2012

#### ISSUE:

1. What are the ethical and practical considerations applicable to attorneys representing clients in the state of Utah under flat-fee or fixed-fee agreements (hereinafter referred to as flat-fee agreements)?

#### OPINION/ANALYSIS

2. The permissibility of flat-fee agreements in Utah is well established, subject always to the requirements of the Utah Rules of Professional Conduct. Utah lawyers may use such agreements under circumstances that ensure that clients will not be charged an unreasonable fee, as prohibited by Rule 1.5, and that client funds will not be comingled with the attorney's funds as prohibited by Rule 1.15. Whether a flat-fee arrangement complies with these rules depends heavily on an analysis of the applicable facts and circumstances. Fee agreements should not describe such fees as "non-refundable", as such fees are always subject to refund in the event they are or become unreasonable under the circumstances of the case. Representation that a flat fee is nonrefundable is deceptive and violates Rule 8.4.

3. Recent cases on the permissibility of flat-fee agreements under the Utah Rules of Professional Conduct implicate several questions regarding the permissibility of such, as well as practical considerations faced by lawyers using such agreements. Such questions are addressed below.

#### A. *What fee agreements are relevant to this opinion?*

The term "flat-fee" and "flat-fee agreement" are used in this opinion to refer generally to fee agreements wherein the client agrees at the inception of a matter to pay a fixed sum to the attorney in exchange for which the attorney agrees to perform a particular scope of work (fn1). Flat-fees are essentially a species of advance payment retainers, wherein the client provides the attorney with payment at the beginning of the relationship in exchange for work to be performed later. Examples of flat-fees include a criminal defense attorney that agrees to handle the defense of a misdemeanor case through trial for a fixed sum, a commercial litigator that agrees with a corporate client to

conduct all aspects of the discovery phase of a particular case for a specified sum or a transactional or patent attorney that agrees to create and file specific documents or handle certain aspects of a transaction for a fixed sum.

4. Clients pursuing flat-fee agreements often do so in order to avoid the negative consequences of the billable hour or to obtain representation where paying for legal services by the hour is not feasible. Hourly clients are generally required to make regular monthly or quarterly payments to the attorney, which may be undesirable or impossible for some clients. Attorneys paid by the hour are not rewarded for performing their work as efficiently as possible, which may increase costs. Corporate clients often use flat-fee agreements to ensure that legal fees do not exceed pre-budgeted amounts. Certain types of collection or criminal defense cases raise the specter that any funds held by the client or in the attorney's trust account may be subject to seizure by the client's creditors or forfeiture by government officials, and thus become unavailable to compensate the attorney. Each of these concerns may be appropriately addressed by flat-fee agreements.

5. Attorneys may prefer to enter into flat-fee agreements to avoid the risk that the client will be unable (or unwilling) to periodically pay for services rendered at an hourly rate. Flat-fee agreements are particularly attractive where, depending on the outcome of the litigation, the client may eventually be incarcerated, unemployed or insolvent. By entering into a flat-fee agreement, the attorney is able to ensure collection in exchange for accepting the risk that the matter may be more expensive or time-consuming to resolve than anticipated at the outset. If the attorney correctly estimates the time and effort needed to perform the scope of work agreed, then the attorney may be able to earn a higher fee than would be possible under an hourly fee arrangement. Conversely, if the attorney does not accurately estimate the scope of work required to meet the client's needs, the costs and expenses of the matter may render the flat-fee agreement unprofitable(fn2).

#### B. *What factors should be considered in determining the reasonableness of a flat-fee?*

6. Rule 1.5 lists several factors that should be considered in determining the reasonableness of fees. Long v. Ethics and Discipline Comm. of the Utah Supreme Court, 2011 UT 32, §45,256 P.3d 206; Utah R. Prof'l Conduct 1.5(a). Utah follows the practice of other jurisdictions in allowing attorneys to charge flat-fees. See Utah State Bar Ethics Advisory Opinion No. 136; Long, 2011 UT 32 at §48. In determining whether a fee is unreasonable, the Utah Supreme Court has indicated that each of the Rule 1.5(a) factors is relevant, specifically including (but not limited to)

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. Long, 2011 UT 32 at §45.

7. The recent Utah Supreme Court decision of Long v. Ethics and Discipline Comm. of the Utah Supreme Court, illustrates some of the challenges faced by lawyers using flat-fee agreements. In Long, the Utah Supreme Court indicated that sufficient evidence existed to support the screening committee's finding that the petitioner charged unreasonable fees in three criminal cases. Id. at §48, 52 (fn3). The Court discussed evidence of the amount charged to each of the clients and the time spent by petitioner on the case. Id. In one case, the petitioner admitted to attempting to collect approximately \$6,600.00 for six hours of work. Id. at §57. In the other two cases, the screening committee compared the district court docket, which suggested that petitioner did very little work, with a narrative accounting created by petitioner after ethics complaints were filed that indicated that petitioner did between fifty and sixty hours of work on each case. Id. at §21. The Utah Supreme Court determined that because petitioner's rebuttal evidence did not consist of contemporaneous documentation, "a reasonable mind might not give this 'accounting' much weight" in comparison with the district court docket. Id. at §52.

8. The Long opinion does not indicate whether the Utah Supreme Court weighed the time spent by petitioner on his cases more heavily than other Rule 1.5 factors which might have shown that the fees were reasonable. Rather, the Court merely indicates that the evidence was sufficient to support the screening committee's finding based on the record. Id. at §26. The only factor discussed in the opinion is the amount

of time spent by petitioner on the cases. The Court's decision can therefore be read to suggest that, in defending his actions before the screening committee, petitioner faced a difficult problem of proof. It is unclear from the opinion itself whether petitioner submitted any evidence of other Rule 1.5(a) factors that supported his contention that the fee was reasonable.

9. Long demonstrates a difficulty that often arises with flat-fee practice. Attorneys must prove the reasonableness of their fees when challenged. It is common for solo and small firm attorneys in some practice areas to forgo contemporaneous accounting for time spent on flat-fee cases because of administrative costs and limited utility of such information in the flat-fee context. While "the time and labor required" is only one of several factors to consider in determining whether a fee is reasonable,(fn4) in disciplinary cases, time spent by the lawyer often weighs heavily in the determination of the reasonableness of the fee. The failure by the lawyer to accurately and contemporaneously account for time spent on a particular matter is not itself a violation of the Rules. However, failing to account may create practical difficulties in defending against disciplinary action. If maintaining contemporaneous time records is inconvenient, the attorney would be wise include language in their fee agreement designating various benchmark events that correlate with work to be performed on the case, the occurrence of which will deem set percentages of the flat fee to have been earned. C. When is the fee earned and can fees be non-refundable?

10. When the flat fee is earned depends primarily on the contractual arrangement between the attorney and client, subject to the rules of professional conduct. Ryan v. Butera, Beausang, Cohen and Brennan, 193 F.3d 210, 214 (3d Cir. 1999). "A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses." Utah R. Prof'l Conduct 1.5(a). Nothing in the Rules of Professional Conduct or the case law reviewed by the committee suggests that the fee need only be reasonable at the outset of the attorney-client relationship. Rather, courts have consistently found that a fee may become unreasonable given circumstances that develop during the attorney-client relationship. See McKenzie Const., Inc. v. Maynard, 758 F.2d 97, 101 (3d Cir. 1985); Long, 2011 UT 32 at §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); see also Douglas R. Richmond, Understanding Retainers and Flat Fees, 341. Legal Prof. 113, 123 (2009). The Rules of Professional Conduct therefore require that fees be reasonable at all times during the representation. See Utah R. Prof'l Conduct 1.5(a).

11. The question of where the attorney must deposit the flat

fee largely turns on when the fee is earned. The fee agreement may provide means by which the fee or portions thereof may be deemed "earned" and become the property of the attorney, subject always to the requirement that the fee agreement must not result in the attorney charging an unreasonable fee.

12. The flat-fee remains property of the client until it is earned. See Iowa Supreme Court *Ed of Professional Ethics and Conduct v. Apland*, 577 N.W.2d 50, 55-56 (Iowa 1998). The unearned portion of a flat fee must be kept separate from the attorney's personal funds. Utah R. Prof'l Conduct 1.15(a) ("[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property"); See also *In re Kendall*, 804 N.E.2d 1152, 1155 (Ind. 2004). Keeping the unearned portion of the fee in trust provides some protection for client funds from the attorney's creditors.<sup>(fn5)</sup> Moreover, maintaining unearned fees in the client trust account assures that client property will be available for repayment in the event that the attorney is not able to complete the representation to an extent that would entitle the attorney to retain the entire fee.

13. Prior ethics opinions appear to allow flat fees to be non-refundable, subject to later disgorgement. See Utah State Bar Ethics Advisory Opinion No. 136; Long, 2011 UT 32 at §48. However, the distinction between a refundable fee and a non-refundable fee subject to potential disgorgement, as discussed in Opinion No. 136, is somewhat unclear. The only practical difference seems to be that the later shifts the risk of the attorney's default to the client. If the attorney collects a truly "non-refundable fee", that fee is property of the attorney. The fee can be spent by the attorney or attached by the attorney's creditors. In the event that the fee later became unreasonable, the client may have no way to recover the unreasonable fee. This result is unsatisfying, particularly given that attorneys are required to hold fees in trust in other circumstances where the client may be entitled to a refund, e.g., where there is a dispute over the amount of fees, or where there is a dispute over ownership of funds held in trust. See Utah R. Prof'l Conduct Rule 1.15(e).

14. Given the prohibition on unreasonable fees under Rule 1.5, there is no such thing as a nonrefundable fee. It is well established that clients are entitled to a refund of unearned or unreasonable fees, regardless of language used in a fee agreement. See Utah R. Prof'l Conduct Rule 1.15(c) ("A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred") (emphasis added). Utah attorneys should reasonably know that any flat fee may have to be refunded if it is unreasonable. Language in a fee agreement which states, without further explanation, that a flat fee or other advance

payment retainer is nonrefundable is a misrepresentation. See Utah R. Prof'l Conduct Rules 8.4(c); *In re Dawson*, 8 P.3d 856, 859 (N.M. 2000). To the extent that Utah State Bar Ethics Advisory Opinion No. 136 suggests otherwise, it is hereby superseded by the instant opinion. Attorneys may avoid making this misrepresentation in their fee agreements by clearly explaining in plain language that fees will be refunded in the event they are unreasonable under the circumstances. If there are particular circumstances which render a flat-fee (or portion thereof) reasonably earned at any time prior to the termination of the representation, the attorney should clearly explain such circumstances in the fee agreement, especially with regard to the factors indicated in Rule 1.5(a).

15. Permissible arrangements where fees may be "earned" prior to conclusion of the representation, thus allowing the attorney to transfer portions of the fee to the attorney's personal or operating account are numerous.<sup>(fn6)</sup> The attorney is not required to use a hypothetical hourly rate in determining when the fee is earned, though such an arrangement could be strong evidence of reasonableness. The fee agreement may designate reasonable events which correlate with the work performed by the attorney, which cause portions of the fee to be earned, such as completion of substantial discovery, filing of a notice of appearance or commencement of trial. Alternatively, an agreement could indicate that the fee is earned once the attorney is committed to the expenditure of substantial work and expenses, for example, where the attorney has appeared in a criminal case immediately prior to trial and is unable to withdraw. Again, where particular circumstances are the basis for designating a certain portion of the fee earned prior to termination of the representation, the attorney should specifically identify such in the fee agreement.

16. Once a portion of the fee is "earned" under the terms of the fee agreement, it becomes the attorney's property and should not be kept in the trust account. See Utah R. Prof'l Conduct Rule 1.15(a). If retention of the fee (or some portion thereof) later becomes unreasonable, the attorney has an obligation to return such fees to the client. See Utah State Bar Ethics Advisory Opinion No. 136. The committee notes that the practice of designating the majority of a flat fee as earned at the outset of the representation may be unreasonable, given that the attorney has not yet performed any of the services contracted for in the fee agreement.

17. If the attorney is subsequently terminated or is otherwise unable to carry out the object of the fee agreement, the attorney's ability to disgorge or repay fees becomes a critical question. In such a case, the client will almost certainly be entitled to a refund of all or part of the fee. Rule 1.5 directs that attorneys shall not "make an agreement for, charge or collect an unreasonable fee ... " See Utah R. Prof'l Conduct Rule 1.5(a) (fn7) By deeming

the entire fee earned at the outset of the litigation, and transferring the fee to the operating account before the object of the representation, or any part thereof, has been accomplished, the lawyer has made "an agreement for" an unreasonable fee if the object of the representation is not accomplished. See *Id.* Under such circumstances, the attorney may have violated the requirements of Rule 1.5, as discussed by the Utah Supreme Court in *Long*.

## CONCLUSION

18. When managed as required by the Rules, flat-fee agreements provide substantial benefits to clients, attorneys and serve the interests of justice. Attorneys can manage financial risks so as to allow clients who could not otherwise afford counsel to obtain representation. Sophisticated clients are able to anticipate and accurately manage litigation expenses, and attorneys are able to avoid the administrative expenses of billing for their services by the hour. It is the committee's opinion that, as discussed herein, Utah attorneys may enter into flat-fee agreements with clients where such agreements do not violate Utah Rules of Professional Conduct Rules 1.5, LIS or 8.4.

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Footnotes:

1. Flat-fee agreements are also referred to in some of the relevant literature as a class of special or security retainers to distinguish them from general retainers, which are payments that give the client an option on the attorney's availability at some future time. See Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 *J. Legal Prof.* 113, 123 (2009); Tyler Moore, Note, *Flat Fee Fundamentals: An Introduction To The Ethical Issues Surrounding the Flat Fee after In re Mance*, 23 *Geo. J. Legal Ethics* 701 (2010); see also *See Dowling v. Chicago Options Associates, Inc.*, 875 N.E.2d 1012, 1018 (Ill. 2007). However, flat-fee arrangements also differ from typical security retainers, which are paid at the inception of a matter and held in trust to secure payment for work to be performed at hourly rates. While general and security retainers are still subject to the requirements of Rules 1.5 and 1.15, they are beyond the scope of this opinion.

2. While Rule 1.5 does not specifically list the risk undertaken by the attorney in undertaking the representation on a flat-fee basis as a factor in determining whether the fee itself is reasonable, the Rule specifically indicates that the listed factors are not exclusive. See Utah R. Prof'l Conduct 1.5(a). The committee believes that the financial risk undertaken by an attorney taking on a particular case is a relevant factor that should be considered when evaluating the reasonableness of a flat-fee agreement in subsequent

disciplinary proceedings.

3. It is instructive to note that two of the three complaints filed against Mr. Long for violation of Rule 1.5 were referred to the Office of Professional Conduct by a district court judge that reviewed fees charged in two of Mr. Long's cases and found the fees to be excessive and unreasonable under the circumstances. The third complaint was brought after Mr. Long hired a collection agency to sue another client for unpaid fees.

4. Indeed, the Utah Supreme Court notes that "[t]hese factors do not represent an exclusive list, and each factor may not be relevant in every case." *Long*, 2011 UT 32 at §45.

5. In certain cases, it may be reasonable for a client to give informed consent to allow the entire flat fee to be earned upon commencement of the representation in order to protect the client's ability to secure counsel. Adding such a provision to a fee agreement may benefit the client where government seizure of the client's funds is reasonably believed to be imminent. In such a case, the fee agreement should be drafted so as to clearly explain in plain language terms the risks of designating the fee as earned immediately upon receipt, and describe the benefits to the client of doing so given the facts of the client's particular case. See *Dowling*, 875 N.E.2d 1012 at 1022-1023. In other words, even in such circumstances, the fee must comply with Utah Rules of Professional Conduct Rule 1.5.

6. Given the numerous factors which may be considered in determining whether a fee is reasonable under Utah Rules of Professional Conduct Rule 1.5( a), it is not possible to specify all of the potential circumstances which might cause a fee (or a portion thereof) in a particular case to be reasonably earned.

7. The comments to Utah Rules of Professional Conduct Rule 1.3 note that the lawyer's duty of diligence may require a sole practitioner to "prevent neglect of client matters in the event of. . . death or disability," by preparing a plan to protect clients in such circumstances. See Utah R. Prof'l Conduct Rule 1.3 cmt. 5. In appropriate circumstances, Rule 1.5 may require an attorney holding substantial funds which may become subject to disgorgement to prepare a plan whereby such funds may be repaid if the attorney is unable to complete the object of the representation.