Utah State Bar Issues Advisory Ethics Opinion on Flat Fees

On May 1, 2012, the Utah State Bar Advisory Ethics Committee issued Advisory Opinion 12-02 on the use of flat fees in criminal defense and other cases. The opinion provides criminal defense lawyers long-needed guidance on flat fees and the steps that lawyers must take to ensure that flat fees are reasonable and comply with the Rules of Professional Conduct. Although the opinion may not please all criminal defense lawyers, it, at least, communicates the basic rules associated with flat fees. It also gives criminal defense lawyers safe harbors to avoid unwelcome scrutiny of their billing practices. And, given the recent rule change to the State Bar’s administrative procedures, the opinion provides UACDL members reliable guidance that has been lacking on this subject.

Flat fees have been of considerable interest among UACDL members because of the perception that the Office of Professional Conduct (“OPC”) has specifically singled out criminal defense lawyers’ use of flat fee agreements. In response, UACDL leaders met with OPC lead counsel Billy Walker to ask for clarification. These leaders also communicated members’ concerns to former Utah Supreme Court Justice Christine Durham when she served as Chief Justice. Finally, UACDL invited OPC attorneys to speak at the UACDL Seminar in Provo in March of 2011.

These efforts provided some clarification but left many questions unanswered. For example, OPC appears not to have targeted criminal defense lawyers solely based on flat fees. Rather, OPC normally raised flat fee issues together with other complaints that coexisted with flat fee concerns. Despite this direction, criminal defense lawyers have remained unsure whether flat fees must be held in a trust account separate from a lawyer’s operating expenses. Likewise, the questions of when fees were earned and may be transferred to an operating account have remained murky.

In the midst of this confusion, members of the State Bar Advisory Ethics Committee approached UACDL leaders in 2011 in preparation for drafting an ethics advisory opinion on the use of flat fees. These committee members listened carefully to UACDL’s concerns and sought to become familiar with the ins and outs of flat fees. They also diligently asked for information and researched the practices in other states. The result is the ethics opinion included after this summary.

The opinion is especially significant because the Utah Supreme Court recently amended the Rules Governing the Utah State Bar to protect lawyers who rely on advisory opinions. Prior to this rule change, OPC insisted that lawyers may not rely on advisory opinions when conducting their affairs. The Supreme Court rejected this view and assured lawyers that OPC cannot pursue ethical violations when lawyers rely on advisory opinions. Effective March 5, 2012, the Supreme Court added the following provision that gives lawyers some assurance that advisory opinions will protect their actions:

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\text{Effect of ethics advisory opinions. -- The OPC shall not prosecute a Utah lawyer for any act that was expressly approved by an ethics advisory opinion that has not been withdrawn at the time of the conduct in question. No court is bound by an ethics opinion's interpretation of the Utah Rules of Professional Conduct.}
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Utah R. Judicial Admin Rule 14-504(d).

To give UACDL members an overview on the Ethics Opinion, the following list summarizes the points that may be of most interest:

- Lawyers who use flat fees should explain in detail in a written fee agreement how the fees are earned, calculated, and credited. The opinion repeatedly refers to various “benchmarks” that
may be used for earning flat fees. The fee agreement, if clear and precise, will avoid most disciplinary complaints. ¶ 9, 15.

- Lawyers cannot use flat fees for operating expenses until the fees are earned. Until that occurs, flat fees must be kept in a trust account separate from an operating account. ¶ 12.
- Despite the trust account requirement, lawyers can utilize several tools, including references in fee agreements to “benchmarks” discussed above, to specify when fees are earned:
  - Lawyers may specify in fee agreements when certain fee amounts or percentages of flat fees are earned. ¶ 11.
  - For example, a first appearance in court may trigger a specific amount or percentage. Other events include the arraignment, preliminary hearing, pretrial motions, etc.
  - Fee agreements may also specify that entire flat fees are earned upon the “expenditure of substantial and expenses” as defined in the agreement. ¶ 15.
  - The fee agreement may specify that an entire flat fee is earned upon the lawyer accepting the case but the fee still must be reasonable under the Rules of Professional Conduct. ¶ 12 n. 5. Thus, any lawyer relying on such a provision assumes the risk that the fee amount is unreasonable.
  - Target dates or events when flat fees are earned depends upon all of the circumstances. But when flat fees are earned depends upon all of the circumstances.
  - Lawyers may not include in their fee agreements that fees are non-refundable. Such a provision is per se unethical because it “shifts the risk of the attorney’s default to the client.” ¶¶ 13, 14.
    - Even a disgorgement provision does not save fee agreements that include a non-refundable clause. ¶ 13.
    - Lawyers must refund any unearned portion of fees. ¶ 14. But, again, this problem may be avoided if the fee agreement specifies when fees are earned. ¶ 15.
- Under the Rules of Professional Conduct, the reasonableness of attorney fees is the benchmark for determining whether an ethical violation occurs. No one factor is determinative and the list of factors in the rules is not exhaustive. ¶ 5 n. 2. However, some factors are weighed more heavily than others including:
  - Although time is not the only measure for determining the reasonableness of a flat fee, the number of hours spent on a case is perhaps the most important factor. ¶¶ 8, 9, 15.
  - Lawyers who use flat fees need not keep detailed time records but if they rely on time for reasonableness, they must be able to document the number of hours spent on a case.
  - Similarly, because time is not the only factor, the use of hypothetical hourly rates need not be included in fee agreements. ¶ 15.
  - Although not specified in the Rules of Professional Conduct, the risk that a lawyer assumes in accepting a case under a flat fee is a relevant factor. ¶ 5 n. 2. Thus, whenever a lawyer accepts a flat fee, the lawyer assumes the risk that the case will be far more complex and time consuming than originally thought. Moreover, if a lawyer foregoes other clients and cases when accepting a flat fee, the lawyer has assumed some risk of lost business.

If any UACDL members have any specific questions about the Advisory Opinion, they should feel free to contact UACDL leaders directly. Also, the Advisory Committee Member who spearheaded the opinion, Alex Leeman, has offered to field questions as well. UACDL members may contact Mr. Leeman at aleeman@vancott.com or (801) 237-0226.