

Utah Ethics Opinions

1992.

118. USB EAOE Opinion No. 118

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 118

Approved August 20, 1992

Issue: 1 Is Utah Rule of Professional Conduct 1.13(a) intended to eliminate the historic distinction (previously stated in DR-9-102(a)) between payments advanced by a client for professional legal fees and payments advanced by a client for costs?

2. If Rule 1.13(a) does eliminate the distinction, how must the lawyer treat funds advanced by the client for payment of either professional legal fees or costs? Specifically, must monies advanced by a client for payment of costs be deposited into a trust account? May such funds be transferred into a non-trust account (business account) after the attorney has incurred the costs? Must monies advanced by a client for attorney's fees be deposited into a trust account? Must these funds be transferred by the attorney into a non-trust account when the fees have been earned?

Opinion: Rule 1.13(a) is intended to eliminate the distinction between funds advanced by the client for costs and funds advanced by the client for the payment of attorney's fees. All advanced funds are the property of the client and must be deposited in a separate trust account maintained by the attorney for clients. Funds may be transferred out of the trust account only in accord with the requirements of Rule 1.13 and the procedures disclosed to the client and included in the attorney-client retainer agreement. When reimbursed costs or earned fees are owed to the lawyers, the funds must be transferred out of the trust account after a proper accounting to the client as described below.

Rationale: Utah Rule 1.13 requires that a lawyer must hold property that belongs to a client separate from the lawyer's own property. Funds "shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client." There is no distinction in the rule or the comment between funds advanced for payment of costs and funds advanced for payment of attorney's fees. Consequently, the standards of Rule 1.13 apply equally to monies advanced by a client for

fees and monies advanced to cover costs (deposition transcriptions, copying costs, court costs, expert witness fees, or other costs).

Rule 1.13 requires the lawyer to keep the property of clients-including all client's funds no matter what their purpose-and third parties absolutely separated from the lawyer's own property. The rule imposes strict accounting and fiduciary requirements on the lawyer with respect to the property of others. As the Comment to Rule 1.13 makes clear, "A lawyer should hold property of others with the care required of a proper fiduciary." Consequently, client funds of any sort can only be disbursed with a proper accounting to the client. Rule 1.13(c) declares:

When, in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests.

The Utah Rules of Professional Conduct require that, when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, within a reasonable time after the representation has begun. (Rule 1.5(b)). It is the height of prudence for all Utah attorneys to reduce to writing their negotiated arrangements with respect to advanced funds, either for fees or for costs, in a manner that complies with Rule 1.13. When there is no special written retainer agreement between lawyer and client, the lawyer must hold all client funds in the trust account until the client has been provided with an accounting of how the funds have been incurred for costs or earned as fees. After the client has been afforded an opportunity to receive and review the accounting, funds transfers may take place as appropriate. Funds that are owed to the lawyer as reimbursement for costs or as earned fees must be transferred out of the trust account at this time. When flexibility is crucial, because large costs may be incurred and quick fund transfers are necessary to pay these costs, arrangements for handling these contingencies may be set out in the retainer agreement between attorney and client. At all times, however, Rule 1.13 holds the lawyer to strict fiduciary standards in dealing with the property of clients.

Rule Cited:

1. 13(a)