

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 97-07

Approved May 30, 1997

Issue: Is a lawyer, acting as a trustee under the United States Bankruptcy Code, required to maintain bankruptcy estate trust funds in a financial institution that complies with check-overdraft reporting requirements described in Rule 1.15?

Opinion: No. A lawyer, acting as a trustee under the United States Bankruptcy Code, is not required to maintain funds in a financial institution that complies with the check-overdraft reporting requirements of Rule 1.15, because the administration of such bankruptcy funds is not the practice of law.

Facts: Pursuant to 11 U.S.C. § 1302, the United States Trustee appointed a lawyer as a Chapter 13 trustee for the District of Utah. (fn1) As a Chapter 13 trustee, the lawyer is a fiduciary for Chapter 13 estates created upon filing a petition for relief under Chapter 13 of the Bankruptcy Code. On behalf of the Chapter 13 estate, the trustee receives money from Chapter 13 debtors. The trustee is bonded, submits regular reports and is audited on a regular basis by the United States Trustee.

Analysis: Utah Rule of Professional Conduct 1.15 now requires a lawyer to enter an agreement with any financial institution where that lawyer has client or third-party trust funds. Under the agreement, the financial institution will report any non-sufficient checks or check overdrafts to the Office of Attorney Discipline. (fn2)

However, most of the Rules of Professional Conduct govern a lawyer's actions only in the providing of legal services or in the practice of law. For example, an attorney's direct-mail advertising of mediation and arbitration services is not prohibited under Rule 7.3 since mediation and arbitration services are not the practice of law. (fn3) This is true of Rule 1.15. Rule 1.15 states that the rule applies only to property "in connection with a representation." The Comment to Rule 1.15 also suggests that Rule 1.15 only applies in the practice of law. (fn4)

The administration of a Chapter 13 trust is not the practice of law. The Bankruptcy Code does not require that a bankruptcy trustee be a lawyer. (fn5) The bankruptcy trustee has no attorney-client relationship with either the debtor or with any of the creditors. The bankruptcy trustee does not act as an advocate for or represent any of the parties. Therefore, a lawyer practicing as a Chapter 13 trustee is not required to conform with the requirements of Rule 1.15 in maintaining Chapter 13 funds.

Provisions other than Rule 1.15 exist to protect Chapter 13 funds. As a bankruptcy trustee, the lawyer must be bonded. (fn6) The United States Trustee regularly audits the lawyer, and the lawyer submits periodic reports to the United States Trustee. Finally, a lawyer acting as a trustee, even a Chapter 13 trustee, is still subject to Rule 8.4 for any misconduct in the handling of trust funds. (fn7)

This opinion that Rule 1.15 does not govern the Chapter 13 trustee's actions applies only to the supervision of bankruptcy trust funds. If the lawyer, acting as a bankruptcy trustee, also maintains a non-bankruptcy estate trust fund for a client or a third party, that fund may be subject to Rule 1.15.

Footnotes

1. Although this opinion involves a Chapter 13 trustee, the analysis and result would be the same for other bankruptcy trustees.

2. 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. 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 or third person. The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Utah Rules of Professional Conduct 1.15(a) (as amended, effective Nov. 1, 1996).

3. Utah Ethics Adv. Op. 97-03, 1997 WL 223849 (Utah St. Bar).

4. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transactions.

Utah Rules of Professional Conduct 1.15, cmt. ¶ 4.

5. 11 U.S.C. § 321 (1994); *In re Construction Supply Corp.*, 221 F. Supp. 124 (E.D. Va. 1963).

6. 11 U.S.C. § 322 (1994).

7. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Utah Rules of Professional Conduct 8.4, cmt. ¶ 3.

Rule Cited:

1.15