

You have advised that you are a Virginia attorney practicing with a Washington/Maryland/Virginia law firm. In the District of Columbia proposed Rules of Professional Conduct, advanced legal fees are termed the property of the lawyer which, in your opinion, appears to be in contradiction to Virginia LE Op. 650. You are concerned as to whether the District of Columbia rule may change the existing opinion in Virginia.

You have asked two questions with regard to advanced legal fees which the Committee will address in the order in which they were presented in your inquiry.

I. Is an advanced legal fee, or retainer, the property of the Virginia lawyer or client?

In the view of the Committee, the terms “advanced legal fees” and “retainer” are not synonymous.

If you are referring to fees paid in advance for services on a specific matter, the fees are entrusted to the lawyer and are deemed the property of the client except for that portion which may be considered the property of the lawyer pursuant to DR:9-102(A)(2) and 9-102(D). The Committee believes the appropriate and controlling disciplinary rule relative to advance legal fees is DR:9-102 which governs preserving the identity of funds and property of a client. The rule further provides that a client's funds shall be properly deposited in one or more identifiable bank accounts in the state in which the law firm is situated; no funds belonging to the lawyer or the law firm shall be deposited therein except to pay bank charges or to deposit those funds belonging in part to the client and in part to the lawyer or law firm. Monies may be withdrawn from the client's trust account when due unless a dispute exists between the client and the lawyer as to the amount belonging to the lawyer or law firm. In addition, a lawyer must identify and promptly notify a client of receipt of his funds, securities or other properties and maintain complete records of the same, as well as provide a appropriate accounting to his client. A lawyer shall upon request promptly pay or deliver to the client or another designated by the client the funds, securities or other properties in the possession of the lawyer.

If, however, you are referring to a retainer or periodic payment made to an attorney to ensure his availability to the client, the Committee believes the funds are rightfully deemed the property of the lawyer or law firm as consideration for the lawyer's unavailability to potential adversary parties. This has been the customary practice among clients to ensure the availability of a specific lawyer or law firm at any given time in the future. This contractual arrangement is not deemed unethical nor is it a violation of the Code of Professional Responsibility.

II. Is the interest earned on advanced fees the property of the lawyer or the client?

The controlling disciplinary rule relative to your second inquiry is DR:9-102(D) and (E). The rule provides two alternatives for depositing a client's funds in an interest-bearing account: (1) the funds may be deposited in one or more interest accounts in which the lawyer will be responsible for establishing and maintaining the record-keeping, accounting, clerical and administrative procedures to compute and credit to client the pro rata interest, at least quarterly, less the expenses or charges to the client for the lawyer's services to maintain the same; or (2) the funds may be deposited in one or more interest accounts in which the bank has agreed to compute and remit to the Virginia Law

Foundation, at least quarterly, the interest or dividends earned at the regular interest rate, and provide the lawyer or law firm and the foundation a report identifying the lawyer or law firm and reflecting the interest rate and balance of such transactions.

The Committee opines that LE Op. 650 is dispositive of your inquiry with regard to employment in Virginia and continues to govern the professional conduct of lawyers in Virginia. Although an attorney may have a proprietary interest in a portion of the advanced fee, unless disputed by the client, and on the dividends earned on an interest account for performing those record-keeping and administrative procedures, nowhere in the Code is an advanced fee and/or the interest earned on the same deemed to be the property of the lawyer. A lawyer who takes such property as his own may be in violation of DR:9-102. (See definition of "Attorney," under § 613 of Part Six, Section IV of the Code of Professional Responsibility)

The Committee further opines that the disciplinary rules governing the conduct of a licensed Virginia attorney will continue to govern that attorney's conduct regardless of any additional admissions he may have to other states' bars.

Committee Opinion
February 13, 1989