

Subject: Disbursement of funds in a real estate transaction prior to the time that a perfected lien is established for the lender of the funds.

Conclusions: DR:9-102 establishes what funds must go into an escrow account and the conditions for withdrawing funds from the account. Disciplinary Rule 9-102(B)(4) establishes an affirmative duty to pay funds to a party when the party is entitled to the funds and implicitly prohibits the payment of funds from an escrow account to a party who is not entitled or not yet entitled to the funds.

Disciplinary Rule 9-102 applies to all real estate closings in which funds are deposited with the attorney for distribution. However, in order to determine whether the implicit prohibition of DR:9-102(B)(4) prevents or delays the disbursement of funds in any particular transaction, it is necessary to determine if the person to whom funds are to be tendered is legally entitled to receive the funds at the time of the tender. This may vary from case to case and is a legal question. It would appear that the primary consideration for determining when a person is entitled to funds in a real estate transaction would be the understanding, agreements and contracts among and between the attorneys, the seller, the lawyer, and the lender. If, for example, all of these parties had agreed that all funds may be disbursed at a time prior to the recordation of the deeds and the establishment of a priority lien for the lender, then disbursement at the agreed time would not be prohibited by DR:9-102(B)(4) [ DR:9-102]. On the other hand, if all parties direct the attorney not to disburse funds until after recordation of the deed, and the establishment of a priority lien for the lender, then DR:9-102(B)(4) would prohibit disbursement until the agreed upon time. In all situations, the attorney must determine whose funds he is holding and at what point in time other persons become legally entitled to the funds. In other words, the attorney simply must comply with the requirements placed upon him by the owner(s) of the funds which are placed in the escrow account.

LE Op. 663 is applicable to a situation in which the buyer has agreed to the disbursement of funds only upon recordation of the deed and the lender's funds have been deposited in the attorney's escrow account with the unconditional directions to the attorney not to release the funds prior to the establishment of a perfected lien position. The time at which funds may be disbursed pursuant to DR:9-102(B)(4) [ DR:9-102] depends on facts which may vary from case to case. If the relevant facts differ from the situation addressed in LE Op. 663, that opinion may not be applicable. Section 17-79, Va. Code, requires that all deeds admitted to record be indexed daily. In a situation where a clerk's office utilizes a monitor viewer and on a particular day is unable to index on that system some 13 days worth of deeds that have come in, the committee opines that a solution to the problem is beyond the committee's purview. In this situation, the committee feels that it may be appropriate for the closing attorney to explain the situation to the seller. Normally, a sale is contingent upon good title and hopefully most sellers would appreciate that any delay might be for the benefit of the seller as well as the buyer.

The committee opines that whether or not an attorney faced with a delay of one to three weeks is obligated to hold the settlement proceeds in an interest-bearing escrow account is a legal question outside the purview of the committee. The committee feels it cannot go beyond advising that the parties having a potential interest in the funds should receive an explanation of the required delay and should be enabled to direct the closing attorney. The closing attorney has the right to charge the proper party should there be extra time

and trouble involved, provided that the closing attorney makes proper disclosure with regard to any additional charge ahead of time. [ DR:9-102, LE Op. 663, § 17-79, Code of Virginia]

Committee Opinion  
October 14, 1986