

You wish to know whether or not it is proper for an attorney to make an immediate disbursement of an insurance company's settlement check (not certified) where the attorney has an arrangement with the bank for either (a) immediate credit of deposited funds without waiting for clearance or (b) honoring of all trust account checks (where there is no return for insufficient funds) with the attorney responsible to the bank for overdrafts.

In LE Op. 183 the Committee stated as follows:

An attorney assumes strict fiduciary responsibility when he holds money belonging to a client. This Committee discussed the attorney's duty in this regard in LE Op. 109 as follows:

“A lawyer who received funds not his own becomes a fiduciary for the person or others entitled to the same. A lawyer owes a duty to all who have entrusted him with funds to preserve the same in such a manner that it can at all times be identified and recovered. The public trust and faith in the profession impose a moral responsibility on every lawyer to so conduct the management of funds not his own that not only is all question of impropriety removed but that there can be no basis for suspicion of misuse of client funds.”

Furthermore, Disciplinary Rule 9-102(B)(3) [DR:9-102] of the Virginia Code of Professional Responsibility provides that a lawyer shall maintain complete records of all funds, securities and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his clients regarding them. Disciplinary Rule 9-102(B)(4) requires that a lawyer promptly pay to his client funds which the client is entitled to receive. These rules strictly interpreted would require that an attorney not disburse upon items deposited in his trust account until the depository bank had irrevocably credited them to that account.

The language from LE Op. 183 is instructive:

An attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately to the drawee bank. Because of the time lag between deposit and collection of checks deposited by the attorney in his trust account, the payment by the drawee bank of trust account checks drawn by the settlement attorney against such uncollected items will necessarily be made from funds of other clients of the attorney who are not even parties to the real estate transaction in connection with which the settlement attorney issues his trust account checks. The attorney has thus used the funds of other clients for his purpose — the conclusion of the real estate transaction from which he is earning a fee. To illustrate the inherent impropriety in such practices, one need only ask the rhetorical question:

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“Would the lawyer's other clients not parties to the real estate transaction be willing to lend their funds to the lawyer without interest so that he could conclude that real estate transaction?”

It is the Committee's opinion that although we do not have a wet settlement act in the area of personal injury law, that any time an attorney is disbursing money from his trust account there should be identifiable funds irrevocably credited to that account before any such disbursement is made. Therefore, the Committee believes that an immediate disbursement of an insurance company settlement check which is not certified even with the arrangement with the bank that you have outlined would not be ethically permissible.

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