Committee Opinion
January 30, 1989

LEGAL ETHICS OPINION 1170

DUAL PRACTICE – MISCONDUCT – REAL ESTATE TRANSACTION – TRUST ACCOUNT: ATTORNEYS REFERRING CLIENTS TO THEIR OWN SETTLEMENT SERVICE COMPANY AND RETAINING THE INTEREST ON THE TRUST ACCOUNTS.

You have advised that two separate law firms have set up separate corporations, the purpose of which will be to provide real estate settlement services for the law firms' clients. You have also stated that the corporation is owned and managed by the attorneys and staffed by their secretaries who perform the settlement services. Recently, you learned that the funds of the law firms' clients were being placed in interest-bearing accounts; the interest was being retained and not accounted for to the client; and at settlement the client was required to sign an authorization disclosing the fact that the funds would be kept in an interest account credited to the corporation. Neither the disclosure nor the authorization stated that the client has a right to choose not to place his funds in an interest-bearing account, that he has the right to a pro rata share of the earned interest, or that the company will retain the funds to its own credit.

You wish to know whether the arrangement described is violative of the Virginia Code of Professional Responsibility. If it is, you further inquire if a purported disclosure and consent will cure those ethical violations.

The Committee is of the opinion that the controlling disciplinary rules relevant to your inquiry are DR:9-102(D), (E) and (F); DR:1-102(A)(2); and DR:5-104(A). The provisions under DR:9-102 describe the options available to an attorney who wishes to deposit and maintain clients' funds in interest-bearing accounts; DR:1-102(A)(2) prohibits a lawyer from circumventing a disciplinary rule through actions of another; and DR:5-104(A) instructs a lawyer as to the limitations imposed when the lawyer wishes to enter into a business transaction with a client wherein they have differing interests.

The Committee previously opined that it is improper for a lawyer or law firm to earn interest or receive any dividends for the lawyer's or firm's benefit on clients' funds held in an attorney trust or escrow account. (See LE Op. 392 and LE Op. 831) It is the view of the Committee, therefore, that when an attorney or a law firm steers a present client to the separate lay corporation which is owned by the attorney or law firm for the purpose of doing something which the attorney may not do directly, i.e., earn interest on clients' funds, DR:1-102(A)(2) is violated. No such violation would occur when individuals who utilize the services of the settlement corporation are not clients of the owning attorney in his capacity as attorney. Similarly, the violation would be obviated if the attorney provided the client with referrals to other such corporations in addition to that one in which he has an ownership interest.

Even where the attorney or law firm is not steering a present client to the separate corporation for purposes of circumventing the disciplinary rule prohibiting the earning of

interest on clients' funds, the Committee finds the provisions of DR:5-104(A) applicable since, in the settlement services corporation setting, the attorney and the client have differing interests in the purchase of those services. Thus, the attorney must obtain the client's consent after full and adequate disclosure of the attorney's differing interest. Furthermore, even with such disclosure and consent, the business transaction may still not be permissible if it is unconscionable, unfair or inequitable.