

Committee Opinion
June 13, 1989

LEGAL ETHICS OPINION 1248

ACQUIRING INTEREST IN LITIGATION
– COMMINGLING – TRUST ACCOUNT;
DISBURSING OF SETTLEMENT
PROCEEDS PRIOR TO SETTLEMENT
CHECK CLEARING.

You have asked the Committee if it is ethically permissible to advance sums of money to the client once the settlement check has been received and the proceeds deposited in the attorney's trust account, but before the three or five day waiting period for the check to clear has passed.

The appropriate and controlling rules relative to your inquiry are DR:5-103(B) and DR:9-102(B)(4). Disciplinary Rule 5-103(B) provides that a lawyer shall not advance or guarantee financial assistance to his client while representing the client in connection with contemplated or pending litigation, except that the lawyer may advance or guarantee expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence provided the client remains ultimately liable for expenses. Disciplinary Rule 9-102 requires an attorney to preserve the identity of funds and property of a client and includes subsection (B)(4), which provides that a lawyer shall promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive. Thus, the rule implicitly prohibits the payment of funds from an escrow account to a party who is not entitled or *not yet* entitled to the funds.

The Committee is of the belief that the attorney-client relationship is not automatically terminated by the mere receipt of the settlement proceeds check and, therefore, the prohibition contained in DR:5-103(B) against advancement of financial assistance continues to preclude such advancements during the period prior to the collection of the check. Furthermore, the Committee is of the view that DR:9-102(B)(4) requires that the lawyer ascertain whether the person to whom the funds are to be released is legally entitled to receive the funds at the time of disbursement. Thus, if the attorney is required by law to hold the settlement proceeds in a trust account for three or five days to assure that the settlement check has been collected, then DR:9-102(B)(4) would prohibit disbursement until the lapse of the requisite period of time. For the lawyer to disburse on uncollected funds would be tantamount to using one client's collected funds as an advancement on the uncollected funds of a second client.

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