

Committee Opinion
July 25, 1989

LEGAL ETHICS OPINION 1255

REPRESENTATION WITHIN THE
BOUNDS OF THE LAW – TRUST
ACCOUNTS – WET SETTLEMENT ACT:
AGREEMENT BETWEEN ATTORNEY
AND LENDER TO WAIVE ALL FUTURE
RIGHTS TO LENDER'S CERTIFIED
FUNDS.

You have asked the Committee to consider the propriety of a law firm honoring a mortgage corporation/lender's request to waive all future rights to certified funds on closings that occurred between the mortgage corporation and the clients of the law firm. You are concerned since you believe the funding of such loans would not be in compliance with the disbursement of loan proceeds as defined in Virginia Code Section 6.1-2.10, Virginia's "Wet Settlement Act". The Committee is of the view that there are several earlier ethics opinions which are dispositive of the inquiry you have raised, most notably, LE Op. 900 which provides that an attorney has the duty to comply with the instructions of the lender or the principal to the extent that they are lawful. Should it be impractical to follow the principal or lender's instructions, the attorney has the duty to notify the lender or principals that he is required to comply with the terms of the Wet Settlement Act. If the instructions would necessitate the attorney breaching the Act, the attorney must advise the principal or lender of that fact and must then comply with the Act. (See DR:7-102(A)(8))

The appropriate and controlling rules relative to your inquiry are DR:9-102(B)(3) and (4) which provide that a lawyer shall maintain complete records of all funds, securities, and other properties of the client coming into his possession and render appropriate accounts to his clients regarding them. The lawyer shall promptly pay to a client funds which the client is entitled to receive. While the disciplinary rule establishes an affirmative duty to pass funds to a party or the parties entitled to the funds, it implicitly prohibits payment of funds from an escrow account to the party who is *not or not yet* entitled to the funds. (emphasis added) Thus, a strict interpretation would require an attorney not to disburse upon items deposited in his trust account until the depository bank had irrevocably credited them to that account. (See LE Op. 183, LE Op. 753 and LE Op. 813) It is well established that an attorney assumes a strict fiduciary responsibility when he holds money belonging to the client. (See *Pickus v. Virginia State Bar*, 232 Va. 5 (1986))

In LE Op. 183, the Committee opined that disbursement by the settlement attorney upon a check of lender or purchaser which was not within the forms prescribed in Section 6.1-2.10, prior to actual crediting irrevocably of such check to the settlement attorney's trust account by the depository bank, is unethical, since the checks drawn against such uncollected items are necessarily being made from the funds of the attorney's other clients who are not in any way parties to the real estate transaction. Such conduct of noncompliance with the Wet Settlement Act would therefore be illegal and violative of DR:7-102(A)(8).

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Under the facts of your inquiry, the Committee would opine that the specific request from the mortgage corporation to waive all future rights to certified funds on closings is permissible as long as the attorney advises the lender that settlement proceeds must, nevertheless, be in one of the other acceptable forms enumerated under Virginia Code Section 6.1-2.10 in order to comply with the Wet Settlement Act.

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