

Committee Opinion
July 25, 1989

LEGAL ETHICS OPINION 1256

ACQUIRING AN INTEREST IN THE
LITIGATION – COMMINGLING –
TRUST ACCOUNTS: ADVANCING
FUNDS FROM SETTLEMENT CHECK
PRIOR TO CLEARING OF CHECK.

You have advised that your firm has been adhering to the disciplinary rules and prior legal ethics opinions which require that identifiable funds must be irrevocably credited to a trust account before making disbursements of insurance company personal injury settlement proceeds. You have indicated that many personal injury clients do not understand the need to adhere to the seven or ten day requisite period before disbursing to them from “cleared” funds after they have already waited typically nine to twelve months to obtain a settlement of their case. In addition, you believe that it would be very unlikely for an insurance company check to “bounce.”

You wish to know whether establishing a line of credit with a commercial bank would provide “identifiable funds, irrevocably credited,” to the firm's trust account in the event a check from an insurance company should be returned for insufficient funds. You further believe that this arrangement would not result in the disbursement of funds belonging to other clients.

You have indicated that at the time of such credit, the bank would notify the firm that the line of credit has been utilized and that a loan in the amount credited is then due and payable by the law firm. For checks in the amount of \$10,000.00 or more, the firm would only utilize this method for those checks issued by insurance companies rated A + by A.M. Best & Company. In addition, the firm would make only partial payments to the clients pending clearance of the insurance company's check where larger settlements are involved.

The appropriate and controlling rules relative to your inquiry are DR:5-103(A), (B) and DR:9-102(A). Disciplinary Rule 5-103(A) and (B) provide that a lawyer shall not acquire a proprietary interest in the client's cause of action or subject matter of the litigation, nor shall a lawyer advance or guarantee financial assistance to his client except that the expenses of litigation, including court costs, investigations, medical examinations, and costs of obtaining and presenting evidence may be advanced or guaranteed by the lawyer provided the client remains ultimately liable for such expenses.

Disciplinary Rule 9-102(A) provides that all funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and *no funds belonging to the lawyer or law firm shall be deposited therein, except that funds to pay bank charges* and funds belonging in part to the client and in part presently or potentially to the lawyer or law firm may be deposited therein (emphasis added). The Committee believes that the funds provided by the line of credit are, in fact, the law firm's or attorney's funds since it would be the law firm or attorney who would become

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the obligor on the note payable to the bank for such credit. Thus, the result of crediting attorneys' funds to the clients' trust account is commingling and is violative of DR:9-102(A).

The Committee would direct your attention to LE Op. 1219 in which the Committee stated that the clear intention of DR:5-103(B) is to preclude an attorney from acquiring an interest in the outcome of the litigation since holding an interest would create a personal conflict and would compromise his undivided loyalty to the client in order to protect his own financial interests. The Committee believes that the terms of the line of credit whereby the law firm would ultimately become responsible for any loans as a result of advancing or disbursing funds to a client which have not "cleared" is tantamount to acquiring an interest in the outcome of the litigation and could also constitute a breach of the attorney's fiduciary relationship. The Committee stated in LE Op. 183:

A lawyer who receives 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 clients' funds.

The Committee believes that the proposed arrangement is violative of DR:5-103 in that the financial assistance contemplated under the facts of the inquiry would not come under the definition of "expenses" which a lawyer may advance or guarantee as prescribed in DR:5-103(B). In addition, the potential for the law firm's acquiring a personal interest in the outcome of the client's litigation is so overwhelming under the terms of the line of credit that it may be violative of DR:5-103(A).

Finally, it is the view of the Committee that providing a line of credit to the clients' trust account when an insurance company's settlement check has been returned for insufficient funds would be improper and violative of the Code of Professional Responsibility since it is a blatant form of commingling attorney's funds with that of a client's. Furthermore, the proposed line of credit arrangement with a bank is unethical if, in doing so, it is the attorney's or law firm's purpose to circumvent a disciplinary rule precluding disbursement on uncollected funds (See DR:1-102(A)(2))

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