Committee Opinion
May 14 1991

LEGAL ETHICS OPINION 1417

PERSONAL INTEREST AFFECTING REPRESENTATION -TRUST ACCOUNTS: ATTORNEY'S DUTY TO INSURE ALL FUNDS PLACED IN TRUST ACCOUNTS - PROPRIETY OF ATTORNEY DEPOSITING CLIENT'S TRUST FUNDS INTO BANK IN WHICH ATTORNEY IS DIRECTOR/ STOCKHOLDER/COUNSEL.

You have advised that, in the course of a real estate transaction, Attorney A deposits his client's funds in excess of $100,000 to his trust account and disburses them within one or two days of closing. Attorney A is a director and stockholder of the bank into which the funds have been deposited and frequently represents the bank in legal matters. The bank is insured by the FDIC which agency's regulations insure only the first $100, 000 of client's funds on deposit in Attorney A's trust account.

You have asked the Committee to opine as to (1) whether Attorney A has a duty to be sure that all of his client's funds are insured by the FDIC; (2) if Attorney A has such a duty, may it be waived by the client; (3) if Attorney A's interests in the bank are in conflict with his client's interest in the safety of his uninsured funds; and (4) if the issues would be resolved differently if the funds remained in escrow for more than one or two days.

The appropriate and controlling disciplinary rules relevant to your inquiries are DR:9-102(C), which requires that a "bank" or "banking institution" into which an attorney may deposit client funds must be a "bank or savings and loan association authorized by Federal or State law to do business in the State of Virginia and in which deposits are insured by an agency of the Federal Government"; and DR:5-101(A), which precludes a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure.

The Committee has earlier opined that the plain language of DR:9-102(C) would not permit investing clients' funds in an Automatic Investment Management service which would invest such funds in Repurchase Agreements. See LE Op. 1265.

It is the opinion of the Committee that the plain language of DR:9-102(C), referencing insurance of bank accounts into which client funds are placed, does not explicitly require that all funds placed into such accounts be insured; the Rule simply requires that the bank or banking institution participate in the federal insurance program. Since there is no duty to assure that all funds are insured, the Committee does not reach the question as to whether any such duty may be waived by the client.

The Committee further opines that the Attorney A's involvement with the bank, serving as director, shareholder, and counsel, constitutes a personal interest such as those

envisioned by DR:5-101(A). The Committee believes that, in the instant matter, the primary obligation of Attorney A is to the client for whom he conducts a real estate transaction. Thus, the Committee is of the opinion that, since Attorney A's service as director and shareholder of the bank constitutes a personal interest, he may not deposit client funds into the bank without having made full disclosure and having received consent from his real estate client. Furthermore, the Committee cautions that if attorney A knows or should know that the financial condition of the bank is precarious, his duty to his real estate client requires that he not deposit client funds into that financial institution without specific authorization from the client.

Finally, the Committee believes that the length of time during which the funds remain in escrow bears no relationship to the ethical duties owed by Attorney A to the client.