

Committee Opinion
June 22, 1992

LEGAL ETHICS OPINION 1469

TRUST ACCOUNTS: EARNING
INTEREST ON ESCROW FUNDS OF
REAL ESTATE SETTLEMENT SERVICE
OWNED BY AN ATTORNEY.

You have indicated that a member of the bar was formerly an associate in a law firm specializing in real estate law. After leaving that firm, the lawyer no longer practices law and has formed a title company, serving as its sole shareholder and director. The sole business of the title company is to conduct residential settlements. You indicate that the attorney does not offer any legal services through the company and all legal matters are referred to outside, unrelated counsel, although you further indicate that the attorney does prepare notes and deeds. Furthermore, you advise that, in the course of transacting its business, the company receives loan proceeds from lending institutions which it holds in escrow in anticipation of the various closings and also holds monies which are received from prospective purchasers. Finally, you indicate that interest is earned on both types of deposits, but is not accounted, credited or paid to either the lending institutions or purchasers.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for the title company to retain the interest earned on the escrowed funds in light of the factual pattern which you believe demonstrates that the attorney shareholder/director is not otherwise engaged in the practice of law.

Since the facts you present indicate that the attorney shareholder/director is preparing deeds and notes [for the customers of the title company], the Committee believes that an attorney/client relationship does arise between the attorney shareholder/director and those individuals or corporations for whom such documents are prepared. The Committee cautions that such preparation of legal documents by the [non-law firm] title company is subject to the constraints of the Unauthorized Practice Rules in general and Unauthorized Practice Rule 6 as it particularly relates to real estate practice. See also Unauthorized Practice of Law Opinion No. 57.

Based upon its conclusion that the preparation of deeds and notes does create an attorney/client relationship, the Committee believes that the appropriate and controlling disciplinary rules relative to your inquiry are DR:9-102(D) and (E), outlining the manner in which an attorney may deposit funds of a client in an interest-bearing trust bank account.

The Committee has 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, LE Op. 831. Furthermore, LE Op. 1170 required the attorney who set up a separate real estate settlement service firm to which he referred his clients to secure the client's informed consent to the service's earning of interest on such accounts.

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Thus, the Committee is of the opinion that so long as any attorney affiliated with the real estate settlement service prepares deeds and notes for the service's customers, any interest earned on the monies received must be treated in accordance with the requirements of DR:9-102. Should no such legal services be provided by the service, the Committee is of the view that no attorney/client relationship would arise and thus the business activity would be outside the purview of the Code of Professional Responsibility.