

LEGAL ETHICS OPINION 1797

IS IT UNETHICAL FOR AN ATTORNEY TO  
DISBURSE PROCEEDS FROM A TRUST  
ACCOUNT THE BANK HAS TEMPORARILY  
FROZEN?

You have presented a hypothetical situation in which a law firm was shocked to learn that it had bounced two checks on its real estate trust account. The firm in its real estate practice believes it complies strictly with CRESPA, the Wet Settlement Act<sup>1</sup> and all other law applicable to real estate closings. When the law firm receives certified or cashiers checks from clients or mortgage institutions for real estate closings, it deposits the checks into the firm's real estate trust account at Bank X ("the Bank"). The Bank has a policy that if the deposit is made after 2:00 on, for example, Monday, the Bank declares the funds unavailable until two days later, in the example – Wednesday. The Bank permits the issuance of a certified or cashier's check after the deposit for purchasing the real estate; however, the Bank puts a hold on the entire trust account. The hold is not just for the amount of the deposited check, but is on all monies in that account. The two checks bounced were written for other clients on the Tuesday in the example and because the Bank had put a hold on the entire account, the checks bounced. The Bank refuses to change its policy regarding this hold procedure. The firm cannot perform all closings early enough to deposit all checks before 2:00. The Bank tells the law firm that when such checks bounce in the future, the Bank will, as required, notify the Virginia State Bar of the overdraft but explain that the Bank believes the attorney has done nothing unethical. The Bank assures the law firm that it believes its letter protects the lawyers and would meet with Virginia State Bar approval.

Under the facts you have presented, you have asked the following question:

If the law firm continues to use this bank for its real estate trust account and knows that the Bank's policy will lead to occasional checks written to and for clients bouncing (even though there are funds in the account), is the law firm violating the Rules of Professional Conduct or any other real estate law?

Questions involving real estate statutes, regulations, and case law are outside the purview of this Committee. Accordingly, this opinion will address only whether by continued use of this bank, with this policy, the attorneys in this firm are in violation of the Rules of Professional Conduct.

The specific provisions at issue for the real estate attorneys in this firm are Rules 1.3's duty of diligence and Rule 8.4's description of misconduct. Specifically, Rule 1.3(c) prohibits an attorney from intentionally prejudicing or damaging a client during the course of the professional representation, except for in two exceptional circumstances not at issue here. Rule 8.4, in pertinent part, deems it unethical for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or]

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<sup>1</sup> Virginia Code Section 6.1-2.10 et. seq.

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

An attorney handling real estate proceeds faces a dilemma created by his obligation to disburse the proceeds timely according to the Wet Settlement Act yet also stay within the parameters of the ethics rules. This Committee has addressed that dilemma in prior opinions. In Legal Ethics Opinion (LEO) 183, this Committee considered a similar question to the one raised by the present hypothetical regarding whether an attorney serving as a settlement agent could disburse the funds to comply with the Wet Settlement Act immediately upon deposit. The opinion concludes that so long as the items deposited are in a form prescribed in the Wet Settlement Act, such as cashier's and certified checks the attorney can disburse funds immediately after deposit. In coming to that conclusion, the opinion explains the careful balance drawn in this situation:

The Committee believes that the new Wet Settlement Act recognizes the considerable risks, beyond the control of the settlement agent, that funds in other forms, such as ordinary commercial checks, may be uncollectable in any given transaction. The Committee further believes that the forms of funds identified in the statute generally are regarded as completely reliable. The Committee, as a matter of ethical responsibility, is unwilling to impose a stricter rule than that necessary to conform to the Wet Settlement Act. Thus, notwithstanding the fact that some of the forms of funds designated in Section 6.1-2.10 are not "collected" in a commercial banking sense at the time they are deposited by the settlement attorney, the Committee is of the opinion that any risk of noncollectability is so slight as to make it unnecessary to restrict a settlement attorney's ability to disburse upon funds received and deposited by him in such form.

In contrast, however, the Committee is of the further opinion that disbursement by a settlement attorney upon a check of a lender or purchaser 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. An attorney must assume that the recipients of checks drawn upon his trust account will present such checks for payment immediately at the drawee bank. Because of the time lag between deposit and collection of checks deposited by the attorney in his trust account, the payment by the drawee bank of trust account checks drawn by the settlement attorney against such uncollected items will necessarily be made from funds of other clients of the attorney who are not even parties to the real estate transaction in connection with which the settlement attorney issues his trust account checks. The attorney has thus used the funds of *other clients* for his own purpose — the conclusion of the real estate transaction from which he is earning a fee. To illustrate the inherent impropriety in such practices, one need only ask the rhetorical question: "Would the lawyer's other clients, not parties to the real estate transaction, be willing to lend their funds to the lawyer without interest so that he could conclude that real estate transaction?"

The Committee is aware that the same type of invasion of other clients' funds may be involved in the immediate disbursement upon funds in some of the forms specified in Section 6.1-2.10, but the Committee also believes that a diligent settlement attorney who presents funds in these forms to his bank with a request that such bank extend immediate credit upon deposit in his trust account will be accommodated by the bank. While the Wet Settlement Act is not a perfect solution to the ethical problems inherent in disbursing upon uncollected funds, the Committee is of the opinion that an attorney who observes its provisions strictly and who uses diligence to obtain credit in his trust account at the earliest possible time upon items deposited therein in the forms prescribed by the Wet Settlement Act, will not be exposing his clients to any serious risk of harm.

The Committee found distinguishable the situation later raised in LEO 898. In that opinion, the question raised is whether an attorney could disburse immediately after depositing a check into the Bank after the Bank has officially closed. The opinion summarizes the prior conclusion drawn in LEO 183 as resting on the concept that, in that situation, the check would be "irrevocably credited" to the account. When a check is deposited after hours, it is in no way credited to the account at the time of the deposit. Therefore, the Committee concluded in LEO 898 that an attorney could not disburse proceeds immediately after depositing the check into a closed bank.

Is the policy of the Bank, regarding the deposit of a check after 2:00 but during the Bank's open hours, the equivalent to the after-hours deposit in LEO 898? The Committee opines that the deposit after 2:00, if made while the Bank remains open, is distinguishable from LEO 898. At this bank, even with its 2:00 policy of freezing accounts for post-2:00 deposits, when a deposit is made, for example at 3:00, the teller would presumably still issue a deposit receipt confirming deposit, thereby rendering the deposit "irrevocable." Those post-2:00 but pre-closing time deposits would be irrevocably credited and thus not directly prohibited by the principle established in LEO 898.

The Committee opines that if the attorneys in the firm in the above hypothetical deposit the checks in question not only after 2:00, but also after the Bank closes, LEO 898 squarely applies and makes clear that immediate disbursement would be impermissible. The question remains then whether the attorneys may deposit the real estate checks after 2:00 but while the Bank is still open, an issue not addressed in LEO 898. Critical here is the principle stated in Rule 1.3(c) that an attorney should not intentionally prejudice or damage a client. The present hypothetical and that of LEO 183 are distinguishable in an important way. In LEO 183, only the amount of the check is frozen by the Bank, with other monies remaining available. In contrast, in the present hypothetical, the Bank freezes the entire account regardless of the amount of the check or the amount of other funds in the account.

In the portion of LEO 183 quoted above, a key point is the following:

...the Committee also believes that a diligent settlement attorney who presents funds in these forms to his bank with a request that such bank extend immediate credit upon deposit in his trust account *will be accommodated by the bank.*

(Emphasis added.) The hypothetical presented in LEO 183 included that sort of bank cooperation. In contrast, the Bank in the present hypothetical is not cooperating and accommodating the real estate attorneys by extending immediate credit. To the contrary, the Bank is freezing the entire account, including all monies deposited on behalf of other clients. The Committee opines that this distinction removes the present hypothetical from the safe harbor developed in LEO 183.

Were these attorneys to deposit real estate proceeds in a trust account with the Bank in the hypothetical situation, it would be done with the knowledge that as checks are written for other clients on Monday or Tuesday, those checks will bounce. To intentionally bounce those checks would be a violation of Rule 1.3(c). That the Bank would explain its policy to the Virginia State Bar each time such a check bounced does not change that the writing of the check violated Rule 1.3(c)'s prohibition against intentionally prejudicing or damaging a client.

Similarly, for those attorneys to write those checks, with the knowledge that the checks will bounce would be impermissible under Rule 8.4. In pertinent part, Rule 8.4 states:

It is professional misconduct for a lawyer to:

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or]

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

The intentional writing of a check with the knowledge it will bounce is the sort of deliberate act prohibited in paragraph (b) of the rule. Also, such an act involves a misrepresentation as to the negotiability of the check, and thus violates paragraph (c) of the Rule. The attorney would be making a misrepresentation to whomever the check is written in that transmitting the check suggests that the check is "good" and will provide the stated funds to the payee. Those provisions are violated in that the intentional writing of checks that will bounce would reflect adversely on an attorney's basic trustworthiness and fitness to practice. It is fundamental that when a client or any member of the public receives a check from a lawyer written on his trust account, that person must be able to count on the good faith of the lawyer and the reliability of the check.

It is outside the purview of this Committee to regulate this bank or its policies. However, this Committee does opine that it would be impermissible under the Rules of Professional Conduct for these attorneys to write checks on the trust account during this hold period for so long as the Bank maintains this policy.

Committee Opinion  
June 30, 2004

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.