

LEGAL ETHICS OPINION 183

DISBURSEMENT OF FUNDS BY
ATTORNEY IN CONNECTION WITH
PURCHASE OR MORTGAGE
FINANCING OF REAL ESTATE.

Subject: Attorney serving as settlement or closing attorney in connection with the purchase or mortgage financing of real estate. When may the attorney ethically disburse funds from his trust account?

Inquiry. In the area of real estate sales and financing, the lending institution that finances the purchase customarily delivers loan proceeds to the settlement attorney in the form of a check drawn upon a bank which may or may not be located in Virginia. Generally, the check is made payable to the settlement attorney. In some instances, payment of these instruments, upon inquiry by settlement attorneys, has been conditioned upon prior receipt by the lender of all papers required in connection with the loan closing, including receipts for recorded documents. In other instances, lenders have been unwilling even to deliver their checks for the loan proceeds to the settlement attorney until closing has transpired and the loan papers have been presented to the lenders. Rarely have loan proceeds been delivered to the settlement attorney in the form of wired funds or certified or cashier's checks.

Typically, the purchaser also delivers a check to the settlement attorney for the difference between the loan amount and the purchaser's obligations. The check may not be a cashier's check or a certified check, although many Virginia attorneys require that the purchaser's funds be certified.

Several attorneys have inquired as to when they may ethically disburse funds from their trust accounts to pay all items associated with a particular real estate transaction.

Opinion: The attorney who serves as settlement attorney bears a fiduciary duty and some responsibility to all three parties to a transaction: the purchaser, the seller and the lender. Often, the settlement attorney is selected by the purchaser, or the purchaser accedes to the seller's request that a particular settlement attorney be used. The settlement attorney often prepares the necessary legal documents for both purchaser and seller, undertakes responsibility for recordation of appropriate documents and must properly disburse funds received from the purchaser and lender.

It has come to the attention of the Legal Ethics Committee that many settlement attorneys deposit the checks given at closing in their trust accounts and immediately disburse funds from that account in accordance with the schedules of receipts and disbursements presented and approved at closing. Necessarily, a time lag occurs between the time of deposit of the purchaser's and lender's checks in the attorney's trust account and the time when these funds are irrevocably credited by the depository bank to the attorney's trust account as "good funds." The time lag may be three to fifteen days, or longer, depending upon the location of the banks upon which the purchaser's and lender's

checks are drawn and other factors beyond the control of the settlement attorney. Because of the volume of banking transactions, the settlement attorney's depository bank cannot and will not, as a normal practice, advise him of the date when the purchaser's or lender's check has been paid, the funds received by the depository bank and check clearance completed. Special procedures such as "wire fate" instructions do exist by which a settlement attorney can determine whether a particular item has been collected. The issue is whether a settlement attorney ethically may disburse funds during this interim period against items deposited in his trust account which have not been irrevocably credited to that account.

An attorney assumes a strict fiduciary responsibility when he holds money belonging to a client. This Committee discussed the attorney's duty in this regard in LE Op. 109, as follows:

"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."

Furthermore, Disciplinary Rule 9-102(B)(3) [DR:9-102] of the Virginia Code of Professional Responsibility provides that a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his clients regarding them. Disciplinary Rule 9-102(B)(4) requires that a lawyer promptly pay to his client funds which the client is entitled to receive. These rules, strictly interpreted, would require that an attorney not disburse upon items deposited in his trust account until the depository bank had irrevocably credited them to that account.

Nonetheless, the Committee recognizes that inconvenience can result from settlement procedures which do not accommodate immediate disbursement by the settlement attorney and is mindful of the arguments made by some that restricting lawyers from disbursing on commercial checks may undermine the economic system. In its 1980 session, the General Assembly of Virginia repealed Section 6.1-2.6 of the Code of Virginia and enacted a new Wet Settlement Act, §§ 6.1-2.10 through 6.1-2.15 of the Code of Virginia. Pursuant to Section 6.1-2.12, the lender has an obligation at or before loan closing to cause disbursement of the loan funds to the settlement agent, who is then responsible to record the necessary papers and disburse the proceeds within two days following settlement. Section 6.1-2.10 defines the manner in which a lender may satisfy its obligation to disburse loan funds by requiring that the funds be delivered to the settlement agent:

"in the form of cash, wired funds, certified checks, checks issued by a political subdivision of the Commonwealth, cashier's check or checks issued by a financial

institution, the accounts of which are insured by an agency of the federal or state government, which checks are drawn on a financial institution, located with the Fifth Federal Reserve District, the accounts of which are insured by an agency of the federal government.”

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.

Council Opinion
October 31, 1980

The Committee is adamant in its view that no basis exists for leaving to the discretion of the settlement attorney the decision of when to disburse upon items not taking the forms prescribed in the Wet Settlement Act. In the “Annotated Code of Professional Responsibility” published by the American Bar Foundation, it is noted that most judges believe the standard set forth in DR:9-102 is one of strict accountability, and that “the attorney's intent, good faith or ability to restore funds” will not form the basis for exculpation. American Bar Foundation “Annotated Code of Professional Responsibility” (1979), at page 499, *et seq.*

It should be emphasized that this opinion addresses only the ethical considerations regarding disbursement, and not the issue of liability of the settlement attorney for any funds lost to a client as a result of the inability to collect upon items deposited by the settlement attorney in his trust account.

In summary, it is the opinion of the Committee that an attorney who complies strictly with the provisions of the Wet Settlement Act, §§ 6.1-2.10 through 6.1-2.15 of the Code of Virginia of 1950, as amended, will not be guilty of unethical conduct, but that disbursement prior to actual crediting to the account of items deposited in an attorney's trust account which do not take the forms prescribed in the Wet Settlement Act will constitute unethical conduct in violation of Disciplinary Rule 9-102.

Council Opinion
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