

ETHICS OPINION

RO-89-99

QUESTION:

* * *

"May an attorney represent both buyer and seller in a real estate transaction where the attorney is called upon to render legal advice to both parties and is further requested to perform title work and issue title opinions and/or title policies and, if so, what are the bounds of such representation and at what point and under what circumstances would the attorney be required to withdraw representation."

* * *

ANSWER:

The Disciplinary Commission has previously addressed this question in a similar situation and has rendered Opinion 86-106 which opines that a lawyer may represent a seller and a buyer in a real estate transaction if both parties consent after full disclosure and are advised that each client is entitled to obtain outside counsel should such be desired. A copy of that Opinion is attached hereto in further answer to your query.

AWJ/vf

10/24/89

ETHICS OPINION

RO-86-106

QUESTION:

"I have enclosed an internal memo which I believe is self-explanatory. Would you be so kind as to give me your opinion whether our disclosure would satisfy the Bar requirements?"

Thank you in advance for a quick reply."

(Note: See attached memorandum dated October 21, 1986 and attached 'disclosure.')

ANSWER QUESTION ONE:

We perceive no ethical impropriety in the first paragraph of the "disclosure" wherein the purchaser and seller acknowledge a potential conflict of interest but elect to have your law firm handle the real estate closing and are advised that each is entitled to separate counsel should such be desired.

DISCUSSION:

Disciplinary Rule 5-105(A)(B) (and (C) provide:

* * *

- " (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if he reasonably determines that he can adequately represent the interest of each and if each consents to representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each:

- (1) Except that in no event shall a lawyer repre-

sent both parties in divorce or domestic relations proceedings, whether or not contested, or matters involving custody of children, alimony or child support. (A lawyer shall be deemed to have complied with this paragraph by obtaining and filing the same in the proceeding a writing from the non represented party in which the non represented party acknowledges:

- (a) That the attorney does not and cannot appear or serve as the attorney for the non represented party.
- (b) That the attorney represents only his or her client and will use his or her best efforts to protect his or her client's best interests.
- (c) That the non represented party has the right to employ counsel of his or her own choosing and has been advised that it may be in his or her best interest to do so.
- (d) That having been advised of the foregoing, the non represented party has requested the lawyer to prepare an answer and waiver under which the cause may be submitted without notice and such other pleadings and agreements as may be appropriate."

Disciplinary Rule 5-105(C) acknowledges that the attorney may represent multiple clients having potential conflicting interest if the lawyer determines that he can adequately represent the interest of each and if each consents to representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

There are usually three parties to the typical real estate closing, namely, the purchaser/mortgagor, the seller, and the lender/mortgagee.

Perhaps the mandatory provisions of DR 5-105(C)(1)(a) through (d) should apply to a real estate closing and the attorney should identify his client and advise that he represents only one party and that he will use his or her best efforts to protect his or her client's best interest, but this appears to be mandatory only in domestic relations proceedings.

We perceive no impropriety in the first paragraph of the "disclosure" and feel that it is a prudent and wise precaution.

ANSWER QUESTION TWO:

Although we heretofore held in an opinion which was published in the January 1983 Alabama Lawyer that a lawyer may deposit funds of a client in

an interest bearing account, but further held that if the money is the property of the client the interest earned is also the property of the client. We attach hereto as Exhibit "A" copy of the opinion heretofore published in the Alabama Lawyer.

Although we have held that interest earned on a client's money is the property of the client, we can see no valid reason why the attorney and the client cannot by contract agree to any disposition of the interest desired.

WBMjr/vf

11-6-86

DISCLOSURE

The undersigned hereby acknowledge that the following disclosure is made prior to the closing of the subject transaction:

We, the undersigned being both purchaser and seller, who have executed a contract dated _____, 19____, conveying certain real estate known as

_____ understand that there is a potential conflict of interest of the attorneys in consummating the transaction made in connection with the subject contract. We have been advised that we have the right to obtain other counsel to represent each of us. After being advised of the potential conflict of interest and our right to obtain counsel, we hereby elect to have a representative of C____, M____, B____ & D____ P.C. close the transaction. We further understand that at any time during or after this transaction our right to obtain counsel continues, and we understand that we have the right to terminate the proceedings at this closing if we feel that we need the services of separate counsel.

We, the undersigned, further understand and acknowledge that most lenders' loan checks are drawn on out-of-state banks; therefore, in consideration of C____, M____, B____ & D____, P.C. disbursing our closing checks drawn against uncollected funds and in further consideration of C____, M____, B____ & D____, P.C. guaranteeing the collection of all funds received, purchasers and sellers agree and consent to the depositing of the loan and sale funds into an interest bearing, zero balance disbursement account, with interest therefrom being payable or accruing to the benefit of C____, M____, B____ & D____ P.C., attorneys.

Dated: _____

Witness

Purchaser

Witness

Purchaser

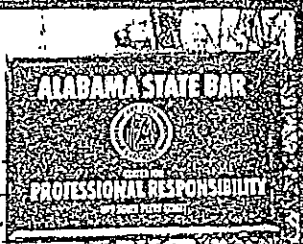
Witness

Seller

Witness

Seller

From the
Center for
Professional
Responsibility



Opinions of the General Counsel

William H. Morrow, Jr.

QUESTION:

May an attorney or a law firm deposit trust funds of one's clients in an interest bearing trust fund account?"

ANSWER:

There is no ethical impropriety in an attorney depositing trust funds of a client in an interest bearing trust account.

DISCUSSION:

Disciplinary rule 9-102(A)(1) & (2) provides:

"DR 9-102—Preserving Identity of Funds and Property of a Client.

(A) 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 as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." (emphasis added)

The disciplinary rule simply provides for deposit of a client's funds in "one or more identifiable bank accounts maintained in the state in which the law office is situated." Since the rule does not specify the precise nature of the bank account there would be no impropriety in depositing a client's funds in an interest bearing account.

QUESTION:

If the answer to the preceding question is in the affirmative, what may ethically be done, under the Code of Professional Responsibility, with the interest so generated by the trust funds deposited in such an account?

ANSWER:

Since the money in the bank account is the property of the client, it follows that the interest is also the property of the client and the attorney must "promptly pay over money collected by him for his client" including both principal and interest when the same is due.

Disciplinary Rule DR 9-102(B)(4) provides:

"A lawyer shall:

(4) Not misappropriate the funds of his client, either by failing promptly to pay over money collected by him for his client or by appropriating to his own use funds entrusted to his keeping." (emphasis added)

DISCUSSION:

Disciplinary Rule 9-102(A) does not specify that the interest earned on the funds in the client's trust account belong to the client. Commentators have criticized this omission, noting that it might allow attorneys to misappropriate such interest. See *Attorney Misappropriation of Client's Funds: A Study in Professional Responsibility*, 10 U. Mich. J. L. Ref. 415 (1977). At least one court has implied that when the conduct of attorneys who have been entrusted with funds is being examined, misappropriation or deprivation of interest should be considered. *Greenbaum v. State Bar*, 15 Cal. 3d 893, 126 Cal. Rptr. 785.