

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 64,333

FILED

NOV 18 1983

SID J. WHITE
CLERK SUPREME COURT

[Signature]
Chief Deputy Clerk

THE FLORIDA BAR, re:

Petition to Amend Florida
Bar Integration Rule,
Section 11.02(4)(f)
(Trust Fund Disbursement)

BRIEF IN SUPPORT OF PETITION

REAL PROPERTY, PROBATE & TRUST LAW
SECTION OF THE FLORIDA BAR
Tallahassee, Florida 32301



THE FLORIDA BAR

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

TALLAHASSEE, FL 32301-83
904/222-5286

November 18, 1983

Mr. Sid J. White, Clerk
The Supreme Court
The Supreme Court Building
Tallahassee, Florida 32301

RE: Petition to Amend Florida Bar Integration Rule,
Section 11.02 (4) (f) (Trust Fund Disbursement)
Case No. 64,333

Dear Sid:

Enclosed is the brief in support of the petition in the above referenced case.

* Please note that Point III in the brief requests a modification of the proposed rule. This point is not in conflict with the petition because paragraph (C) of the proposed rule limits those instruments which must be issued by an institution within the state of Florida which was the intent of the committee and the Board of Governors.

Sincerely,

Stanley A. Spring,
Staff Counsel

SAS/lrc

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STATEMENT OF THE CASE

The Florida attorney representing a client in the purchase or sale of real estate, or representing a lender making a loan secured by a lien on real estate, faces a great ethical and practical difficulty. Because it is important that this court understand this ethical and practical difficulty, the following example of a typical real estate transaction is offered for consideration:

Attorney Smith represents Mr. Seller. Mr. Seller has contracted to sell his home to Mr. Buyer for a purchase price of \$60,000.00. Mr. Buyer has transferred to a new employment location and must have immediate possession of the home and must immediately relocate his family and place his children in a new school. Mr. Buyer is financing the purchase of the home and will receive a mortgage loan in the amount of \$40,000.00 from ABC Federal Savings and Loan Association. Out of the proceeds of the sale, Mr. Seller must pay off a mortgage on his home, which has an outstanding principal balance of \$20,000.00. Mr. Seller has contracted to buy a new home and needs the proceeds from his sale to Mr. Buyer to accomplish his purchase. XYZ Realty holds a \$10,000.00 earnest money deposit paid by Mr. Buyer under his contract with Mr. Seller. XYZ Realty is to be paid a \$5,000.00 real estate brokerage commission.

The closing of the sale by Mr. Seller to Mr. Buyer is scheduled at the offices of ABC Federal Savings and Loan Association for the morning of December 1. Mr. Seller must close on the purchase of his new home on December 2. As the attorney for Mr. Seller, attorney Smith is to receive the closing proceeds and make all disbursements. At the closing, attorney Smith

received the following checks payable to his trust account which he immediately deposited to his trust account:

- 1) Business check in the amount of \$10,000.00 drawn on the trust account of XYZ Realty.
- 2) Loan proceeds check in the amount of \$40,000.00 drawn on the account of ABC Federal Savings and Loan Association maintained at the First National Bank of Asheville, North Carolina.
- 3) Check in the amount of \$10,000.00 purporting, on its face, to be an "official check" drawn on a local bank and representing a withdrawal from the passbook savings account of Mr. Buyer.

Attorney Smith has now deposited \$60,000.00 to his trust account. Mr. Buyer expects his deed to be recorded and immediate possession of the house. ABC Savings and Loan Association requires its Mortgage to be recorded promptly. XYZ Realty expects immediate payment of its commission. The existing mortgage on the home must be satisfied immediately. Mr. Seller requires immediate disbursement of his net proceeds to be able to purchase his new home the next day. Consequently, Attorney Smith is required to immediately disburse the \$60,000.00 he has received and deposited to his trust account.

All the checks which attorney Smith deposited to his trust account are uncollected funds. However, because attorney Smith has an active practice, his trust account balance of collected funds normally exceeds \$60,000.00. Further, because attorney Smith has a long and good relationship with the bank where he maintains his trust account, the bank will, upon his request,

pay checks drawn on his trust account if the amount of the checks exceed the balance of collected funds in his trust account. The bank long ago made a business judgment that attorney Smith would be financially responsible for any overdraft resulting from the failure to collect any check deposited to his trust account.

In this example, attorney Smith is faced with an ethical and practical difficulty which several thousand Florida attorneys representing clients in real estate transactions face daily. The ethical difficulty is that an attorney who disburses funds held for a client, when those funds, as deposited to the attorneys trust account, are not yet collected funds, may be in violation of the Integration Rule, by-laws, and disciplinary rules of the Florida Bar. The practical difficulty is that the need for immediate disbursement of funds is real. Further, commercial title insurance companies who are aggressively competing for the business of handling real estate transactions without the aid of attorneys, can and will make immediate disbursement of closing funds, because they are unrestricted by any statute, regulations, or disciplinary rules.

The Executive Council of the Real Property Probate and Trust Law Section of the Florida Bar became concerned about this ethical and practical difficulty at its January 1983 meeting. James Altman, then Chairman of the Real Property Probate and Trust Law Section, appointed a

special committee to study this problem and to make recommendations. Through investigations and discussions with attorneys throughout the state, the special committee ascertained the following facts:

- A. Attorneys representing clients in real estate transactions regularly disburse uncollected funds from their trust account.
- B. Attorneys representing clients in real estate transactions have various standards as to what kind of uncollected funds will be disbursed. Some attorneys will only disburse uncollected funds represented by local cashier's checks; some attorneys will disburse all uncollected funds except those represented by personal check; and some attorneys will disburse all uncollected funds, including those represented by personal checks.
- C. All attorneys disbursing uncollected funds recognized their financial responsibility to the clients for whom they hold funds.
- D. Most attorneys disbursing uncollected funds feel they are not in violation of the Integration Rule of the Florida Bar, the By-Laws of the Florida Bar, the Code of Professional Responsibility, or any disciplinary rule.

After ascertaining the position of many Florida attorneys, the special committee sought the position of the Florida Bar. The staff auditor of the Florida Bar clearly took the position that disbursement of uncollected funds, even though the funds were ultimately collected, could constitute a technical violation of Rule 11.02 of the Integration Rule of the Florida Bar and the disciplinary rules promulgated in connection with Canon 9 of the

code of Professional Responsibility. Because the prevalent practice of Florida attorneys may constitute a violation of the Integration Rule and the Code of Professional Responsibility, the special committee determined that some action must be taken.

The special committee drafted a proposed amendment to the Integration Rule of the Florida Bar and presented its proposal at the July 1983 meeting of the Executive Council of the Real Property Probate and Trust Law Section. The amendment was approved by the Section's Executive Council and the committee was authorized to seek the approval of the Board of Governors of the Florida Bar. After review and revision of the proposal by the Integration Rule and By-Laws Committee of the Florida Bar, the proposed amendment was submitted to the Board of Governors of the Florida Bar. At its September 1983 meeting, the Board of Governors of the Florida Bar voted to recommend to this Court the adoption of an amendment to the Florida Bar Integration Rule by creating §11.02(4)(f) thereof. This amendment to the Integration Rule of the Florida Bar will permit a Florida attorney, in certain definite situations, to disburse funds held for a client in his trust account when the funds held for that client are uncollected funds. Under the proposed amendment, the attorney recognizes his financial obligation to clients for whom he holds funds; but, under the proposed amendment, the attorney shall not

be subject to disciplinary action for making disbursement on uncollected funds within the limitations set in the amendment unless such disbursement causes a financial loss to a client for whom the attorney holds funds, and the attorney fails to meet his financial obligation to that client.

POINT I

CLIENTS FOR WHOM ATTORNEYS HOLD FUNDS
ARE ADEQUATELY PROTECTED BY THE PRO-
POSED AMENDMENT.

To adequately understand a proposed rule allowing an attorney to disburse uncollected funds from his trust account, it is necessary to understand the process by which checks are collected. The collection or clearance of checks is a complicated procedure governed principally by the Uniform Commercial Code. The provisions of F.S. §674.105(1981) label banks according to the various functions a bank may serve in the collection process. The "depository bank" is the first bank to which an item is sent for collection. Consequently, when an attorney deposits to his trust account a check representing funds to be held for a client, the bank where he maintains his trust account becomes the "depository bank". The check then may proceed through various "intermediary banks" or "collecting banks" and will be forwarded to the "presenting bank" who will present it to the "payor bank" for payment. Final settlement as defined by F.S. §674.103(1)(j) (1981) is accomplished when the payor bank remits as directed to or on behalf of the depository bank. Not until final settlement does the check clear and represent good funds on deposit in the attorney's trust account. To illuminate this process, the following steps are typically involved in the clearance process:

1. Check is received by the depository bank.
2. Check is forwarded to the settlement and proof department of the depository bank.
3. Check is forwarded to the depository bank's federal reserve bank.
4. Check is forwarded to the payor bank's federal reserve bank.
5. Check is forwarded to the payor bank.
6. Check is forwarded to the payor bank's sorting and proof department.
7. Check is forwarded to the payor bank's bookkeeping department.
8. Payment is made by the payor bank to or through the payor bank's federal reserve bank.
9. Payment is then forwarded to the depository bank's federal reserve bank.
10. Payment is forwarded or credited to the depository bank.
11. Payment is credited to the depositor.

Depending on the nature of the check, its handling and the location of the bank or depository on which it is drawn, the clearance process as described could require from twenty-four (24) hours to two (2) weeks before final settlement.

Because of the complications and time requirements of the collection process, it may be difficult to understand how any bank where an attorney maintains a trust account will honor checks drawn on that account if the deposits to

the account have not been collected. In fact, most attorneys, because of the volume of transactions handled and the activities of their clients, have sizable collected balances in their trust account and the bank must honor checks drawn on that trust account. However, if there is not sufficient collected balance in the trust account to allow the bank to honor a check, the attorney's bank may make the uncollected funds available for disbursement by "provisional settlement". (F.S. §674.201(1)(1981)). Under the provisions of F.S. §674.201(1), the provisional settlement or provisional payment of the check is made by the attorney's bank as the agent of the attorney and subject to reversal if not paid by the payor bank. Most banks are willing, upon request by the attorney, to make provisional settlement of uncollected checks and thereby make funds available for disbursement from the attorney's trust account.

It is important that the possibilities involved in disbursement of uncollected funds be fully discussed. In the event any check deposited to the attorney's trust account is not paid by the payor bank, the trust account will be debited by the amount not paid. If a provisional settlement has been made allowing a disbursement of the uncollected funds, and there are not sufficient collected funds in the account to equal the debit, an overdraft will occur. If there are collected funds held for other

clients in the trust account to equal all or a portion of the debit, then those funds held for other clients have been wrongfully disbursed. In any of these events, the attorney will have liability: (1) to his bank for reversal of the provisional settlement; or (2) to clients for whom he held monies; or (3) to his bank and to his clients.

Since the possibilities are fully disclosed, it is important to discuss the risk. The very fact that the Uniform Commercial Code permits provisional settlement is an indication that provisional settlements are not normally reversed. In Uniform Commercial Code Comment No. 1 to F.S. §674.212 (1981), the following statement occurs:

"Under current bank practice, in a major portion of cases, banks make provisional settlement for items when they are first received and then await subsequent determination of whether the item will be finally paid. This is the principal characteristic of what are referred to in banking parlance as "cash items". Statistically, this practice of settling provisionally first and then awaiting final payment is justified because more than ninety-nine percent (99%) of such cash items are finally paid, with the result that in this great preponderance of cases, it becomes unnecessary for the banks making the provisional settlements to make any further entries. In due course, the provisional settlements become final simply with lapse of time..."

Clearly, the adoption of F.S. §674.212 (1981) is an acknowledgment that most all checks deposited are ulti-

mately paid. Consequently, the risk of loss to the client and to the lawyer is minimal.

Under the proposed rule, any attorney making a business and economic decision to disburse on uncollect^d funds, recognizes his financial liability and further agrees to meet that liability within two (2) working days after notice. Therefore, in addition to the civil liability of the attorney to his clients, the attorney can be disciplined for failure to meet that financial obligation. Surely, the public is adequately protected.

Under the proposed rule, any person using the services of an attorney in a real estate transaction is provided far more protection than presently provided if that person closes his real estate transaction by using the services of an agent for a commercial title insurance company. These agents do act as disbursing agents for closing proceeds. There are no statutory or regulatory restrictions imposed on agents for commercial title insurance companies that in any way prohibit the immediate disbursement of funds. In fact, such agents regularly disburse funds at closing. Such agents commingle all funds received as closing proceeds. In the event a deposit to an agent's account is uncollected, there is good likelihood that the agent's bank account will be overdrawn and a check payable to a completely innocent customer may be dishonored. Of course, the agent has civil liability to

the injured customer; however, the agent is most likely a corporation formed to insulate its principals from liability.

Attorneys cannot escape personal liability to their clients. F.S. §621.07 (1981); In The Matter of the Florida Bar 133 So.2d 545 (Fla. 1961). Under the proposed rule, an attorney who does not meet his obligation to his client may be disciplined. Clearly, the greater financial obligation and the threat of discipline gives the public adequate protection.

POINT II

DISBURSEMENT OF UNCOLLECTED FUNDS DOES
NOT VIOLATE ANY DUTY OF THE ATTORNEY
TO HIS CLIENTS.

An attorney has imposed upon him the following specific duties when holding funds for clients:

- A. Funds held for a client must be held by the attorney in an account clearly labeled and designated as a Trust Account. Integration Rule of the Florida Bar, Article XI, Rule 11.02(4)(a).
- B. Funds entrusted to the attorney by a client are held in trust for the client. Integration Rule of the Florida Bar, Article XI, Rule 11.02(4).
- C. Funds held for a client cannot be commingled with the attorney's personal funds. Code of Professional Responsibility, Ethical Consideration (EC)9-5.
- D. The attorney must maintain complete records of all funds entrusted to him; render appropriate accounts to his client regarding such funds; and, promptly pay to the client, as requested, any funds which the client is entitled to receive. Code of Professional Responsibility, Disciplinary Rule (DR)9-102.

Clearly, nothing in the proposed Rule allows conduct or action which violates any of the stated duties. However, an attorney holding funds for a client owes a duty to exercise care. This duty is not set forth in the Integration Rule of the Florida Bar, nor in the Code of Professional Responsibility. In State v. Ruskin, 126 So.2d 142 (Fla. 1961), Justice Thornal stated as follows:

"The funds of a client in the custody of his lawyer should be guarded and pro-

tected as securely as if the same were in the custody of the community's strongest financial institution. The relationship between a lawyer and a client is of the highest degree of integrity and fidelity. In handling his client's money, the lawyer should guard it with much greater diligence and caution than he does his own."

Consequently, this Court must consider whether the proposed Rule would violate the duty of care imposed upon an attorney holding funds for a client. As previously stated, the likelihood that a provisional settlement will be reversed is negligible because in the vast majority of cases all checks are paid. In those rare cases that checks are not honored, they are generally replaced by good funds. In cases where checks are not honored and cannot be replaced by good funds, and such failure causes damage to an innocent client for whom funds are held, the attorney is legally and ethically required to replace the funds.

It is suggested that the proposed Rule creates a standard of care and treatment of a client's funds which is far, far greater than care and treatment which the attorney would give his own funds. It is further suggested that the standard of care created by the proposed rule is far, far greater than the standard of care which the average member of the Bar perceives as being the standard currently imposed.

A thorough review of cases in this state and elsewhere has failed to discover any case where an attorney has been found guilty of any violation because he disbursed uncollected funds from his trust account. The absence of such holdings may, at first thought, seem to make consideration of this proposed Rule difficult. However, it is suggested that the absence of such holdings can establish two important conclusions:

- A. No grievance committee, referee, or disciplining court has deemed disbursement of uncollected funds to be a violation.
- B. The prevalent practice of disbursing uncollected funds has not resulted in loss or harm to any client.

Consequently, it can be persuasively argued that the absence of such decisions is evidence that the disbursement of uncollected funds violates no duty imposed on the attorney holding funds for a client.

A thorough review of cases involving trust account violations is thoroughly depressing and embarrassing to the average attorney. All such cases involve dishonesty, misappropriation, and conversion of clients' funds to personal use of the attorney. It must be stated that all elements of the Integration Rule of the Florida Bar and the Code of Professional Responsibility regarding funds held for a client are designed to prevent such dishonesty, misappropriation, and conversion. The proposed Rule in no way erodes that purpose.

The basis of the proposed Rule is to further define procedures and to give the attorney guidance and direction. Certainly, the business, banking, and legal world grows more complicated each day. The attorney holding funds for a client must deal with these complications. Under the proposed Rule, the attorney will have direction and guidelines that are realistic in today's complicated world and which violate no existing duty owed by the attorney to his clients.

POINT III

THE PROPOSED RULE SHOULD BE FURTHER
REVISED BY THIS COURT TO ALLOW DIS-
BURSEMENT OF UNCOLLECTED FUNDS REP-
RESENTED BY CERTIFIED OR CASHIER'S
CHECKS DRAWN ON OUT-OF-STATE FINAN-
CIAL INSTITUTIONS.

It must be understood that the proposed Rule is the drafting product of many lawyers with varied opinions. In the drafting process, an attempt was made to concisely provide guidelines to attorneys as to the types of uncollected funds that could be disbursed. It must be stated that the draftsmen of the proposed Rule, by omission, have created an inconsistency. The proposed Rule, by omission, would not allow the attorney to disburse uncollected funds held for a client when such uncollected funds are represented by a cashier's or certified check drawn on a financial institution outside the state of Florida. It is suggested that this omission is inconsistent in that cashier's or certified checks drawn on out-of-state institutions are more likely to be honored than other forms of checks for which disbursement would be allowed under the proposed Rule. Therefore, it is suggested that this Court consider a revision to the proposed Rule by modifying subparagraph (a) thereof to read as follows:

"(a) The deposit is made by certified
or cashier's check; or"

C O N C L U S I O N

It is clear that the attorney today must operate in a complicated world. To transact business, the attorney must regularly receive and disburse funds for and to his clients. Banking transactions and the system for clearance of funds are complicated and cumbersome. To competitively and realistically operate in this complicated and cumbersome world, the attorney must have some flexibility. However, that flexibility cannot be gained at the expense of the attorney's integrity; nor can that flexibility be gained at the expense of the clients the attorney represents.

It is strongly urged that the proposed Rule and its revision as suggested herein gives the attorney the flexibility he so desperately needs. However, that flexibility is not gained at the expense of the attorney's integrity; nor is that flexibility gained at the expense of the attorney's clients. In fact, the proposed Rule would remove a serious cloud of doubt and enable the attorney to better serve his clients' needs by being able to promptly and efficiently disburse funds held for a client in accordance with the sound guidelines set forth in the proposed Rule.

Finally, it is important to state that the proposed Rule clearly informs the members of the Bar as to their

responsibilities. It is felt that the members of the Bar are fully capable of making prudent judgments as to the disbursement of uncollected funds. However, it is further felt that each attorney must be clearly informed by the terms of the Rule, itself, that he has absolute liability for the funds he holds for clients and that if, in making judgments and decisions concerning disbursement of uncollected funds, he errs, he must meet his financial obligation to his clients or face disciplinary action.

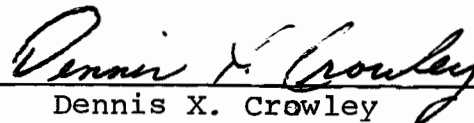
It is urged that this Court adopt the proposed Rule with the revision suggested herein.

Respectfully submitted,

REAL PROPERTY, PROBATE & TRUST LAW
SECTION OF THE FLORIDA BAR,
Walter R. Beales III, Chairman

By 

J. RICHARD HARRIS, Chairman,
Special Committee on
Trust Accounting



Dennis X. Crowley
Ethics Counsel
The Florida Bar