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Chief Justice James E. Alderman
The Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

Dear Mr. Chief Justice:

As an attorney licensed to practice in both Florida and Virginia, I read with interest the article in the March 15, 1984, issue of The Florida Bar News relating to the disbursement of uncollected funds from trust accounts.

The Virginia State Bar has addressed this issue in Legal Ethics Opinion No. 183 and No. 454, copies of which are enclosed. Also enclosed is a copy of the Wet Settlement Act of the Code of Virginia (1950), as amended.

It appears that the Virginia ethics opinions are consistent with the proposal of the Florida Bar. We have experienced no difficulty whatsoever in complying with the Virginia opinions and therefore encourage a thoughtful review of the enclosed opinions and adoption of the Florida Bar proposal.

Very truly yours,

KIELKOPF AND ALBERT

Douglas W. Kielkopf

DWK/clb
Enclosures
cc: J. Richard Harris, Esquire
John L. Berry, Esquire

Opinion No.	Action Taken	Opinion No.	Action Taken
LE-138	Withdrawn	LE-161	Withdrawn
LE-139	Rescinded	LE-162	Withdrawn
LE-140	Rescinded	LE-163	Withdrawn
LE-141	Withdrawn	LE-164	Withdrawn
LE-142	Rescinded	LE-165	Withdrawn
LE-143	Withdrawn	LE-166	Rescinded
LE-144	Withdrawn	LE-167	Withdrawn
LE-144-A	Withdrawn	LE-168	Rescinded
LE-145	Rescinded	LE-169	Withdrawn
LE-146	Rescinded	LE-170	Rescinded
LE-147	Withdrawn	LE-171	Withdrawn
LE-148	Rescinded	LE-172	Withdrawn
LE-149	Withdrawn	LE-173	Withdrawn
LE-150	Rescinded	LE-174	Withdrawn
LE-151	Withdrawn	LE-174-A	Rescinded
LE-152	Withdrawn	LE-175	Withdrawn
LE-153	Rescinded	LE-176	Rescinded
LE-154	Withdrawn	LE-177	Rescinded
LE-155	Rescinded	LE-178	Rescinded
LE-156	Rescinded	LE-179	Rescinded
LE-157	Rescinded	LE-180	Rescinded
LE-158	Rescinded	LE-181	Withdrawn
LE-159	Rescinded	LE-182	Withdrawn
LE-160	Withdrawn		

Legal Ethics Opinion No. 183.

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 Legal Ethics Opinion No. 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) 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, Sections 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 necessary 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 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, Sections 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
October 31, 1980

Legal Ethics Opinion No. 184.

Rescinded by Council
June 16, 1983

Legal Ethics Opinion No. 185.

Subject: Attorney's Representation of Defendants Before the Criminal Courts in a Jurisdiction where the Attorney's Spouse is an Assistant Commonwealth's Attorney.

Inquiry: Attorney's wife is an Assistant Commonwealth's Attorney. She is one of eighteen attorneys in that office and is one of four attorneys who are assigned to the Juvenile Division. The Juvenile Division also has a supervisor attorney and two other attorneys who take some of the overflow from that division. Her practice is primarily in the Juvenile and Domestic Relations Court, but she does handle some cases in the Circuit Court.

The attorney has asked the Committee if he may ethically practice criminal law in Juvenile and Domestic Relations Court, Police Court and/or Circuit Court in the jurisdiction were his wife is an Assistant Commonwealth's Attorney.

Opinion: The Legal Ethics Committee, in Informal Legal Ethics Opinion LE-IO #412 [1], held that it was improper for an attorney to practice criminal law in the courts of the county where his wife is an Assistant Commonwealth's Attorney, even though she had no part in the prosecution of the husband's cases and full disclosure was made to the defendant. It was the opinion of the Committee that such representation created an appearance of impropriety.

Council is of the opinion that LE-IO #412 does not properly recognize the provision of Canon 5 of the Code of Professional Responsibility, and partic-

[1] Editor's Note: LE-IO #412 has been withdrawn by the Legal Ethics Committee.

Legal Ethics Opinion No. 454.

Disbursement of Trust Funds.

An attorney is in compliance with Formal Legal Ethics Opinion No. 183 if, upon receipt and deposit of a certified check in his trust account, he then immediately disburses funds from the account. [See II:DR 9-102(A) & (B), DR 7-101(A)(1) & (3).]

Committee Opinion

Legal Ethics Opinion No. 455.

Conflict of Interest — Trustee Under a Deed of Trust.

It is not ethically permissible for a law firm to represent a bank in litigation where the bank is a party and where the trustees under a deed of trust are also parties and are members of the same firm. [See II:DR 5-101(A) & (B), DR 5-102.]

Committee Opinion

Legal Ethics Opinion No. 456.

Letterhead.

It is not improper for an attorney to designate the fact that he has been certified as a Civil Trial Advocate by the National Board of Trial Advocacy on his letterhead. [See II:DR 2-102(A).]

Committee Opinion

Legal Ethics Opinion No. 457.

Conflict of Interest — Lawyer as Witness.

Law Firm A, after full disclosure and consent, represented both purchaser and seller in a real estate transaction. An easement in favor of the purchaser was created by the seller's deed, and subsequent to closing, a dispute arose between purchaser and seller concerning purchaser's rights under the easement. Law Firm A, at seller's request and without consent of purchaser, filed suit againt purchaser. Attorney B was employed by purchaser and filed an answer. Thereafter, upon motion, the Bill of Complaint was taken for confessed as to liability, and trial was ordered to determine seller's damages. In the Committee's view, A's original decision to file suit for seller against purchaser was improper:

(1) Because it was reasonably likely that a lawyer in the firm might be called to testify since the firm had prepared the deed. [See II:DR 5-101(B).]

(2) Because the former attorney-client relationship between A and purchaser existed with respect to the same transaction out of which the dispute arose. [See II:DR 4-101(B) and DR 5-105(A).]

Committee Opinion

such mortgage or deed of trust, to receive a written disclosure of whether such financial institution will permit a qualified purchaser to assume such mortgage or deed of trust, and, if the answer is in the affirmative, the following terms of such assumption:

1. The rate of interest to be assumed, which may vary with an exterior standard;

2. The balance of the escrow account, if any;

3. Any fees and charges to be assessed by the financial institution against the seller and buyer in connection with the assumption;

4. Usual limitations or requirements placed on the assumption; and,

5. Other terms and conditions of the assumption deemed pertinent by the financial institution.

B. The financial institution shall state the time period during which the terms disclosed pursuant to subsection A of this section shall be valid, together with any limitations thereon.

C. Any such financial institution receiving such a written request from an owner shall respond in writing within ten business days of the receipt of the request.

D. Any such financial institution receiving a second or subsequent written request with respect to the same mortgage or deed of trust within any twelve-month period may charge a fee, not to exceed fifteen dollars, for each additional request to be paid in advance. (1982, c. 233.)

CHAPTER 1.1.

WET SETTLEMENT ACT.

§ 6.1-2.10. Definitions. — The following terms as used in this chapter shall have the following meanings:

1. *"Loan closing"* means that time agreed upon by the borrower and lender, when the execution of the loan documents by the borrower occurs;

2. *"Settlement"* means the time when the settlement agent has received the duly executed deed, loan funds, loan documents, and other documents and funds required to carry out the terms of the contract between the parties and the settlement agent reasonably determines that prerecordation conditions of such contracts have been satisfied. *"Parties"* as used in this subsection means the seller, purchaser, borrower, lender and the settlement agent;

3. *"Settlement agent"* means the person responsible for conducting the settlement and disbursement of the settlement proceeds;

4. *"Loan funds"* means the gross or net proceeds of the loan to be disbursed by the lender at loan closing;

5. *"Disbursement of loan funds"* means the delivery of the loan funds by the lender 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 or checks issued by an insurance company licensed and regulated by the State Corporation Commission, which checks are drawn on a financial institution, located within the Fifth Federal Reserve District, the accounts of which are insured by an agency of the federal government;

6. *"Disbursement of settlement proceeds"* means the payment of all proceeds of the transaction by the settlement agent to the persons entitled thereto;

7. *"Lender"* means any person regularly engaged in making loans secured by mortgages or deeds of trust on real estate;

8. *"Loan documents"* means the note evidencing the debt due the lender, the deed of trust, or mortgage securing the debt due to the lender, and any other documents required by the lender to be executed by the borrower as a part of the transaction. (1980, c. 730; 1981, c. 86.)

§ 6.1-2.11. Applicability. — This chapter applies only to transactions involving purchase money loans made by lenders, which loans will be secured by first deeds of trust or mortgages on real estate containing not more than four residential dwelling units. (1980, c. 730.)

§ 6.1-2.12. Duty of lender. — The lender shall at or before loan closing cause disbursement of loan funds to the settlement agent. The lender shall not be entitled to receive or charge any interest on the loan until disbursement of loan funds and loan closing has occurred. (1980, c. 730.)

§ 6.1-2.13. Duty of settlement agent. — The settlement agent shall cause recordation of the deed, the deed of trust, or mortgage, or other documents required to be recorded and shall cause disbursement of settlement proceeds within two business days of settlement. (1980, c. 730.)

§ 6.1-2.14. Validity of loan documents. — Failure to comply with the provisions of this chapter shall not affect the validity or enforceability of any loan documents executed after July 1, 1980. (1980, c. 730.)

§ 6.1-2.15. Penalty. — Any persons suffering losses due to the failure of the lender or the settlement agent to cause disbursement as required by this chapter, shall be entitled to recover, in addition to other actual damages, double the amount of any interest collected in violation of § 6.1-2.12 of this chapter plus reasonable attorneys' fees incurred in the collection thereof. (1980, c. 730.)

CHAPTER 2.

BANKING ACT.

Article 1.

In General.

Article 2.

Incorporation and Powers.