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Committee on Professional Ethics

Opinion — 575 — 4/18/86 (46-85)

Topic: Escrow Funds, duties respecting placing in interest-bearing account.

Digest: A lawyer holding contract deposit as escrow agent/attorney should, in an appropriate case, request instructions from the contracting parties about placing funds in an interest-bearing account.

Code: DR 9-102
DR 9-102(B)

QUESTION

When an attorney representing a party to a real estate transaction also acts as escrow agent, what ethical duties does the attorney have to place the contract deposit in an interest-bearing account?

OPINION

A lawyer acting as attorney for the seller in a real estate transaction has received the buyer's contract deposit, and is holding the funds as escrow agent/attorney. The lawyer asks whether he has an ethical duty to deposit the funds in an interest-bearing account.

It is settled that an attorney for one party to a real estate transaction may act as an escrow agent for both sides with full disclosure of the facts and with the consent of both parties. ABA Inf. 923 (1966) In that capacity, the attorney

is merely carrying out the escrow instructions of both parties. In N.Y. State 532 (1981), where we opined that a real estate contract permitting the lawyer/escrow agent to retain interest earned on escrow funds as compensation for administrative costs and expenses was *per se* improper, we noted as follows:

> When a lawyer serves as an escrow agent, his obligations are those of a trustee. *Farago v. Burke,* 262 N.Y. 229, 233, 186 N.E. 683, 684 (1933); *see also, Helman v. Dixon,* 71 Misc. 2d 1057, 1059, 338 N.Y.S.2d 139, 142 (Civil Ct. N.Y.C. 1972) and cases therein cited. The lawyer/escrow agent must meet the same fiduciary and professional standards that are mandated for lawyers as well as for trustees with respect to the preservation, safekeeping and use of client funds and of trust property."

The professional standards mandated for lawyers with respect to clients' funds place emphasis on using one or more identifiable bank accounts without commingling funds belonging to the lawyer, maintaining complete records and rendering appropriate accounts to the client, and promptly paying such funds as requested by the client. *See* DR 9-102. The Code of Professional Responsibility is silent as to whether the account in which such funds are deposited should be interest-bearing. In N.Y. State 90 (1968), at a time when withdrawals from interest-bearing bank accounts were generally subject to notice and a waiting period, this Committee noted that such restrictions may confliict with the client's desire and right to prompt payment (*cf.* DR 9-102(B)(4)) and advised obtaining the client's specific instructions before depositing the funds in an interest-bearing account.

In ABA 348 (1982), the Committee on Ethics and Professional Responsibility of the American Bar Association addressed a range of questions on placing clients' funds at interest. That Committee noted that client funds are generally commingled and left uninvested because of the administrative expense of establishing a separate account for each client and the impracticability of calculating and allocating interest on commingled funds. However, consistent with our comments in N.Y. State 554 (1983), the A.B.A. Committee concluded that "where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and bank charges, the lawyer should consult the client and follow the client's instructions as to investing." ABA 348

(1982). See also N.Y. State 554 (1983) ("where a lawyer holds a sum for a client which is sufficient to earn interest, the lawyer has a fiduciary obligation to invest that sum, and an ethical obligation to notify the client of receipt of the funds, and any interest thereon, maintain adequate records, and make prompt payments of both principal and interest"); N.Y. State 532 (1981) (requiring an accounting to clients for interest earned on client funds); N.Y. City 81-68 (1981) (interest earned on client funds belongs to the client). *See generally* DR 9-102(B)(1), (3), (4).

The same principles apply to a lawyer acting as escrow agent/attorney, whether the lawyer is acting for the seller or the buyer. As an escrow agent, the attorney owes fiduciary duties to both parties to the contract with respect to the preservation, safekeeping and use of client funds and of trust property. *See* N.Y. State 532 (1981); N.Y.City 80-56 (1980); *cf., In re Solomon,* 87 A.D.2d 137, 450 N.Y.S.2d 804 (1st Dep't 1982) (sellers' attorney disciplined for withdrawing funds from escrow account without authorization despite lack of harm to buyers or sellers).

In the opinion of the Committee, when an attorney is requested to act as escrow agent/attorney for a contract deposit sufficient in amount that it might warrant being placed in an interest-bearing account if it were client's funds, the attorney should recommend to the contracting parties that specific instructions be included in the escrow agreement on whether such funds should be placed in an interest-bearing account and how the interest earned should be apportioned between the parties. In making this recommendation, the attorney should consider the amount of the deposit, the expected holding period, and the costs and expenses involved in making such a deposit. *See* Nassau County 85-9 (1985). Where the contract pursuant to which the deposit is made is silent about placing the funds at interest but the amount thereof and other circumstances might warrant its being placed at interest, the attorney should consult with the parties for their specific instructions. If the parties then are unable to agree, the duty of an escrow agent/attorney with respect to placing the funds at interest ceases to be an ethical question and becomes one as to what, if any, duties in that regard are imposed by law in light of the terms of the escrow agreement. This Committee does not opine on questions of law.

Of course, as discussed above, the escrow agent/attorney has the same duties respecting record keeping and accounting as an attorney has with respect to client funds.