



NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 582 – 5/4/87 – (13-87) Topic: Escrow Funds

Digest: Attorney may not retain interest for period between date of deposit and date check clears paid on checks received on behalf of clients and deposited in escrow account.

Code: Canons 5 and 9;
EC 2-17, 2-18, 5-3,
9-5, 9-6;
DR 2-106(A),
9-102(A) and (B).

QUESTION

Where an attorney receives a settlement check on behalf of a client and deposits it in an interest bearing escrow account, is it permissible for the attorney to retain the interest earned on the funds from the date of deposit of the check into the account until the date the settlement check clears?

OPINION

An attorney proposes to maintain an interest-bearing escrow account which would be used solely for the deposit of checks representing settlements of personal injury cases. A check payable to the order of the client for the client's full share of the settlement amount would be issued on the date that the settlement check "cleared". Interest would be paid to the client on a

daily basis from the date the settlement check cleared until the date the check to the client was charged to the escrow account. Personal funds of the attorney would not be commingled in this account and clients would sign a written agreement to the above arrangement. In the event that a significant amount of interest was paid to the client, Form 1087 would be filed by the attorney with the Internal Revenue Service.

This Committee held in N.Y. State 532 (1981) that it is ethically improper for a lawyer to receive interest earned on funds held in an escrow account as compensation for serving as the escrow agent. We stated in that opinion, "Such a fee arrangement presents so great a danger of unfairness, deception, overreaching and conflict of interest, or the appearance thereof, that we find any such arrangement *per se* improper under the standards incorporated into such Code provisions as Canons 5 and 9, EC 2-17, EC 2-18, EC 5-3, EC 9-5, EC 9-6, DR 2-106(A), and DR 9-102(A) and (B)." It is the opinion of the Committee that N.Y. State 532 is fully applicable to the facts set forth herein. Under the proposed arrangement the interest paid to the attorney would clearly be compensatory for the attorney's service as escrow agent.

While we recognized in N.Y. State 532 that it might be permissible for an attorney, subject to the client's consent, to retain the interest on client funds which are to be promptly and routinely disbursed, that statement was limited to instances "(w)here the amount of interest allocable to any one client's account is relatively small in relation to the bookkeeping expense which would be required to determine the precise amount of interest earned as of any given date." *Id.* Under the proposed arrangement, the attorney is willing to calculate a client's interest on a daily basis commencing with the date the settlement money becomes available. We, therefore, see no reason why it should be administratively burdensome for the attorney to calculate the interest earned from the date of deposit.

For the reasons stated, the question posed is answered in the negative.
