



## NEW YORK STATE BAR ASSOCIATION

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### Committee on Professional Ethics

**Opinion 600 - 5/16/89 (24-88)**

**Topic:** Trust accounts; use of attorney's credit to back credit for client.

**Digest:** Improper for an attorney to maintain a credit line for clients based on a multiple-client escrow account; provided the attorney obtains consent after full disclosure, his personal credit-worthiness may be used to provide credit for a client.

**Code:** DR 5-103(B), 5-104(A),  
9-102

#### QUESTIONS

1. May an attorney use a credit line supported by checks deposited in a multiple-client escrow account where the bank would provide immediate credit in the form of bank cashier's checks or certified checks based on the attorney's credit-worthiness and the balance in the account?

2. May an attorney use an "attorney exchange account" in which the proceeds of a single closing are deposited, against which funds the bank would provide immediate credit in the form of a bank cashier's check if the bank relies solely on the personal credit-worthiness of the attorney?

#### OPINION

A lawyer proposes to use one or both of the products described above that a bank may offer to its attorney customers. The first arrangement is impermissible in that it would involve improper use of other clients' funds in the escrow account for the benefit of the client for whom the check is drawn. DR 9-102. Were the check to bounce, the bank would be protected against any loss by the deposits in the multiple client escrow account, but that use of the funds of Client A to benefit Client B would be an impermissible conver-

sion. See Pa. Op. 85-172 (1986), indexed in ABA/BNA 901:7301; N.C. Op. 358 (1984), indexed in ABA/BNA 801:6614; S.C. Op. 20-78, indexed in Maru's No. 12726 (1980).

In the second arrangement, however, the funds of other clients are not involved. Furthermore, since no funds of the lawyer are actually deposited in the escrow account, there would be no impermissible commingling of the lawyer's and client's funds. See DR 9-102 and the rules of the four Judicial Departments, which each require that a client's funds be identified and deposited separately from the lawyer's funds, remaining at all times the property of the client. 22 NYCRR 603.15, 691.12, 806.8, 1022.5.

This second service is tantamount to a lawyer lending funds to a client or guaranteeing funds advanced by the bank. In litigated matters, such an arrangement is prohibited by DR 5-103(B). There is no express prohibition against a lawyer lending a client funds in connection with a non-litigated matter. C. Wolfram, *Modern Legal Ethics* 507 n. 75 (1986). *But see* ABA Inf. 1170 (1970). Since the lawyer may directly lend or guarantee the funds to the client, it is not *per se* unethical for a lawyer to permit the bank to use the lawyer's credit-worthiness to provide immediate credit to a client based on a single closing account. Washington Op. 177, indexed in ABA/BNA 801:8902. In order to use this service, however, the lawyer must explain the arrangement to the client who must then consent. Pa. Op. 85-172 (1986), indexed in ABA/BNA 901:7301. DR 5-104(A) provides:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The lawyer and the client have potentially differing interests in the loan transaction. Should the payor not make good on the deposited check, the bank may proceed against the lawyer who would in turn seek indemnification from the client. Therefore, the lawyer should enter into this arrangement only where the lawyer is confident that the client understands the ramifications and the potential conflict, including the fact that the lawyer may have to withdraw from representation at some point in the future. In addition, the client must fully comprehend his obligations to the lawyer. The extent of the disclosure will depend on the client's experience and sophistication and it may be impossible in some situations to obtain knowing consent. Despite the

fact that the lawyer is extending a benefit to the client, it is important that he exercise caution when considering personal involvement in client affairs.

**CONCLUSION**

For the reasons stated above, Question 1 is answered in the negative and, subject to the qualifications set forth, Question 2 is answered in the affirmative.

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