

BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion *06 03*

Topic: Responsibility of associate for advance of Trust funds when sufficient funds are not on deposit to cover the advance.

Digest: Preserving identity of funds and property of others; disclosure of information to authorities.

Code: DR 9-102; DR 1-103; DR 1-104; DR 1-102

QUESTION

Does an associate attorney having authority to sign checks on trust account violate the Disciplinary Rules if her lawyer-employer signs a check for funds in the trust account before the client has deposited sufficient funds in the trust account to cover the checks?

OPINION

No, if the associate attorney is not involved in the transaction and does not know and should not reasonably know; however, yes if the associate attorney ratifies, knows or reasonably should of the conduct of her employer. Further , if the associate attorney knows or reasonably should know that her lawyer-employer is commingling trust funds he or she is obligated to report his or her employer's conduct to the appropriate Grievance Committee

DISCUSSION.

The lawyer-employer violates Disciplinary Rule 9-102 if he draws trust for the benefit of a client who has not deposited funds in the trust account to cover the amount of the draw. DR 9-102 mandates that a lawyer preserve the identity of the funds of each client whose funds are in the account. When the lawyer draws from the trust account for a

client's benefit in excess of the client's funds in the trust account, the lawyer takes or borrows trust funds which belong to another person, in violation of DR 9-102.

If the associate attorney has authority to sign checks drawn on the trust account she has fiduciary duties with respect to funds in the account. Clearly an associate attorney who has power to withdraw funds from a trust account must never take an action resulting in the misappropriation of trust funds. DR-9-102(A). However, fiduciary duties are not limited to restraints on actions taken by the associate to withdraw funds. Fiduciary duties imposed by the existence of a trust fund are a matter of law, but include duties of loyalty, care and prudence. Although matters of law are not within the scope of this opinion, it is noteworthy that in one case the Appellate Division of the New York Supreme Court held a lawyer responsible for improper disposition of trust funds because as a trustee, he had a legal duty "to oversee... the handling of the escrow account. *Matter of Caradoso*, 152 A.D. 2nd 69, 548 NYS 2nd 51 (2nd Dept. 1999).

DR 1-104(E) requires an associate attorney to conform to the Disciplinary Rules, even if the associate attorney acts "acts at the direction;; of another person. DR 1-104(E) also holds an associate attorney responsible for his or her attorney-employer's violation of a Disciplinary Rule if the associate attorney with "with knowledge of the specific conduct ratifies it." DR 1-104(D). Delivery by the associate of a check known by the associate to be improperly drawn on a trust account would clearly constitute ratification.

Finally, DR 1-103 requires an associate attorney with knowledge to report his or her lawyer-employer when knowledge of conduct is certain and there is a substantial question as to a violation of Disciplinary Rule or "any other conduct that adversely reflects on the lawyer's fitness as a lawyer" (See DR-102(A)(7)) as well as generally prohibiting dishonesty, deceit and misrepresentation. Under DR 1-103(A) and EC 1-4, a lawyer "should not report a mere suspicion of misconduct," but should report another lawyer if he has "either actual knowledge" or "believes clearly" tht theother lawyer has violated the Code in a way that raises a "substantial Question as to his honesty, trustworthyness or fitness inh other respects" *Simion, N.Y. Code of Professional Responsibility Annotated, 2006 Edition, page 69*, quoting, in part, *N. Y. Bar OP. 1995-5*