FORMAL OPINION NO. 115

INTEREST ON TRUST ACCOUNTS

The Committee has received a request for an opinion on the propriety of a lawyer depositing client funds received by the lawyer as security for the payment of fees in interest-bearing bank accounts and retaining the interest earned thereon for his own use. The question contemplates that the funds would represent prepaid but unearned fees for legal services.

There are no previous Idaho ethics opinions on the issue, although two informal opinions of the American Bar Association, issued prior to the adoption of the Code of Professional Responsibility, condemned the practice in the absence of a specific authorization from the client. "The canon cannot permit of the argument that for a lawyer to invest trust funds in his possession . . . and retain the income earned for the purpose of defraying his operating expenses is using trust funds in direct violation of the canon." ABA Informal Opinion No. 991 (July, 1967); see also ABA Informal Opinion No. 545 (May, 1962).

We believe that the rules relating to an attorney's role as fiduciary are such that he may not invest unearned client funds and retain therefrom the interest earned in the absence of specific authorization from the client.

First, the law is clear that an attorney who receives money from a client which is unearned and which is not applied directly to an existing indebtedness holds that money as a trustee rather than as a debtor; and as a consequence, the lawyer's duties with respect to that money are the same as the duties of any other trustee or fiduciary. DR 9-102.

Second, the trustee is disabled by law from obtaining any personal benefit, advantage, gain or profit out of his administration of the trust in the absence of an expressed consent from the trust beneficiary. As a consequence, it may well be that such a transaction would be voidable by the client irrespective of loss suffered by the trust or of the good faith of the lawyer. 90 C.J.S. Trusts, Sec. 248.

Additionally, by virtue of both general trust law principles and DR 9-102 (B)(3) the lawyer must promptly account to the client all transactions regarding the client's fund. DR 9-102 (B)(1)(3) provides that a lawyer shall: (1) promptly notify client of the receipt of his funds, securities or other properties; (2) maintain complete records of all funds, securities and other properties of the client coming into the possession of the lawyer and render appropriate accounts to his clients regarding them. Accordingly, a program of investing client funds in interest-bearing accounts cannot be carried on in secret or without notice to the client.

The Professional Ethics Committee of the American Bar Association has recently considered this issue and, in Formal Opinion No. 348, concluded that, "The model code does not permit the lawyer to use interest earned on client funds to defray the lawyer's own operating expenses without the specific and informed consent of the client." The ABA committee reasoned that although DR 9-102 does not specifically condemn the practice, there is nothing in rule which indicates an intent to "relax in any manner the long-standing restrictions on a lawyer's use of client funds."

It thus appears clear that an attempt to profit from the use of unearned client funds through investment of those funds in interest-bearing accounts is prohibited.

Conceivably, such a practice would be permissible if conducted after full disclosure to the client and with client consent. The Committee would caution, however, that any contract whereby a trustee profits from his trust may be presumed to be the product of undue influence and accordingly the lawyer may have a significant burden in establishing the validity of such a contract should a challenge arise. We would further caution that the lawyer must comply with all the requirements of DR 9-102 (B) relating to maintenance of records, payment to the client when requested and accounting to the client.

DATED this 28th day of June, 1984.

COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY

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