

NYSBA Nixes Escrow Checks On Uncollected Bank Funds

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Stage set: A typical house title closing. Present: the usual cast. Plot: Buyers have contracted to pay \$250,000 for a one-family house in Queens. Seller's attorney is holding the \$25,000 contract deposit in her attorney trust account, along with deposits on six other real estate transactions. Her trust fund totals \$147,500. At the closing, the title closer reports a newly entered judgment against the sellers for \$30,000. The parties wish to ensure satisfaction of the judgment, which exceeds the \$25,000 contract deposit. They agree that sellers will endorse the buyer's certified check for \$35,000 to seller's attorney, who will draw a check on her trust account for \$30,000 plus interest and costs in payment of the judgment. To the extent attorney's check exceeds \$25,000; she has obviously drawn against the funds of other clients.

Query: In payment of a client's obligations to a third party, may a lawyer issue a check from her escrow account drawn against an undeposited or uncleared bank or certified check delivered to the lawyer?

This was the question considered by the NYSBA Committee on Professional Ethics in Opinion 737 dated February 1, 2001.

It goes without saying that a lawyer may not overdraw her escrow account or draw a check which may be returned for uncollected funds. (See, NYPRR April 2001, *A Primer on Trust Accounts...*) But what if a lawyer, under the pressure to close a real estate transaction and in reliance on the usual integrity of a cashier's or certified check, draws on good funds of other clients.

After a thorough analysis of the arguments, pro and con, the Committee answered the query, "No,"... the lawyer may not draw on the funds of client B to pay claims against Client A though she is holding or has already deposited a bank, cashier's or certified check belonging to Client A.

The Committee relied on DR 9-102 governing attorney trust accounts. It rejected the contrary decisions of disciplinary authorities in Illinois and Florida. The Committee acknowledged that a bank check may be compared to cash but argued that even cash can be lost or stolen before it's deposited. Even certified checks can turn out to be forgeries and the issuers of treasurer's checks may become insolvent.

The Committee recognized that the amounts involved are usually small, that closings will be more difficult if its opinion is followed, especially for persons of moderate or low income, and that bank and certified checks are generally accepted as legal tender in commercial transactions. But it insisted that lawyers must be held to a higher standard than the general community in their management of trust funds.