STATEWIDE GRIEVANCE COMMITTEE

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ETHICS OPINION 99-1

The Statewide Grievance Committee has been made aware of certain mortgage lenders' operating procedures regarding loan closings. Rather than supplying the loan funds to the Connecticut attorney acting as settlement agent prior to the scheduled closing date, these lenders' procedures entail supplying the loan funds to the attorney/settlement agent on the day of the closing by inter-bank electronic funds transfers, commonly called "wire transfers." Such wire transfers result in the loan funds being credited to the attorney/agent's trustee bank account. This procedure has proven problematic due to the not infrequent errors and omissions of persons involved in the wire transfer process, working either on behalf of the lending institutions, or on behalf of the drawee or the depository banks transacting the wire transfers.

More than occasionally, errors and omissions in wire transfers have resulted in delays in receipt of the loan funds well past the dates of the loan closings. In rare cases, the loan funds have not been provided at all. A contributory cause of such situations is the failure of the attorneys involved to have confirmed the actual receipt of the loan funds in their trustee accounts. In some cases, it appears that attorneys may have proceeded to close loans and disburse funds from their trustee accounts despite being aware that the loan funds had not yet been received at the times of the closings and disbursements.

Connecticut attorneys are obligated under Rule 1.15 of the Rules of Professional Conduct to hold their individual clients' funds separate and to safeguard them from loss or misuse. When there are other clients' funds on deposit in an attorney's trust account, the effects of that attorney's closing a loan and disbursing funds prior to the actual receipt of the loan proceeds is to put those other clients' funds to a clearly unauthorized use and to put those other clients at some risk of losing their funds.

The practice of disbursing funds at a closing before the actual receipt of the loan proceeds also undermines the effectiveness of the statutory program for the use of interest earned on attorneys' clients' funds accounts. Improperly advancing other clients' funds in place of the funds intended to finance the real estate transactions reduces the balance of funds in the affected accounts below what they would otherwise have been, had the loan funding been received and deposited. Thus, less interest is earned by the accounts and made available for the purposes of the statutory program.

When the balance of other clients' funds in a trustee account is not sufficiently large, the practice in question causes the account to be overdrawn. Such overdrafts implicate the attorney in the mishandling of other clients' funds and can cause additional costs, inconvenience and distress for third parties. Also, such overdrafts can cause a situation reportable to this Committee under the overdraft notification program established under the provisions of Practice Book § 2-28. Such notifications cause additional work for this Committee with resultant costs to the public which finances it.

Attorneys need to avoid all these negative effects by taking reasonably prudent actions to safeguard all their clients' interests, in accordance with the Rules of Professional Conduct. At a minimum, such actions include obtaining confirmation of the receipt of wire transfers to the credit of the proper bank account prior to the closing of the transaction the funds are intended to finance. Such confirmation should be obtained from an appropriate source at the bank to which the funds are to be transferred. Seeking such confirmation would provide the attorneys either with reasonable assurance of the receipt and availability of the funds or with notice of the errors or omissions that might have prevented their receipt. Naturally, if receipt of the funds cannot be confirmed, the transaction should not be closed.

The Committee is aware of the practice of closing transactions upon the exchange of checks. That practice can be distinguished from the one discussed above by the fact that the closing attorney has available at the time of disbursing his checks, certified checks or checks drawn by the lending bank on its own funds which, if free from irregularities and if properly endorsed, can be reasonably relied on to provide the intended funds. Thus, this Opinion does not apply to the case where an attorney closes a transaction in reliance on such checks and he or she intends and reasonably expects to deposit the checks immediately after the closing so that they will be available upon the first presentation of any check drawn for the closing.