

ETHICS ADVISORY OPINION

12-11

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Question Presented:

Are Automated Clearing House transfers that are issued to attorney trust accounts considered collected funds for the purpose of disbursing on real estate transactions?

Summary:

Funds deposited by ACH deposit may not be treated as "collected funds", due to the reversibility of such deposits, at least until expiration of five banking days after receipt.

Opinion:

Rule 1.15(f)(1) states that a lawyer shall not disburse funds from his trust account unless the funds to be disbursed have been deposited in the account and are collected funds. It is noteworthy that 1.15(f)(2) states that a lawyer may disburse funds from a trust account at the lawyer's risk in reliance on deposits when the deposit is "(ii) by verified and documented electronic funds transfer." However, the rule does not specifically address the various types of electronic funds transfer.

Automated Clearing House (ACH) transactions are a form of electronic funds transfer but are distinguished from a wire transfer in that ACH processes large volumes of transactions in batches instead of individual transfers. ACH transactions are governed by NACHA (formerly the National Automated Clearing House Association).

Section 2.9 of the NACHA 2012 Operating Rules provides that "[a]n Originator may initiate a Reversing Entry to correct an Erroneous Entry previously initiated to a Receiver's account." It

further provides that “[t]he Reversing Entry must be Transmitted to the ACH Operator in such a time to be Transmitted or made available to the Receiving Depository Financial Institution (RDFI) within five Banking Days after the Settlement Date of the Erroneous Entry.” Erroneous entries are defined as: “(a) a duplicate of an Entry previously initiated by the Originator or Originating Depository Financial Institution (ODFI); (b) orders payment to or from a Receiver different than the Receiver intended to be credited or debited by the Originator; (c) orders payment in a dollar amount different than what was intended by the Originator; ...” The Settlement Date is further defined as “... the date an exchange of funds with respect to an Entry is reflected on the books of the applicable Federal Reserve Bank(s)... .”

Therefore, an ACH deposit may be reversed without the consent of the RDFI as long as it meets one of the exceptions noted above and the reversal is done within five banking days of the date the deposit is reflected on the books of the receiving bank.