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Honest Broker: Lawyers as Escrow Agents

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Lawyers occasionally act as escrow agents. Although the concept is deceptively simple, serving as an escrow agent can create significant risks for the lawyer and the lawyer's law firm. In this column, we'll look at three: (1) conflicts; (2) coverage; and (3) claims.

Conflicts

Any Oregon lawyer considering serving as an escrow agent should be thoroughly familiar with Oregon State Bar Formal Opinion 2005-55 (rev 2014), which is available on the OSB web site. Formal Opinion 2005-55 examines conflict issues both when the lawyer does not represent any parties in the transaction involved and when the lawyer does.

On the former, Formal Opinion 2005-55 reasons that "[t]here is no reason that a lawyer cannot play this role in a transaction in which the lawyer does not represent any of the parties." Formal Opinion 2005-55 is predicated on the assumption that the lawyer is providing the services involved under the auspices of the lawyer's firm and, therefore, falls within the exception granted by ORS 696.520(2) from the general regulation of escrow services when conducted by "[a]n attorney at law rendering services in the performance of duties as an attorney at law."

On the latter, Formal Opinion 2005-55 finds that the dual roles of lawyer and escrow agent creates an inherent conflict. On one hand, the lawyer owes a duty of loyalty to the lawyer's client. On the other, assuming the role of escrow agent creates a duty to act as a neutral to all of the parties involved. As the opinion puts it quoting the Oregon Court of Appeals: "'The word "'escrow'" by definition means "'neutral,'" independent from the parties to the transaction.'" The conflict is under RPC 1.7(a)(2), which addresses situations in which the lawyer's professional judgment on behalf of a client may be materially limited by (among other things) duties to non-clients. A lawyer's actions on behalf of a client regarding the adequacy of documentation required for the disbursement of funds, for example, might be tempered by the lawyer's corresponding duties toward other parties to the transaction if the lawyer is also acting as an escrow agent for all involved. Formal Opinion 2005-55 counsels that conflicts under RPC 1.7(a)(2) can be waived—but only with the "informed consent" (confirmed in writing) of the client under RPC 1.7(b).

Formal Opinion 2005-55 notes that it does not address an associated issue: whether providing compensated escrow services to a client triggers the "business transaction" rule—RPC 1.8(a)? In *In re Spencer*, 355 Or 679, 330 P3d 538 (2014), however, the Supreme Court disciplined a lawyer for failing to obtain

a conflict waiver meeting the extremely strict requirements of RPC 1.8(a) when he provided real estate brokerage services to a client.

Formal Opinion 2005-55 concludes by counseling that "[t]here is no reason . . . a lawyer cannot hold client funds, documents, or other property as part of a transaction involving a client as along as the lawyer is not described as an 'escrow agent' and the lawyer's role is not otherwise misdescribed or misrepresented." This qualifier addresses, for example, the relatively common scenario where a claimants' lawyer receives settlement funds that are subject to medical liens that will be satisfied out of the funds involved. Oregon State Bar Formal Opinion 2005-52, in turn, outlines the duties of a lawyer holding funds for a client against which medical or other liens have been asserted.

Coverage

Lawyers who are considering acting as escrow agents should also carefully review whether they are covered under their firm's malpractice or general liability policies.

The Oregon State Bar Professional Liability Fund primary plan, for example, contains an exclusion—Exclusion 21—for escrow activities:

> "This Plan does not apply to any Claim arising from a Covered Party entering into an express or implied agreement with two or more parties to a transaction that in order to facilitate the transaction, the

Covered Party will hold documents, money, instruments, titles, or property of any kind until certain terms and conditions are satisfied, or a specified event occurs."

Exclusion 21 goes on to explain that it does not apply to situations like the earlier example of a claimants' lawyer receiving settlement funds for a client or a family lawyer holding funds to be distributed consistent with a judgment:

> "This exclusion does not apply to a Claim based on: (a) a Covered Party's distribution of settlement funds received from the Covered Party's client, or from an opposing party, in order to close a settlement; or (b) a Covered Party's distribution of funds pursuant to and consistent with a limited or general judgment in a domestic relations proceeding."

Claims

In the May 2018 issue of the PLF's In Brief newsletter, the PLF's Claims Director neatly summarized the risks of civil damage claims underlying Exclusion 21 when there is an asserted error in disbursing or failing to disburse funds held as an escrow:

> "[T]he risks of serving as an escrow agent can be highly disproportionate to the fee charged by the lawyer. Frequently, the lawyer is taking responsibility for very large sums of money for very little reward. As a result, the PLF is of the opinion that if the parties need an escrow agent, they should hire a title company or some other person or entity that regularly provides these services as a neutral."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.