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Deed of Trust: Lawyer as Escrow

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Lawyers acting as escrows[1] is nothing new. Reported decisions in Washington noting lawyers as escrows stretch back to the 1800s.[2] While a time-honored role, serving as an escrow can create significant risks for a lawyer and the lawyer's law firm. Because serving as an escrow has long been an adjunct function of law practice, lawyers may not fully appreciate the contemporary risks that have developed over time. In this column, we'll look at three: conflicts; claims and related insurance coverage; and trust account issues.

Before we do, three qualifiers are in order.

First, in this column, we'll focus on settings where a lawyer is acting as an escrow in connection with a business or real estate transaction rather than situations where a litigator is simply processing a settlement through the lawyer's trust account. RPC 1.15A addresses safeguarding property generally and RPC 1.15A(g) outlines the duties of a lawyer holding funds in trust in which more than one person has a claim.[3] Both merit close review by litigators holding third-party funds.[4]

Second, we'll focus on lawyers acting as escrow incidental to their law practices rather than those who may own an escrow service outright.[5] RPC 5.7 discusses "law-related services" and sets out criteria for determining whether the

RPCs apply to businesses owned or controlled by a lawyer that are affiliated with the lawyer's law practice.[6] Lawyers who are operating an escrow service—whether in their own office or separately—should carefully review RPC 5.7 as, depending on the circumstances, *all* of the RPCs may apply.

Third, we'll focus on the duties of lawyers rather than limited practice officers authorized to handle real estate closings under Admission and Practice Rule 12.[7]

Conflicts

Conflicts can arise either when a lawyer is serving soley as an escrow or when the lawyer-escrow is also legal counsel to one of the parties in the transaction involved.

Escrow Only. A lawyer may be retained solely as an escrow without representing any of the parties as legal counsel. Prudent risk management practice suggests confirming this in writing so that the parties will not inadvertently believe the lawyer is also representing them as legal counsel.[8] Absent such written confirmation (and conduct consistent with the writing), courts have sometimes construed the lawyer as representing all parties jointly on the closing as legal counsel.[9] In that event, the line between a permitted common representation relating solely to the closing and a nonwaivable conflict arising

from negotiating between commonly represented clients is perilously thin—particularly if the escrow services include preparing rather than simply recording documentation of the transaction involved.[10]

Even when a law firm is only providing escrow services, the Washington Supreme Court in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 589-590, 675 P.2d 193 (1983),[11] noted that because the lawyer must act impartially as an escrow, a lawyer-escrow has a corresponding duty to inform the parties to consider obtaining independent counsel to advise them regarding their individual interests in the transaction involved:

> [A]n attorney acting as an escrow agent has a duty to inform the parties to the real estate closing of the advisability of obtaining independent counsel. This duty to inform, which extends equally to both parties to the closing, in no way conflicts with the attorney escrow agent's duty of impartiality. *Id*. at 590.[12]

Escrow and Lawyer. The potential for conflicts sharpens considerably when the lawyer-escrow is also representing one of the parties to the transaction. *Bowers* also discussed this scenario and noted that the lawyer's duty of impartiality as an escrow may come into conflict with representation of the lawyer's client. Although *Bowers* was decided under the former Code of Professional Responsibility, conflicts arising from potential material limitations on

a lawyer's professional judgment from competing duties to clients and nonclients are now found in RPC 1.7(a)(2):

> [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> . . .
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Conflicts under RPC 1.7(a)(2) are generally waivable. For example, the simple fact that a lawyer-escrow in this situation must disburse funds consistent with written instructions negotiated with a counterparty would ordinarily be a conflict waivable by the lawyer's client.[13] As we'll discuss in the next section, however, the duties of impartiality and safekeeping of property running toward a counterparty have been held to be fiduciary.[14] Therefore, a very real conflict could emerge if, for example, a client demanded that a lawyer ignore agreed escrow instructions and disburse funds solely to the client's benefit. In that instance, the conflict would likely be nonwaivable.[15]

Claims and Coverage

Unsurprisingly, a lawyer-escrow who commits an error in legal services provided in connection with a transaction may be held liable for legal

malpractice.[16] Equally unsurprisingly, a lawyer-escrow who commits an error as an escrow may also be held liable for negligence.[17] Because lawyer-escrows also owe fiduciary duties to nonclients to whom they are serving as escrow, lawyer-escrows are also at risk of claims for breach of fiduciary duty if they, for example, improperly disburse funds to the detriment of a nonclient.[18] Other common law and statutory claims may follow for deficient performance as an escrow.[19]

Claims relating to escrow services provided in conjunction with law practice may—*or may not*—be covered by a lawyer-escrow's legal malpractice policy. Coverage under such policies typically turns on the definition of "professional services" and any related exclusions.[20] Therefore, lawyers providing escrow services along with their law practices should carefully review their malpractice policies.[21] Depending on the services provided and their policy, lawyer-escrows may find that they need a special rider or separate policy to cover that facet of their practice.

Trust Accounts

RPC 1.15A(a)(2) generally requires that "escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction" be deposited into the lawyer's trust account.[22] Comment 3 to RPC 1.15A

reinforces this point by specifically noting lawyer-escrows as falling within the rule. Serving as an escrow in conjunction with a law practice, therefore, means that the lawyer is subject to the exacting standards and meticulous record-keeping requirements of RPCs 1.15A and 1.15B. Failure to follow the trust account rules in this regard puts the lawyer at risk of regulatory discipline.[23]

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management 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 a member of the Oregon State Bar Legal Ethics Committee and 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 *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.

[1] Black's Law Dictionary (11th ed. 2019) generally defines the escrow function as holding a legal document or property "delivered by a promisor . . . for a given amount of time or until the occurrence of a condition, at which time . . . [the holder] . . . is to hand over the document or

property to the promisee." As Black's also notes, the person or entity serving as the neutral holder is commonly referred to as "an escrow."

[2] *See, e.g., Dawson v. McCarty*, 21 Wn. 314, 315, 57 P. 816 (1899).

[3] *See generally* WSBA Advisory Ops. 2220 (2012) (garnishment of trust account), 2213 (2011) (disbursal of settlement funds), 185 (rev. 2010) ("letters of protection"); *see also Tomchak v. Greenberg*, 2016 WL 4081194 at *3 (Wn. App. Aug. 1, 2016) (unpublished) (framing these duties in fiduciary terms).

[4] *See Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999) (discussing civil liability for improper disbursement of settlement proceeds being held in lawyer's trust account).

[5] *See generally* RCW Ch. 18.44 (Escrow Agent Registration Act). RCW 18.44.021(1)(b) exempts lawyers from the Act if escrow transactions are performed by a lawyer while engaged in the practice of law and using a law firm trust account.

[6] *See generally* Mark J. Fucile, *Doing Business: RPC 5.7 and "Law-Related Services,"* 74 No. 3 WSBA NWLawyer 16 (March 2020); *see* WSBA Advisory Ops. 2053 (lawyer operating escrow company as separate business), 2162 (2007) (lawyer operating escrow service as department of law firm); *see also* WSBA Advisory Op. 1338 (1990) (addressing circumstances when law firm trust account must be used in providing escrow services).

[7] *See generally* WSBA Advisory Op. 2151 (2007) (discussing LPOs in the context of both law firms and independent escrow companies); *see also Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 28 P.3d 802 (2001) (discussing LPO liability for legal malpractice). More information on the Washington LPO program, including a link to the LPO RPCs, is available on the WSBA web site.

[8] *See generally Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (outlining standard for determining whether an attorney-client relationship exists that looks to the subjective belief of the putative client and whether that subjective belief is objectively reasonable under the circumstances).

[9] *See, e.g., Stroud v. Beck*, 49 Wn. App. 279, 287-88, 742 P.2d 735 (1987) (lawyer-escrow construed as representing both counterparties jointly in closing real estate investment).

[10] Comment 29 to RPC 1.7 observes: "Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails." *See also In re Carpenter*, 160 Wn.2d 16, 27-28, 155 P.3d 937 (2007) (disciplining lawyer for failing to withdraw when nonwaivable conflict developed between jointly represented clients).

[11] *Bowers* involved a nonlawyer escrow agent held to the standard of a lawyer.

[12] *See also Stroud v. Beck*, *supra*, 49 Wn. App. at 287-88 (suggesting the failure to advise parties to seek independent counsel breaches lawyer's duties as an escrow).

[13] *See Hurlbert v. Gordon*, 64 Wn. App. 386, 393-96, 824 P.2d 1238 (1992) (discussing—and generally limiting—duties of lawyer-escrow to explain documents when counterparty has its own lawyer).

[14] *See generally Stiley v. Block*, 130 Wn.2d 486, 499-500, 925 P.2d 194 (1996) (noting fiduciary duties of lawyer-escrow).

[15] *See Hulbert v. Gordon*, *supra*, 64 Wn. App. at 394 (noting the potential for a nonwaivable conflict for a lawyer-escrow).

[16] *See generally Stiley v. Block*, *supra*, 130 Wn.2d at 499-502 (discussing legal malpractice claim against lawyer-escrow).

[17] *See, e.g., Malbec, Inc. v. M&D III, Inc.*, 2012 WL 2989222 (Wn. App. July 23, 2012) (unpublished) (affirming judgment against attorney-escrow for negligence in performance of escrow services in business transaction).

[18] *See, e.g., Splash Design, Inc. v. Lee*, 2000 WL 1772519 (Wn. App. Dec. 4, 2000) (unpublished) (affirming judgment against attorney-escrow for breach of fiduciary duty by making unauthorized disbursement of funds in business transaction).

[19] *See, e.g., Eacho v. Gustafson & Hogan, P.S., Inc.*, 2012 WL 359338 at *3-*4 (Wn. App. Feb. 2, 2012) (unpublished) (breach of contract); *Miran v. America One Finance Inc.*, 2008 WL 4000543 at *3-*4 (W.D. Wash. Aug. 25, 2008) (unpublished) (Washington Consumer Protection Act). Lawyers have also been disciplined and prosecuted for misappropriation of funds held as an escrow. *See, e.g., In re Johnson*, 114 Wn.2d 737, 790 P.2d 1227 (1990) (professional discipline); *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005) (criminal prosecution).

[20] *See, e.g., ALPS Property & Casualty Insurance Company v. Farthing*, 2018 WL 4927366 at *4-*9 (E.D. Va. Sept. 26, 2018) (unpublished) (examining definition of "professional services" and exclusion for trust account activities in declaratory judgment proceeding over scope of coverage under legal malpractice policy); *St. Paul Fire & Marine Ins. Co. v. Llorente*, 156 So.3d 511 (Fla. App. 2014) (concluding that error in escrow services provided by attorney were not covered under malpractice policy).

[21] The Oregon State Bar Professional Liability Fund plan, which is publicly available on its web site at www.osbplf.org, for example includes a specific exclusion for escrow services: "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." (OSB PLF 2021 Basic Plan, Exclusion 21 at 15.)

[22] Under RPC 1.15A(j), a lawyer who prepares documents related to a closing of a real estate or personal property transaction where the funds involved are being held by a separate closing firm is required to "ensure" that the funds are held in a manner consistent with either RPC 1.15A or LPO RPC 1.12A (which incorporates similar standards). RPC 1.15A(j) excludes situations where the lawyer has a preexisting attorney-client relationship with a client buyer or seller concerned and does not have an attorney-client relationship with the closing firm or LPO involved. Comment 17 to RPC 1.15A(j) explains these elements further. WSBA Advisory Op. 2158 (2007) addresses separate issues surrounding funds held solely in a fiduciary—rather than representational—capacity.

[23] *See, e.g., In re Oh*, 176 Wn.2d 245, 290 P.3d 963 (2012) (lawyer with both escrow and law practices disciplined for trust account violations).