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Ethical Issues When a Lawyer Serves as an Escrow Agent

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I. Question:

May a lawyer serve as an escrow agent for two or more parties to a transaction on which the lawyer also represents one of the parties in the transaction?

II. Answer:

Yes, a lawyer may act as both an escrow agent for all parties and a lawyer for one of the parties in the same transaction if all parties consent after full disclosure, as long as the lawyer is able to fulfill all of the lawyer's duties to all parties under the escrow agreement without creating a conflict with the lawyer's fulfillment of all ethical duties owed to the lawyer's client in the transaction.¹

¹ See *Henry v. Hutchins*, 178 N.W. 807, 809 (Minn. 1920) ("In accepting the documents in escrow the attorney became the agent of both the parties, and was bound in good faith to carry out their agreement in the matter. The fact that the attorney was the agent of one client to the transaction, if he was such, did not preclude the parties from the right to select him as custodian of the papers."); *Mantel v. Landau*, 34 A.2d 638, 639 (N.J. Ch. 1943) ("The parties may select as depositary a person who has been, or still is, the attorney of one of them. He received the deposit, however, not as such attorney, but as the agent or trustee for both parties."); *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 856 N.Y.S.2d 497, 2008 WL 199757, at *9 ("It is not a conflict of interest for an attorney for one party in a transaction to hold the other party's money in escrow in connection with the transaction. This happens literally every day.") (citation omitted); *Saad v. Rodriguez*, 506 N.E.2d 1230, 1233-34 (Ohio Ct. App. 1986) (attorney may act in the dual capacity as an attorney for one party and an escrow agent for both); *Moore v. Weinberg*, 681 S.E.2d 875, 878 (S.C. 2009) ("[T]he [fiduciary] duty arises from an attorney's role as an escrow agent and is independent of an attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship."); see also Florida Ethics Op. 02-6 (2003); Mass. Bar Ethics Op. 83-6 (1983); Neb. Ethics Advisory Op. 87-4 (1987); N.Y.C. Bar, Formal Op. 1986-5, "Lawyer as Escrow Agent" (1986); Va. State Bar, Legal Ethics Op. 372, "Real Estate – Escrow Agent" (1980); but see Or. State Bar, Formal Op. 2005-55, "Lawyer as Escrow Agent" (revised 2014); Colo. RPC 1.7(b).

III. Discussion:

A lawyer serving as escrow agent and as an attorney in the same transaction has ethical duties to all parties arising from the escrow agreement and also has duties to the lawyer's client.² In this situation, a lawyer's ethical duties to the client include, among others, those arising under Colorado Rules of Professional Conduct (Colo. RPC or the Rules) 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules), 1.15A (General Duties of Lawyers Regarding Property of Clients and Third Parties), 1.16 (Declining or Terminating Representation), 2.1 (Advisor), 4.1 (Respect for Rights of Third Persons); 4.2 (Communications with Persons Represented by Counsel); 4.3 (Dealing with Unrepresented Person). Of note in this opinion are the exercise of professional judgment, conflicts of interest, and the handling of escrowed property.

First, when acting as both counsel and an escrow agent, the lawyer has potentially competing duties to exercise independent professional judgment.³ On the one hand, a lawyer has an ethical duty to exercise independent professional judgment on behalf of the lawyer's client. On the other hand, as an escrow agent, the lawyer must be neutral as between the parties.⁴ This issue is alleviated when there is no dispute with respect to the escrowed funds or other property and all parties have consented to the lawyer acting as escrow agent.

Next, when serving in this dual role, once the lawyer has addressed actual and potential conflicts of interest between the parties by making full disclosure and obtaining the parties' written consent (assuming that the conflicts are consentable), there remains the potential for other conflicts to arise during the time the lawyer is serving as the escrow agent. That is, when a lawyer simultaneously takes on these roles, there may be a risk that the lawyer's representation of one of the parties will be materially limited by the lawyer's responsibilities as a neutral escrow

² See Matthew K. Corbin, *Lawyers as Escrow Agents*, 33 Law. Man. Prof. Conduct 426, (2017) (Corbin); *Acc. & Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658 (Colo. 2012) (a fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship); see also *Willey v. Minn. Lawyers Mut. Ins. Co.*, 2017 IL App (5th) 160452-U, ¶ 29; *Youngblut v. Wilson*, 294 N.W.2d 813, 817 (Iowa 1980) (noting that, a lawyer who serves as an escrow agent is the agent of all parties to an escrow); *Robertson v. ADJ Partnership, Ltd.*, 204 S.W.3d 484, 491 (Tex. Ct. App. 2006) (discussing differences between the fiduciary duties owed by a person providing legal services and by a person acting as an escrow agent).

³ Colo. RPC 2.1.

⁴ *Id.*; Corbin at 428

for all of the parties in the event a dispute arises among the parties under the escrow agreement, which would create a conflict of interest in violation of Colo. RPC 1.7(a)(2).⁵ A conflict of interest may arise in several forms. For example, a conflict may arise if the parties have a dispute regarding their rights in the escrowed property,⁶ or if the lawyer must assert a lien on the escrowed property.⁷ It is generally agreed that a lawyer may be required to resign as escrow agent and decline or cease representing her/his client in the event that a conflict of interest arises.⁸ However, a dispute resolution provision in the escrow agreement might enable the parties to resolve such a dispute without the conflicted lawyer's involvement.

Lastly, a lawyer must properly maintain the escrowed property.⁹ Escrowed funds should be held in an account separate from any funds belonging to the lawyer,¹⁰ although several escrowed funds may be commingled in one account separate from the lawyer's funds, as long as proper records are maintained.¹¹ The funds also must also be held in a separate interest-bearing trust account, unless all parties agree that the funds be maintained in the lawyer's COLTAF account.¹² It is not advisable to hold several different escrowed funds in a single interest-bearing account because it may be difficult to calculate the interest attributable to each party.¹³

⁵ Corbin at 426 (citing *Virtanen v. O'Connell*, 44 Cal. Rptr. 3d 702, 706 (Cal. Ct. App. 2006) (instructing lawyers who act as escrow holders "to be aware of the duties of an escrow holder before agreeing to act as one" because when a lawyer faces competing demands from a client and another party to the escrow, the lawyer cannot favor the client and disregard the other party's rights); *Fong v. Oh*, 172 P.3d 499, 512 (Haw. 2007) (cautioning lawyers about the potential for conflicts of interest in these dual capacity situations); *Baker v. Coombs*, 219 S.W.3d 204, 209 (Ky. App. 2007) (stressing that the lawyer-escrow agent "became embroiled in a situation in which there was a potential for him to become conflicted with his own client," and that lawyers should strongly consider these potential conflicts "before embarking upon a similarly perilous course of representation").

⁶ See Colo. RPC 1.7(a)(2) (material limitation conflict exists if there is a significant risk that the representation of one client 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); see also N.Y.C. Bar, Formal Op. 1986-5 ("In the event of a dispute over the disposition of the escrowed funds, the escrow agent, as a fiduciary for both sides, would be obligated to assume a neutral position, while, as the lawyer for one party, he would be ethically bound to represent his client zealously.").

⁷ C.R.S. § 12-5-119 (discussing charging liens); Colo. RPC 1.8(i).

⁸ See Colo. RPC 1.16; Corbin at 430; Neb. Ethics Advisory Op. 87-4; N.Y.C. Bar Formal Op. 86-5.

⁹ See *People v. Ziankovich*, 433 P.3d 640, 648 (Colo. O.P.D.J. 2018) (lawyer must hold separate from the lawyer's owner property any client property that is in the lawyer's possession in connection with the representation); *People v. McDowell*, 942 P.2d 486, 492 (Colo. O.P.D.J. 1997) (noting that lawyer's knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation).

¹⁰ See Colo. RPC 1.15A(a); N.Y.C. Bar Formal Op. 86-5.

¹¹ See Colo. RPC 1.15A(a); Corbin at 431-432.

¹² Colo. RPC 1.15A, cmt. [1].

¹³ *Id.*; Corbin at 433.

If the escrowed property is not funds, but rather personal property (such as assignments, deeds, or bills of sale), the lawyer must appropriately safeguard the property.¹⁴ If a dispute arises concerning the property, whether funds or other property, the lawyer must separately retain and safeguard the property until the dispute is resolved.¹⁵

IV. Conclusion

The Rules permit a lawyer to act as an escrow agent in a transaction on which the lawyer is simultaneously representing one of the parties under certain circumstances. However, there are significant considerations that a lawyer must carefully analyze before doing so.

¹⁴ Colo. RPC 1.15A(a).

¹⁵ Colo. RPC 1.15A(c), *see also* cmt. [5] (“The duty to keep separate from the lawyer’s own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision applies even if there is no dispute as to ownership.”). As such, many escrow agreements contain a dispute resolution provision allowing the escrow agent to interplead the property or funds with a court of competent jurisdiction.