

ATTORNEY AS ESCROW AGENT

By

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An attorney should not act as an escrow agent when his client is a party to the escrow agreement. To do so may create a conflict between the attorney's duties as an escrow agent and his duties as an advocate for this client. The conflict is created when the client's interests require the attorney to follow a course of action contrary to the course of action required of him under the terms of the escrow agreement.

This problem is exemplified by a recent complaint submitted to our office regarding this conflict. The attorney represented a home builder in the sale of a newly constructed home. The builder and buyer escrowed monies for the purpose of a contemplated street assessment. The builder's attorney served as the escrow agent. Subsequently the street was not built and the escrowed assessment was to be distributed. However, in the interim, a dispute had arisen between the builder and the buyer. Each claimed damages from the other. The builder, as the attorney's client, ordered the attorney not to release the escrowed monies. The buyer, as a party to the escrow agreement, demanded the return of the escrowed monies. When the attorney refused to release the escrowed monies, the buyer complained the attorney acted unethically in failing to perform his duties as an escrow agent.

The attorney had placed himself in an untenable position. If he performed his duties as an advocate for his client, he failed to perform his duties as an escrow agent. If he performed his duties as an escrow agent, he violated his ethical obligation to serve as an advocate for his client.

When an attorney is faced with this conflict of interest the attorney must disqualify himself from representing either party. ABA Informal Opinion 923 sets forth the conflict that may arise and the duties placed upon the attorney:

"Where both parties agree for an attorney to represent them as escrow agent to merely carry out routine escrow instructions, it would not appear unethical or improper for an attorney to so act. However, if before undertaking to so act, it appears that a conflict of interest might arise, the attorney should not accept to serve.

If it were agreed in advance and with the express consent of both parties that if a conflict should arise, the attorney would represent only the seller (his client) and disqualify as to the buyer, then he may not be required to so disqualify himself as to both parties....If not, he

should disqualify himself from representing either party.”

To avoid this dilemma, an attorney should decline when asked by his client and other parties to serve as the escrow agent. He should fully disclose the problems created by this dual role. He should urge the parties to select, as an escrow agent a third party having no conflicting duties to any of the parties to the escrow agreement. If all parties still desire the attorney to serve as escrow agent then he should, after fully disclosing the potential conflict, obtain the express consent of all parties that if a conflict should arise he would represent only his client and disqualify himself as to representing any other parties to the agreement.

While this would seem to be an isolated problem, we have had numerous complaints filed arising from an attorney attempting to serve in this dual capacity.