

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 710 – 11/6/98 (35-98)

Topic: Lawyer as escrow agent;
Release of funds in escrow to
client .

Digest: Absent authorization by all
parties, lawyer who serves as
escrow agent may not release
funds to client except as provided
in the escrow agreement; while
lawyer may resign as escrow
agent, provision must be made to
protect funds in escrow.

Code: DR 9-102.

QUESTION

A lawyer has been holding funds in escrow for a number of years pursuant to a written agreement made incident to a real estate transaction in which the lawyer represented the sellers. The purpose of the escrow was to secure the purchasers against loss which they might sustain through "an assessment with regard to [a certain sidewalk] violation" by the local municipality. The inquirer states that a representative of the municipality has recently advised that for various reasons there is no possibility the municipality will issue an assessment. Still, the purchasers have refused to permit the lawyer to return the escrowed funds to the sellers, notwithstanding the purchaser's apparent awareness of the recent communications with the municipality. Further, the escrow agreement failed to authorize the lawyer to release the funds to the seller upon ascertaining that no assessment would be made with respect to the sidewalk violation. Nor did it provide for a procedure to resolve disputes relating to the funds in escrow.

Under such circumstances, may the lawyer return the escrowed funds to the clients upon furnishing the purchasers' attorney with an affidavit recounting the investigation and findings?

OPINION

As a general rule, an escrow agent has contractual and fiduciary duties to all parties to an escrow arrangement which may be discharged only in accordance with the terms of the escrow agreement or with the informed consent of all parties. Although the Code of Professional Responsibility imposes some additional obligations on the lawyer who serves as an escrow agent, *see, e.g.*, N.Y. State 575 (1986); N.Y. State 532 (1981), the lawyer's obligations derive principally from the substantive law of contracts and agency. To the extent that the inquiry in this case encompasses issues of substantive law, we are obliged to decline to provide the inquirer with guidance because the resolution of such matters is beyond the jurisdiction of this Committee.

In the event of a dispute relating to the funds in escrow, the escrow agent is required to follow the procedures set forth in the escrow agreement for its resolution. Unfortunately, the escrow agreement in question is silent with respect to dispute resolution. Without such a provision, it would be inappropriate for the lawyer to assume the power to resolve the dispute by releasing the escrow and returning the funds to the sellers, because the stipulated contingency for release of the funds has not occurred. *See* Brooklyn Op. 1993-1 (1993) (attorney escrowee may urge the parties to resolve the dispute, but, if the parties cannot do so amicably, "the attorney escrowee may not disburse the funds based on his or her own notions of fairness"); *see also* N.Y. City 82-8 (1982); N.Y. County 672 (1989).

The inquirer may resign as escrow agent; however, in such case the mandate of DR 9-102 to protect the property of others entrusted to the lawyer's custody requires that the lawyer take steps to preserve intact the funds in escrow and initiate a process whereby the dispute may be resolved. Unless the parties agree to some other arrangement, one way to do this would be for the lawyer to commence a stakeholder's action and deposit the funds with the court. *See* Brooklyn Op. 1993-1 (1993) (the attorney may commence an interpleader action or "[a]wait a suit by a party claiming entitlement to the funds and defensively interplead the remaining party"); *cf.* N.Y. City 1986-5 (1986).

The inquirer's predicament underscores the importance of anticipating problems which may arise when agreeing to act as an escrow agent and of making certain that the escrow agreement provides a means of dispute resolution. *See* New York City 1986-5 (1986) ("We stress the importance of having a carefully drafted escrow agreement that covers, among other things, possible disputes over the escrowed funds."). Attorneys should avoid the danger that such arrangements will be made casually in the press of a real estate closing, without much thought being given to the possibility that the event stipulated for release of the funds in escrow may not occur.

CONCLUSION

For the reasons stated, the question posed is answered in the negative.

