Nebraska Ethics Advisory Opinion for Lawyers
No. 87-4

IT IS NOT, PER SE, A VIOLATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY FOR THE LAWYER FOR ONE PARTY IN A TRANSACTION TO ACT AS AN ESCROW AGENT IF ALL PARTIES CONSENT AFTER FULL DISCLOSURE AND IF IT APPEARS OBVIOUS THAT THE LAWYER CAN ADEQUATELY REPRESENT THE INTERESTS OF ALL PARTIES. THE CONSENT SHOULD RECOGNIZE THE POTENTIAL FOR CONFLICTS OF INTEREST AND A MEANS TO RESOLVE THE SAME. ACTING AS ESCROW AGENT MAY GIVE RISE TO THE POTENTIAL FOR AN APPEARANCE OF IMPROPRIETY OR OTHER POTENTIAL PROBLEMS FOR THE LAWYER WHICH SHOULD BE FULLY CONSIDERED BEFORE UNDERTAKING TO ACT AS ESCROW AGENT.

QUESTION PRESENTED

May a lawyer for one party in a transaction act as an escrow agent concerning that transaction?

DISCUSSION

1. Independent Judgment. "DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.

A. A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

B. A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of

another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

C. In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after a full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." (Emphasis added.)

2. Confidences and Secrets. "DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee."

3. Appearance of Impropriety. "Canon 9 -- A Lawyer Should Avoid Even the Appearance of Professional Impropriety." "DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but. the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally

resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

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The Bar Association of the City of New York at Opinion 1986-5, ABA/BNA Lawyers Manual on Professional Conduct, Page 901:6402 (July 14, 1986), has addressed the questions raised.

This Committee adopts the following as instructive for Nebraska lawyers considering whether to act as escrow agent:

"A lawyer may represent a client in a transaction and act as escrow agent in the same transaction if all parties consent after full disclosure. The consent should be based on cognizance of the potential conflicts of interest, and the escrow agreement should provide means for resolving any conflicts of interest. The agreement should provide that

the lawyer may continue to represent his client in the event of a dispute over the funds. It should further provide that the lawyer may bring an interpleader action or submit the matter to arbitration as a means of resolving any conflict of interest. Whether the existence of or the information pertaining to an escrow account is a confidence or secret of a client is a question of law and should be decided on a case-by-case basis by the court. In this regard, a lawyer must decline to furnish such information unless the client consents or until a court orders disclosure. When a lawyer acts as escrow agent for two parties and also represents one of them, the two roles and differing duties may lead to a conflict of interests. If a lawyer is put in the position of having to assert a lien on the escrowed funds on his client's behalf, the potential for a conflict of interest is very strong, and even if the conflict is addressed by obtaining consent of the nonclient, the problem of the appearance of impropriety remains. A lawyer may be required to resign as escrow agent or decline to represent his client under these circumstances. Conflicts of interest may also arise when the lawyer has claims of his own against the escrowed funds. Even if a lawyer has a legal right to the funds, he may not ethically pay out to himself funds disputed by the client. He may retain the funds until the dispute is resolved; any undisputed portion should promptly be paid to the client. A lawyer should resign as escrow agent in cases where he is legally entitled to a portion of the fund. This is so because the potential for a conflict of interest is great where the lawyer's interpretation of the escrow agreement or his timing of distribution of the funds may directly affect the settlement of his own dispute with the client. Escrowed funds should be deposited in identifiable

accounts and should be kept separate from any of a lawyer's own funds. Proper records should be maintained when more than one escrow fund is deposited in one account. The account may be interest-bearing, but the lawyer may not retain any of the interest earned as compensation without obtaining the client's prior consent. Even with such consent there are serious risks of ethical impropriety. A lawyer may have gained a financial interest in the account which could interfere with his duty to exercise independent professional judgment on behalf of his client. He also could be in violation of the code's prohibition of collecting a clearly excessive fee. A lawyer may participate in Interest on Lawyer Accounts programs (IOLA) in which small sums of client funds or funds held for a short period of time are deposited in interest-bearing accounts and the interest is paid to approved organizations that provide legal assistance to the poor. A lawyer must keep complete records of all escrow funds and provide a complete accounting of such funds to the client."

CONCLUSION

While there is no absolute rule barring a lawyer for a party from acting as an escrow agent after full disclosure and consent of all parties, significant risks are inherent in such activity and must be carefully considered.