

## FORMAL OPINION NO 2005-55

[REVISED 2014]

### Lawyer as Escrow Agent

#### Facts:

Lawyer has a substantial business practice.

#### Questions:

1. May Lawyer act as escrow agent in a transaction in which Lawyer represents none of the parties?

2. May Lawyer act as escrow agent in a transaction in which Lawyer represents one of the parties?

3. If the answer to the second question is no, may Lawyer nonetheless hold client funds, documents, or other property pursuant to the terms of an agreement between Lawyer's client and the other party to the agreement?

#### Conclusions:

1. Yes.
2. No.
3. Yes, qualified.

#### Discussion:

The word “‘escrow’ by definition means ‘neutral,’ independent from the parties to the transaction.” *Banif Corp. v. Black*, 12 Or App 385, 388, 507 P2d 49 (1973); ORS 696.505(3). There is no reason that a lawyer cannot play this role in a transaction in which the lawyer does not represent any of the parties. Cf. ORS 696.520(2), which exempts from the definitions and restrictions of the statute a lawyer “rendering services

in the performance of duties as attorney at law.” See also Oregon RPC 2.4, permitting lawyers to act as mediators.<sup>1</sup>

On the other hand, a lawyer cannot simultaneously be both counsel to a party to a transaction and a neutral escrow agent for the transaction. *Cf. In re Phelps*, 306 Or 508, 510 n 1, 760 P2d 1331 (1988); *In re Barrett*, 269 Or 264, 524 P2d 1208 (1974). The obligation of neutrality is in direct contradiction to the obligations that a lawyer has to a client. The simultaneous role would constitute a situation in which there is a significant risk that the representation of the client will be materially limited by the lawyer’s responsibilities as a neutral escrow, in violation of Oregon RPC 1.7(a)(2). This self-interest conflict can be waived only if the lawyer has the informed consent of the client as required by Oregon RPC 1.7(b). Moreover, the lawyer’s failure to disclose the dual role to the other party would be tantamount to “conduct involving dishonesty, fraud,

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<sup>1</sup> Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties’ consent to the lawyer’s role as mediator.
- (b) A lawyer serving as a mediator:
  - (1) may prepare documents that memorialize and implement the agreement reached in mediation;
  - (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - (3) with the consent of all parties, may record or may file the documents in court.
- (c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law” in violation of Oregon RPC 8.4(a)(3).<sup>2</sup>

There is no reason, however, a lawyer cannot hold client funds, documents, or other property as part of a transaction involving a client as long as the lawyer is not described as an “escrow agent” and the lawyer’s role is not otherwise misdescribed or misrepresented. With regard to the duty to hold client funds in trust accounts, see OSB Formal Ethics Op No 2005-48.

**Approved by Board of Governors, April 2014.**

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<sup>2</sup> Because of these conclusions, it is unnecessary to consider the potential applicability of Oregon RPC 1.8 and Oregon RPC 5.4(c). For opinions discussing these rules, see, for example, OSB Formal Ethics Op No 2005-10, OSB Formal Ethics Op No 2005-22, and OSB Formal Ethics Op No 2005-30 (rev 2016).

COMMENT: For more information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 12.1 (lawyer trust accounts and client property) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 4 cmt c, 44 cmt b, 48 cmt d (2000) (supplemented periodically); ABA Model RPC 2.6; and ABA Model RPC 8.4(c). See also *In re Benjamin*, 312 Or 515, 823 P2d 413 (1991) (disbarring lawyer for spending \$1,900 of client’s money while acting as escrow agent and for withholding in lawyer’s trust account \$480 that belonged to client).

