The Duality of Lawyers as Escrow Agents

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An escrow agent is someone who holds money or property in trust for others under agreed terms until a transaction is completed, or a dispute is resolved. Although institutional depositaries are widely available, clients frequently ask their lawyers to serve as escrow agents in connection with transactions in which the lawyer represents the client. In fact, lawyers are generally permitted to serve as escrow agents with respect to clients' transactions so long as all parties involved knowingly consent to the arrangement. This is true both under agency law and as a matter of lawyers' professional responsibility.

Unlike a lawyer who owes fiduciary duties only to the lawyer's client, however, an escrow agent owes fiduciary duties to all parties to the escrow agreement. These include (1) a duty to strictly comply with the escrow agreement's terms; (2) a duty to impartially perform the escrow function; (3) a duty of disclosure, the extent or scope of which varies by state; and (4) a duty to safeguard entrusted funds or property.

A lawyer-escrow agent who breaches any of these duties may face liability under a variety of theories. Therefore, a lawyer who agrees to fill the dual role of escrow agent tempts noteworthy professional risk in the process—risk that extends beyond potential liability to the lawyer-escrow agent's client. In some circumstances, a lawyer acting as an escrow agent may be liable to the client for legal malpractice. This creates the possibility that a lawyer's wrongdoing as an escrow agent will not be covered by the lawyer's professional liability insurance policy. This Article examines the professional liability challenges lawyer-escrow agents face in their dual roles in a practical fashion intended to be useful to courts and lawyers alike.

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INTRODUCTION

An escrow agent is someone who holds money or property in trust for others under agreed terms until a transaction is completed, or a dispute is resolved.[1] To use a common example, consider a real estate sale. The buyer and seller will enter into a contract that fixes the sale terms, including the purchase price. Once the contract is signed, the buyer will deposit a sum of earnest money—likely an agreed percentage of the purchase price—into an account to be held in escrow until the sale closes. The person or entity holding the account and responsible for administering the deposited funds in accordance with the parties' escrow agreement is the escrow agent. Once the sale closes, the escrow agent will release the escrowed funds to the seller. In real estate transactions,

1. *See* Coast Sec. Mortg. Corp. v. Real Est. Agency, 15 P.3d 29, 33–35 (Or. 2000) (explaining when someone acts in the capacity of an escrow agent under Oregon law).

a title company may serve as escrow agent. Banks and other financial institutions regularly serve as escrow agents in various contexts. Some companies specialize in escrow services. Yet, despite the availability of institutional depositaries, clients frequently ask their lawyers to serve as escrow agents in connection with transactions in which the lawyer represents the client. A client may believe that engaging an institutional escrow agent will unnecessarily increase the complexity and cost of the transaction. In other instances, the client's request may be animated by the client's familiarity with, and trust in, the lawyer. In still other cases, lawyers' service as escrow agents may be a regular aspect of their practices.[2] Regardless of the specific situation, lawyers are generally permitted to serve as escrow agents with respect to clients' transactions so long as all parties involved knowingly consent to the arrangement.[3]

At least initially, the suggestion that a lawyer may function as an escrow agent in a matter in which the lawyer represents one of the parties seems unusual. After all, a lawyer is a client's agent when acting within the scope of the representation.[4] The lawyer's fiduciary duties flow exclusively to the client.[5] An escrow agent, on the other hand, is commonly said to be an agent for all parties to the escrow agreement.[6]

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2. *See, e.g.*, Ohio Bd. of Prof. Conduct, Ohio Adv. Op. 2022-07, at 1 (2022) (responding to a request for an ethics opinion from a lawyer with an international transactional law practice who "frequently holds client or third-party funds in escrow").

3. *See* Colo. Bar Ass'n, Colo. Formal Ethics Op. 140, at 1 (2020), https://www.cobar.org/Portals/COBAR/Repository/ethicsOpinions [https://perma.cc/ABH8-C49U] (requiring the parties' "consent after full disclosure" when allowing a lawyer to act as both an escrow agent for all parties and a lawyer for one party in the same transaction); *see also* N.Y.C. Ethics Op. 1986-5, 1986 WL 293094, at *2–3 (1986) ("As a general rule, it is ethically permissible for a lawyer to represent a client and to act as escrow agent in the same transaction if all interested parties have consented after full disclosure . . . .").

4. *See* United States v. Prado, 701 F. Supp. 3d 76, 81 (D. Mass. 2023) (noting an attorney functions as a client's agent in an attorney-client relationship); Selby v. O'Dea, 156 N.E.3d 1212, 1227 (Ill. App. Ct. 2020) (explaining that "[a]s a general rule" attorneys are considered agents of their clients); Est. of Miller v. Storey, 903 N.W.2d 759, 774–75 (Wis. 2017) (explaining "[i]t is well established that attorneys are agents of their clients").

5. Saad v. Rodriguez, 506 N.E.2d 1230, 1233 (Ohio Ct. App. 1986).

6. GSR Mkts., Ltd. v. McDonald, No. 1:19-cv-01005, 2020 WL 13064706, at *3 (N.D. Ga. July 14, 2020) (quoting Roberts v. Porter, Davis, Saunders, & Churchill, 389 S.E.2d 361, 364 (Ga. Ct. App. 1989)); Winn v. Ameritite, Inc., 731 F. Supp. 2d 1093, 1100 (D. Idaho 2010) (applying Idaho law); Maxfield v. Martin, 173 P.3d 476, 478 (Ariz. Ct. App. 2007); Mays v. Viva La Vegan Grocery, Inc., 700 S.W.3d 750, 769 (Ark. Ct. App. 2024); Rideau v. Stewart Title of Cal., Inc., 185 Cal. Rptr. 3d 887, 891 (Ct. App. 2015); United Am. Bank of Cent. Fla., Inc. v. Seligman, 599 So. 2d 1014, 1016 (Fla. Dist. Ct. App. 1992); Willey v. Minn. Laws. Mut. Ins. Co., No. 5-16-0452, 2017 WL 6054957, at *5 (Ill. App. Ct. Dec. 6, 2017) (applying Iowa law); Smith v. First Nat'l Bank & Tr. Co. of Sturgis, 440 N.W.2d 915, 918 (Mich. Ct. App. 1989); Bakewell v. Heritage Nat'l Bank, 890 S.W.2d 653, 659 (Mo. Ct. App. 1994); Hoffman v. Atlas Title Sols., Ltd., 214 N.E.3d 1271, 1280 (Ohio Ct. App. 2023) (quoting Hurst v. Enter. Title Agency, Inc., 809 N.E.2d 689, 697

But in fact, agency law permits dual agency provided the respective principals' interests do not conflict.[7] As a matter of agency law, holding funds in escrow for two parties does not present a disqualifying conflict of interest for the escrow holder.[8]

Nor does a lawyer's dual role as lawyer for a party and as escrow agent necessarily present a conflict of interest under rules of professional conduct.[9] The lawyer's two roles are separate and distinct.[10] As a New York court pragmatically concluded, "[i]t 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[.]"[11]

Although it is generally permissible for a lawyer to serve as escrow agent in a matter in which the lawyer represents a client both under agency law and as a matter of professional responsibility, it is easy to

(Ohio Ct. App. 2004)); LEM 2Q, LLC v. Guar. Nat'l Title Co., 144 A.3d 174, 180 (Pa. Super. Ct. 2016) (quoting Janson v. Cozen & O'Connor, 676 A.2d 242, 247 (Pa. Super. Ct. 1996)); Wandler v. Lewis, 567 N.W.2d 377, 384 (S.D. 1997) (quoting Am. State Bank v. Adkins, 458 N.W.2d 807, 810 (S.D. 1990)); Bell v. Safeco Title Ins. Co., 830 S.W.2d 157, 161 (Tex. App. 1992); Orlando Millenia, LC v. United Title Servs. of Utah, Inc., 355 P.3d 965, 972 (Utah 2015) (quoting Freegard v. First W. Nat'l Bank, 738 P.2d 614, 616 (Utah 1987)); Black v. Metro Title, Inc., 712 N.W.2d 395, 398 (Wis. Ct. App. 2006) (quoting *Bell*, 830 S.W.2d at 160–61). In fact, some courts caution against characterizing an escrow holder as an agent. As the Missouri Supreme Court explained long ago: "The depositary of an escrow is sometimes spoken of as the agent of the grantor and sometimes as the agent of both parties, and whilst that may be correct, in a limited sense, yet strictly speaking he is not an agent at all; he is a trustee of an express trust, with duties to perform for each which neither can forbid without the consent of the other." Seibel v. Higham, 115 S.W. 987, 990 (Mo. 1908). Arguably for this reason, some courts prefer the term "escrow depositary" to "escrow agent." *See, e.g.*, *Winn*, 731 F. Supp. 2d at 1100 (using the term "escrow depositary" instead of "escrow agent" throughout the court's opinion).

7. *See* White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 724 (Tenn. 2000) ("[A]n agent may serve two masters simultaneously, so long as the objectives of one master are not contrary to the objectives of the other.").

8. *See* Corral Group, LP v. SMIC, Ltd. (*In re* SMIC, Ltd.), Bankr. No. 10-40120-DML-11, Adversary No. 10-040541-DML, slip op. 2013 WL 4078704, at *11–12 (Bankr. N.D. Tex. Aug. 13, 2013) (explaining why, as a matter of agency law, an escrow agent may concurrently serve principals with competing interests).

9. *See* Boozer v. Fischer, 674 S.W.3d 314, 327 (Tex. 2023) (explaining why a lawyer may serve as an escrow holder under the Texas Rules of Professional Conduct).

10. *Saad*, 506 N.E.2d at 1233; Moore v. Weinberg, 681 S.E.2d 875, 878 (S.C. 2009).

11. Egnotovich v. Katten Muchin Zavis & Roseman LLP, No. 604101/06, 2008 WL 199757, at *9 (N.Y. Sup. Ct. Jan. 23, 2008) (citation omitted); *see also In re* Hilson, 863 N.E.2d 483, 492 (Mass. 2007) ("Attorneys often are called on to hold funds of a third party in connection with a representation, and are not automatically precluded from doing so because they are acting as attorney for a person involved.").

imagine a scenario where that arrangement could stress the lawyer. *SMP, Ltd. v. Syprett, Meshad, Resnick & Lieb, P.A.*[12] is illustrative.

In September 1986, SMP leased part of a Florida shopping center it owned to Sarasota Entertainment Corp.[13] The parties anticipated major improvements to the leased property and agreed to split the associated costs equally.[14] Progress payments on the improvements were due ten days after the contractor requested a construction draw.[15] Sarasota Entertainment agreed to place some stock certificates in escrow to secure its obligation to pay its half of the progress payments.[16]

The law firm of Syprett, Meshad, Resnick & Lieb, P.A. (Syprett) represented Sarasota Entertainment in negotiating the security agreement and also served as escrow agent.[17] Under the security agreement, SMP "received the 'unconditional right to sell the necessary number of shares of stock assigned hereby to generate funds sufficient to cover [Sarasota Entertainment's] obligation to fund reimbursement under [the] lease."[18] The escrow clause in the security agreement stated that the agreement would "be perfected by the delivery to [SMP] of the described stock certificates, whereupon [SMP] shall deliver same to . . . Syprett . . . (Escrow Agent) to be held on behalf of the parties pursuant to the terms of this [a]greement."[19] SMP delivered the stock certificates to Syprett as required.[20]

When Sarasota Entertainment did not pay its share of two construction draws, SMP's project manager sent a letter to Syprett in August 1987 in which he wrote: "As Escrow Agent for Sarasota Entertainment Corp. I hereby direct you to sell the required number of stocks to satisfy Sarasota Entertainment's portions of the [d]raws as required in the attached [agreement]."[21] Syprett apparently did not believe it was authorized to sell the stock under the terms of the escrow agreement.[22] Instead of responding to SMP's letter, however, Syprett dallied until November

12. *See generally* SMP, Ltd. v. Syprett, Meshad, Resnick & Lieb, P.A., 584 So. 2d 1051 (Fla. Dist. Ct. App. 1991) (elucidating the problems that may arise when an attorney serves as an advisor for an individual client and as the escrow agent for both clients in a transaction).

13. *Id.* at 1052.

14. *Id.*

15. *Id.*

16. *See id.* ("In order to secure its obligation for these payments, Sarasota Entertainment agreed to place certain securities in escrow.").

17. *Id.*

18. *SMP*, 584 So. 2d at 1052.

19. *Id.* at 1052–53.

20. *See id.* at 1053 (recognizing that the securities Sarasota Entertainment placed in escrow were delivered to the law firm).

21. *Id.*

22. *Id.*

1987, when it filed an interpleader action alleging that SMP and Sarasota Entertainment disputed the disposition of the escrowed stock and the law firm, "as a mere stakeholder," needed to interplead the stock.[23] SMP counterclaimed against Syprett on the theory that it was damaged by Syprett's failure to sell the stock as instructed in August because the stock "had become 'virtually worthless' by November."[24]

The *SMP* court framed the determinative issue as whether Syprett had a duty to timely inform SMP that it would not honor SMP's instruction to sell the stock because it did not believe the escrow agreement empowered it to do so.[25] The court theorized that Syprett may have believed that obeying SMP's instruction would prejudice Sarasota Entertainment.[26] Complicating factors the court did *not* mention with respect to Syprett's alleged duty as escrow agent were the firm's negotiation of the security agreement as Sarasota Entertainment's counsel along with the cursory escrow language Syprett drafted that supposedly was inconsistent with SMP's right to sell the escrowed Sarasota Entertainment stock.[27] Anyway, given the skeletal escrow agreement, the court held that a duty to inform could exist under the circumstances.[28] Whether Syprett breached that duty and, if so, whether SMP was damaged as a result, required further factual development.[29] In holding as it did, the *SMP* court warned lawyers that "this case may demonstrate many practical reasons for an attorney to avoid serving as an escrow holder for a transaction involving a client[.]"[30]

Although lawyers often serve as escrow agents in connection with clients' transactions and most such engagements are uneventful, the *SMP* court's observation that lawyers should consider the wisdom of serving as escrow agents in matters in which they represent clients reflects good

23. *Id.*

24. *SMP*, 584 So. 2d at 1053.

25. *Id.*

26. *Id.*

27. Syprett arguably faced a variation of what is commonly referred to in conflict-of-interest discussions as an "underlying work problem." *See generally* William Freivogel, "*Underlying Work" Problem*, FREIVOGEL ON CONFLICTS, https://www.freivogelonconflicts.com/underlyingwork.html [https://perma.cc/LM8D-H5UD] (last visited Jan. 7, 2025) (offering several examples of legal malpractice cases from situations where an attorney agrees to handle a dispute that a previous attorney started).

28. *SMP*, 584 So. 2d at 1053.

29. *See id.* (noting that the issues of whether a duty was breached and if any damages resulted from the breach remained unresolved in the case).

30. *Id.* at 1055.

advice.[31] Other courts have similarly cautioned lawyers about the potential perils of dual service as escrow agents in connection with clients' representations.[32] Lawyers have generally heeded courts' warnings. Lawyers who agree to serve as escrow agents with respect to clients' matters tend to carefully comply with their separate fiduciary duties in that role. Likewise, most lawyers acting as escrow agents scrupulously honor their ethical duty to safeguard money or property belonging to third parties entrusted to them.[33] Even so, lawyers' service as escrow agents presents a noteworthy level of risk.[34] For instance, a lawyer who fails to abide by the terms of an escrow agreement may face liability for breach of contract as well as tort liability for breach of fiduciary duty.[35] Depending on the facts, escrow agents may be liable for fraud or negligence in the performance of their duties.[36] In some states, a lawyer's missteps as an escrow agent may trigger liability under consumer protection statutes.[37] If one of the parties to the escrow

31. *See In re* Reyes, 651 B.R. 99, 144–45 (Bankr. S.D.N.Y. 2023) ("To the extent that Ms. Tirelli's duties as an escrow agent created tension with her duties as counsel, the Court has little sympathy. . . . By positioning herself in the role of attorney and of escrow agent, Ms. Tirelli created her own ethical dilemma."); *see also* Neb. Jud. Branch, Neb. Ethics Advisory Op. for Laws. No. 87-4, at 6 (1987) ("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.").

32. *See, e.g.*, Virtanen v. O'Connell, 44 Cal. Rptr. 3d 702, 706 (Ct. App. 2006) (advising lawyers "to be aware of the duties of an escrow holder before agreeing to act as one"); Fong v. Oh, 172 P.3d 499, 512 (Haw. 2007) (warning lawyers about conflicts of interest in transactions where the lawyer represents a client and serves as escrow agent); Baker v. Coombs, 219 S.W.3d 204, 209 (Ky. Ct. App. 2007) (observing that the lawyer serving as an escrow agent "became embroiled in a situation in which there was a potential for him to become conflicted with his own client," and noting that the case "presented a clear *caveat* for attorneys to weigh [concurrent client conflicts of interest] before embarking upon a similarly perilous course of representation").

33. *See* MODEL RULES OF PRO. CONDUCT r. 1.15(a) (AM. BAR ASS'N 2024) (imposing this obligation).

34. *See* BRADFORD W. IRELAN & JEREMY T. BROWN, TEXAS TITLE INSURANCE § 4.1 (2d ed. 2024) (asserting that escrow agents "face potential liability under a dizzying array of claims").

35. *See* Weisz v. Great Am. Title Q-103-1, LLC, 603 S.W.3d 336, 342 (Mo. Ct. App. 2020) (citing Hammack v. Coffelt Land Title, Inc., 284 S.W.3d 175, 178 (Mo. App. W.D. 2009))) (stating "an escrow agent's failure to abide by the terms of an escrow agreement is a breach of contract" and "[a]n escrow agreement creates a fiduciary relationship, and breach of the fiduciary duty constitutes a tort").

36. IRELAN & BROWN, *supra* note 34, § 4.1; *see also* Mays v. Viva La Vegan Grocery, Inc., 700 S.W.3d 750, 768–71 (Ark. Ct. App. 2024) (concluding that the lawyer-escrow agent was negligent and committed fraud); Moore v. Weinberg, 681 S.E.2d 875, 878 (S.C. 2009) (concluding that a lawyer-escrow agent could be liable for negligence in failing to disburse escrowed funds in accordance with the parties' agreement); Black v. Metro Title, Inc., 712 N.W.2d 395, 398 (Wis. Ct. App. 2006) ("[A]n escrow agent may be held accountable where a third party is the victim of fraud on the part of the escrow agent.").

37. *See, e.g.*, Styrk v. Cornerstone Invs., LLC, 810 P.2d 1366, 1371 (Wash. Ct. App. 1991) (applying the Washington Consumer Protection Act); IRELAN & BROWN, *supra* note 34, § 4.1 (referring to the Texas Deceptive Trade Practices Act).

agreement is actually perpetrating a fraud and exploiting the lawyer's services as escrow agent to facilitate the scheme, the lawyer may confront criminal liability and disabling professional discipline.[38] A lawyer-escrow agent who knowingly participates in a client's fraud tempts liability for aiding and abetting the client's misconduct or for conspiracy.[39] In some circumstances, a lawyer acting as an escrow agent may be liable to the client for legal malpractice.[40] On the right facts, lawyers' tortious conduct as escrow agents may expose them to punitive damages.[41] In addition, there is some chance that a lawyer's wrongdoing as an escrow agent will not be covered by the lawyer's professional liability insurance policy.[42] For these reasons, many law firms discourage or prohibit their lawyers from serving as escrow agents. Other firms require executive or management committee approval before allowing a lawyer to serve as an escrow agent.

This Article explores the obligations lawyers assume when acting as escrow agents and the corresponding professional liability and responsibility challenges and concerns. Looking ahead, Part II discusses the requirements for creating an escrow and the following question of escrow agency, including implied or de facto escrow agency relationships. Part III analyzes the fiduciary duties an escrow agent owes the parties to the escrow agreement. Although these duties may vary depending on state law, courts generally recognize (1) a duty to strictly comply with the escrow agreement's terms; (2) a duty to impartially perform the escrow function; (3) a duty of disclosure, the extent or scope of which varies by state; and (4) a duty to safeguard entrusted funds or property. Part IV examines the application of statutes of limitations to claims against lawyer-escrow agents. Part V discusses whether expert testimony is required to establish an escrow agent's liability. Bringing

38. *See, e.g.*, Disciplinary Couns. v. George, 158 N.E.3d 575, 576–77, 579–80 (Ohio 2020) (suspending a lawyer-escrow agent who pleaded guilty to wire fraud and securities fraud).

39. *See, e.g.*, Cevdet Asküt Ve Ogullar Koll. STI v. Cavusoglu, No. 14-3362 (WJM), 2015 WL 4318131, at *2–3 (D.N.J. Apr. 11, 2016) (detailing the defendants' fraudulent scheme).

40. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 48 cmt. d (AM. L. INST. 2000) (offering an example of a potential legal malpractice allegation).

41. *See, e.g.*, *Mays*, 700 S.W.3d at 772–73 (upholding a punitive damage award against the lawyer-escrow agent); *see also* Crosby v. Kendall, 545 S.E.2d 385, 388, 390–91 (Ga. Ct. App. 2001) (affirming a judgment against a lawyer-escrow agent who breached his fiduciary duties that included $100,000 in punitive damages); Spalding v. Coulson, 661 N.E.2d 197, 208 (Ohio Ct. App. 1995) (concluding that the plaintiff pleaded a sufficient claim for punitive damages arising out of a lawyer's breach of fiduciary duty while serving as an escrow agent).

42. RONALD E. MALLEN, LEGAL MALPRACTICE § 34:10, at 713 (2024) (footnote omitted) ("The functions and obligations of an escrow agent are inconsistent with those of an attorney and may not be insured under a lawyer's professional liability policy."). Many lawyers' professional liability insurance policies, however, particularly manuscripted or "bespoke" policies drafted by leading insurance brokers for their law firm clients, do cover lawyers' service as escrow agents.

up the rear, Part VI examines the attorney-client privilege as it relates to lawyers' dual service as escrow agents.

I. THE REQUIREMENT OF AN ESCROW AND THE FOLLOWING QUESTION OF AGENCY

A. Creating the Escrow

For a lawyer or anyone else to serve as an escrow agent and assume the associated duties first requires the creation of an escrow.[43] A party's mere deposit of money or property into an account held by a lawyer or other third party does not create an escrow,[44] nor does it by extension make the account holder an escrow agent.[45]

The requirements for creating an escrow are a matter of state law.[46] Although courts variously list the elements of an escrow, an escrow fundamentally requires (1) the deposit of funds or property (2) by agreement of the parties (3) with a third party, who will (a) owe fiduciary duties to both parties regarding the funds or property held in escrow, (b) hold the funds or property outside of the depositor's control, and (c) deliver the funds or property to the other party upon satisfaction of an agreed condition or occurrence of a specified event.[47] It is essential for

43. *See, e.g.*, Baker v. Coombs, 219 S.W.3d 204, 208 (Ky. Ct. App. 2007) (explaining that because the lawyer never received the stock certificates he was to hold in escrow, he never assumed a fiduciary duty to the plaintiff; his alleged fiduciary duty as an escrow agent was "inchoate and unenforceable"); *see also* Gargano v. Morey, 86 N.Y.S.3d 595, 598–99 (App. Div. 2018) (requiring "evidence of an escrow agreement based upon words or conduct" to impose fiduciary duties on an alleged escrow agent).

44. Am. State Bank v. Enabit, 471 N.W.2d 829, 832 (Iowa 1991) (quoting Tutt v. Smith, 204 N.W. 294, 296 (Iowa 1925)); Lost Lake Holdings LLC v. Town of Forestburgh, 208 N.Y.S.3d 314, 318 (App. Div. 2024) (quoting Lennar Ne. Partners Ltd. P'ship v. Gifaldi, 695 N.Y.S.2d 448, 451 (App. Div. 1999)).

45. *See, e.g.*, Shapiro v. Snow Becker Krauss P.C., 617 N.Y.S.2d 470, 470 (App. Div. 1994) (citation omitted) ("That the check [the] plaintiffs gave [the law firm's client] was made payable to [the law firm's] escrow account did not transform [the law firm] into an escrow agent with a fiduciary duty to inquire of [the] plaintiffs as to any conditions attached to the payment of the check."); *see also* Threatt v. Rogers, 604 S.E.2d 269, 272–73 (Ga. Ct. App. 2004) (concluding that a lawyer who held his clients' earnest money check was not functioning as an escrow agent).

46. *See In re* Odonata Ltd., 658 B.R. 62, 70 (Bankr. S.D.N.Y. 2024) ("The requirements for the creation of an enforceable escrow are typically governed by state law.").

47. *See* Boozer v. Fischer, 674 S.W.3d 314, 323 (Tex. 2023). Courts state the requirements for an escrow in various ways with similar elements. For example, a bankruptcy court identified the following escrow elements under New York law: "(a) an agreement as to the subject matter of the escrow, (b) the identification of a third-party depositary; (c) an irrevocable delivery of the subject matter of the escrow to the third party, subject to agreed terms governing the persons to whom, and the conditions upon which, the escrowed property may be released; and (d) the relinquishment of the escrowed property by the person who has agreed to put the property into escrow." *In re Odonata*, 658 B.R. at 70. The Maine Supreme Judicial Court has likewise identified four

the creation of an escrow that the depositor relinquish control of the funds or property; if the depositor can revoke the escrow agreement, there is no escrow.[48]

While written escrow agreements that clearly express the parties' intent are desirable, an escrow agreement generally does not need to "be embodied in a formal contract."[49] For example, parties may form an escrow agreement through exchanges of correspondence.[50] Multiple states recognize oral escrow agreements.[51]

Deciding if an agreement is an escrow agreement does not depend on the label the parties assign to the document or transaction; rather, the agreement's "true purpose must be determined from the relations of the parties and their respective rights and duties."[52] This is fundamentally a question of the parties' intent.[53] Drilling down the parties' intent at the time the funds or property are deposited is the critical focus.[54] Whether

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requirements for a valid escrow: "(1) an agreement regarding the subject matter and delivery of the deposit or instrument; (2) an escrow agent; (3) delivery of the funds or instrument to the escrow agent, conditioned upon the performance of an act or occurrence of an event; and (4) relinquishment by the grantor or depositor." Johnson v. Exclusive Props. Unlimited., 720 A.2d 568, 572–73 (Me. 1998).

48. *See In re* ANR Advance Transp. Co., 247 B.R. 771, 775 (Bankr. E.D. Wis. 2000) (detailing the role that control plays in an escrow agreement); *see also* Hooker Atlanta Corp. v. Hocker (*In re* Hooker Inv., Inc.), 155 B.R. 332, 339 (Bankr. S.D.N.Y. 1993) (noting that the depositor retains a contingent right to reclaim the escrowed funds or property if the specified condition does not occur).

49. Mercurious Inv. Holding, Ltd. v. Aranha, 247 F.3d 328, 331 (1st Cir. 2001) (citing Kaarela v. Birkhead, 600 N.E.2d 608, 609–10 (Mass. App. Ct. 1992)).

50. *Id.* (citing *Kaarela*, 600 N.E.2d at 609–10); *see, e.g.*, Calcagno v. Drew, 694 N.Y.S.2d 248, 248–49 (App. Div. 1999) (involving an exchange of letters between a lawyer for the buyer of a business and a lawyer for a party claiming an interest in the business being sold).

51. *See, e.g.*, Levitsky v. McPherson (*In re* McPherson), 564 B.R. 6, 18 (Bankr. D. Mass. 2017) (applying Massachusetts law); Hammack v. Coffelt Land Title, LLC, 348 S.W.3d 75, 81 (Mo. Ct. App. 2011) ("Missouri courts have recognized that an escrow agreement may be based on an oral agreement."); Horner v. Semenza, No. 58574, 2013 WL 3257963, at *3 (Nev. May 31, 2013) ("An escrow agreement and the status as an escrow agent do not require a written agreement; the agreement and status stem from the parties' intent and conduct."); Zhang v. Lau, 178 N.Y.S.3d 545, 548–49 (App. Div. 2022) (stating that the plaintiffs had sufficiently pleaded the existence of an oral escrow agreement); Union Sav. Bank v. Laws. Title Ins. Corp., 946 N.E.2d 835, 841 (Ohio Ct. App. 2010) ("Ohio courts have held that escrow agreements do not have to be in writing."). *But see* Spalla v. Fransen, 936 N.E.2d 559, 565 (Ohio Ct. App. 2010) ("[W]e follow the rule . . . which requires an escrow to be shown by writing.").

52. Albrecht v. Brais, 754 N.E.2d 396, 399 (Ill. App. Ct. 2001) (citing Merchants Nat'l Bank v. Frazier, 67 N.E.2d 611, 618 (Ill. App. Ct. 1946).

53. *See Horner*, 2013 WL 3257963, at *3 (noting the importance of the parties' intent and conduct); *see also* Boozer v. Fischer, 674 S.W.3d 314, 324 (Tex. 2023) ("To determine whether these parties created an escrow, we look to the parties' intent as expressed by the terms of their agreement.").

54. *See, e.g.*, Askenaizer v. Moate, 406 B.R. 444, 450 (D.N.H. 2009) ("The intention of the parties at the time of the deposit determines the type of agreement created."); Pearse Assocs., LLC

the parties intended to create an escrow at the time of deposit further underpins the determination of whether the lawyer holding the funds or property potentially is an escrow agent.[55]

B. Escrow Controversies: Illustrative Cases

Parties' differing expectations regarding escrows and associated disagreements around lawyers' status or duties as escrow agents sometimes spawn litigation.[56] *Boozer v. Fischer*,[57] a 2023 Texas Supreme Court case, is a leading example of an escrow dispute that resulted in litigation.

Ray Fischer agreed to sell his tax consulting business to CTMI, which was owned by Mark Boozer and Jerrod Raymond.[58] Fischer and CTMI later found themselves in litigation with one another, which they largely settled.[59] Their settlement agreement left open CTMI's request for a declaratory judgment regarding Fischer's entitlement to revenue for projects he started but did not finish before he left the company.[60] The issue then became how the parties would handle those funds pending resolution of CTMI's declaratory judgment claim.[61] At Fischer's urging, the parties agreed the disputed funds "would 'be[ ] held in escrow.'"[62] As CTMI collected the revenue from the specified projects, it would deposit 15 percent of it "'into an interest bearing escrow account.'"[63] If Fischer won the declaratory judgment claim, the settlement agreement provided he would "'receive payment of' the funds."[64] The lawyers for the parties decided that the transcript of their negotiations would

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v. Perry, 960 A.2d 1166, 1173 (Me. 2008) (quoting Progressive Iron Works Realty Corp. v. E. Milling Co., 150 A.2d 760, 762 (Me. 1959)); *In re* Hilson, 863 N.E.2d 483, 492 (Mass. 2007) (quoting *Kaarela*, 600 N.E.2d at 610).

55. *See Horner*, 2013 WL 3257963, at *3 ("[An] escrow agent agrees to receive and distribute the deposit under the conditions. . . ."); Janson v. Cozen & O'Connor, 676 A.2d 242, 247 (Pa. Super. Ct. 1996).

56. *See, e.g.*, Alexander O & G, L.L.C. v. Nomad Land & Energy Res., L.L.C., 313 F. Supp. 3d 794, 801–03 (S.D. Tex. 2018) (rejecting the argument that a law firm and one of its lawyers assumed the role of escrow agent); Threatt v. Rogers, 604 S.E.2d 269, 272–73 (Ga. Ct. App. 2004) (concluding a lawyer who was holding his clients' earnest money check for delivery to the designated escrow agent did not assume an escrow agent's duties); *Pearse Assocs.*, 960 A.2d at 1173 (concluding the lawyer was not serving as escrow agent but was instead his client's agent and was acting on his client's behalf).

57. 674 S.W.3d at 314.

58. *Id.* at 319.

59. *Id.* at 320.

60. *Id.* (citing Fischer v. CTMI, L.L.C., 479 S.W.3d 231, 234–36 (Tex. 2016)).

61. *Id.*

62. *Boozer*, 674 S.W.3d at 320.

63. *Id.*

64. *Id.*

constitute the settlement agreement.[65] The parties acknowledged that they understood and accepted these arrangements.[66]

When it came to implementing their agreement, the parties first considered appointing Fischer's lawyer as escrow agent, but he refused because he did not want to be responsible for paying income tax on interest accruing on the funds while they were in his trust account.[67] The parties then agreed CTMI would place the funds in an account controlled by Boozer and Raymond's lawyer, Wesley Holmes.[68] To solve the tax problem, the parties "agreed that the account would 'be a CTMI account, but' that they would 'have it be controlled by [Holmes].'"[69] Holmes acknowledged that while CTMI would handle the taxes on the account, he was "on the hook."[70]

Holmes opened an account in CTMI's name, but he controlled the account.[71] As the settlement agreement required, CTMI eventually transferred nearly $1 million into the account.[72] When Fischer won on CTMI's final claim, he demanded payment of the money in the account controlled by Holmes.[73] Unfortunately, Holmes had secretly absconded with the funds.[74] CTMI then filed the current case seeking a declaration that it had satisfied its obligations under the settlement agreement because it had fully paid the amount it owed Fischer under the terms of the escrow agreement.[75] Fischer counterclaimed for breach of contract, asserting that CTMI still owed him the roughly $1 million supposedly escrowed.[76] CTMI prevailed in the trial court, but Fischer won reversal on appeal, leading to CTMI successfully petitioning the Texas Supreme Court for review.[77]

The first question for the court was whether parties may negotiate an escrow agreement appointing one party's lawyer as the escrow holder

65. *See id.* at 320 (stating that the lawyers for the parties negotiated these terms "in open court" during a break in the trial of the case).

66. *See id.* (explaining that the trial court put the parties on the stand and had them testify that they understood and agreed to the settlement terms).

67. *Boozer*, 674 S.W.3d at 314.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Boozer*, 674 S.W.3d at 314.

73. *Id.*

74. *Id.*

75. *Id.* at 321.

76. *Id.*

77. *Boozer*, 674 S.W.3d at 321.

while the parties are actively litigating against each other.[78] The court concluded they could.[79]

To determine whether Fischer and CTMI created an escrow, the court examined their intent as reflected in the terms of their agreement.[80] As is normal when construing agreements, "no magic words are necessary, but the words the parties used in their agreement—especially the word 'escrow' itself—are the clearest indicators of that shared intent."[81] Although, the use of the word "escrow" in an agreement is not conclusive, it helps clarify the parties' intent.[82] This principle reflects courts' general approach to contract interpretation.[83] The court also considered whether the agreement satisfied the basic elements of an escrow, as well as the context of its formation and the deposit of the funds to help illuminate the agreement's terms.[84]

Here, the parties' language and the structure of their transaction evidenced the creation of an escrow.[85] As the court explained with respect to the parties' language:

> The agreement repeatedly used the word "escrow" to describe the arrangement. It stated that the funds would "be paid into an interest bearing escrow account" and "be[ ] held in escrow," with the funds being placed in the "escrow account" of either Holmes or Fischer's attorney. The parties expressly agreed that the transcription of the hearing would itself constitute the text of the agreement.[86]

As for the structure of the transaction, the parties agreed CTMI would vest control of the disputed funds in a third party—Holmes—who promised to hold the funds as a fiduciary for both Fischer and CTMI.[87] The agreement provided that the deposited funds were to be exclusively

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78. Id.Id.

79. *Id.*

80. *Id.* at 324.

81. *Id.*

82. *Boozer*, 674 S.W.3d at 324 (quoting Lechner v. Halling, 216 P.2d 179, 185 (Wash. 1950)) (While not dispositive or sufficient, 'the use of the word "escrow" . . . indicates more clearly than any other their actual intention.'").

83. *Id.* (citing URI, Inc. v. Kleberg Cnty., 543 S.W.3d 755, 764 (Tex. 2018)); *see also* Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 891 S.E.2d 100, 114 (N.C. 2023) ("When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected . . . ."); Slak v. Strozier, 234 N.E.3d 1144, 1153 (Ohio Ct. App. 2024) (citing Kelly v. Med. Life Ins. Co., 509 N.E.2d 411, 411 (Ohio 1987)) ("When we review a contract, we read the document as a whole and presume that the parties' intent is reflected in the language of the document.").

84. *Boozer*, 674 S.W.3d at 324.

85. *Id.* at 325.

86. *Id.*

87. *Id.*

"controlled by" Holmes.[88] Critically, everyone agreed Holmes would hold the money until Fischer's and CTMI's lawsuit was resolved.[89] If Fischer won the case, he would "receive payment."[90] Then, CTMI deposited the disputed funds into the account controlled by Holmes, thereby completing the steps necessary to establish an escrow.[91]

Fischer also argued that his agreement with CTMI did not create an escrow because, as a matter of law, an escrow agent must be a neutral third party.[92] If Fischer was right, the parties' agreement would not be a lawful escrow no matter their intent because Holmes was no stranger to the deal; he was Boozer and Raymond's lawyer and he was representing them in litigation against Fischer.[93] The court acknowledged Fischer's correctness up to a point:

> [W]hen one party's attorney holds funds, the law will presume that the parties have *not* created an escrow. As discussed above, one fundamental feature of an escrow is that the escrow holder owes fiduciary duties to *both* parties, not just one. Ordinarily, however, an attorney owes fiduciary duties to—and serves as an agent for—his *own* client, not an adverse party. Presumptively, therefore, when a party gives his attorney funds to hold, the attorney holds those funds as his *client's* agent.[94]

But while Fischer had accurately identified courts' understanding of a lawyer's usual role, this was merely a default rule.[95] In other words, a lawyer for one side will be deemed not to have been an escrow agent absent clear evidence the parties and the lawyer agreed from the start that the lawyer would hold any funds in that capacity.[96]

The court observed that like other default rules, parties may contract around this one, even if doing so produces unusual or unwise results.[97] Such contractual freedom is especially appropriate when the parties are sophisticated, capably represented, and immune to their counterparts' dominion.[98] The court also noted that its conclusion aligned with

88. *Id.*

89. *Id.*

90. *See Boozer*, 674 S.W.3d at 325 (explaining that the lawyers for the parties, the parties themselves, and Holmes agreed to this arrangement).

91. *Id.*

92. *See id.* (reciting Fischer's argument that Holmes could not be a neutral third party because he was Boozer and Raymond's lawyer).

93. *Id.*

94. *Boozer*, 674 S.W.3d at 325–26.

95. *Id.* at 326.

96. *Boozer*, 674 S.W.3d at 326.

97. *Id.* (first citing Rosetta Res. Operating, LP v. Martin, 645 S.W.3d 212, 220 (Tex. 2022); then citing Endeavor Energy Res., L.P. v. Energen Res. Corp., 615 S.W.3d 144, 153 (Tex. 2020)).

98. *Id.* (citing Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 58 (Tex. 2008)).

precedent from other states and with the Restatement (Third) of the Law Governing Lawyers.[99] Tying off its reasoning, the court explained that recognizing parties' contractual right to select one of their lawyers as an escrow agent respected Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and its commentary.[100] That rule governs lawyers' duties when holding funds or property belonging in whole or part to clients or others.[101] As for lawyers' perspectives and obligations when holding funds in escrow:

> Attorneys understand that when they agree to serve as an escrow holder, they take on fiduciary duties to both parties for the limited purpose of the escrow agreement. . . .An attorney should be well-equipped to comply with the high fiduciary duties of an escrow holder. Those duties do not generate a conflict in a context like this one, where an agreed-upon objective standard governs the distribution of funds and where the attorney acknowledges himself to be "on the hook," rather than merely acting for his client.[102]

Persisting, Fischer asserted that the parties' arrangement was not an escrow because CTMI owned the account and was responsible for paying the taxes on the interest accruing on the funds held there.[103] The court disagreed, noting that what counts when creating an escrow is control of the subject funds or property rather than ownership.[104]

Certainly, opening the account in CTMI's name was relevant to the creation of the escrow.[105] If the only information available was that the disputed funds were being held in a CTMI account, the court would conclude there was no escrow.[106] But that conclusion would rest on the assumption that account owners control their accounts.[107] Because the control element is pivotal, however, once the parties agreed that Holmes would exclusively control the account—thereby separating control and ownership—any impediment to the funds in the account being held in escrow dissolved.[108] For that matter, it was Holmes's exclusive control of the account that enabled him to steal the deposited funds.[109]

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99. *Boozer*, 674 S.W.3d at 326–27 (citing the RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 44 cmt. h (AM. L. INST. 2000)).

100. *Id.* at 327.

101. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.14 (TEX. STATE BAR 2022).

102. *Boozer*, 674 S.W.3d at 327 (footnotes omitted) (citations omitted).

103. *Id.*

104. *Id.*

105. *Id.* at 328.

106. *Id.*

107. *Boozer*, 674 S.W.3d at 328.

108. *Id.*

109. *Id.*

In conclusion, the *Boozer* court held that CTMI and Fischer created an escrow.[110] Although perhaps more a matter of curiosity than currently relevant, the court then analyzed who should bear the consequences of Holmes's dishonesty and decided that Holmes's liability under the escrow agreement did not erase CTMI's liability under the settlement agreement.[111] The court therefore ruled that CTMI was liable to Fischer.[112]

In contrast to the outcome in *Boozer*, in *Pearse Associates, LLC v. Perry*, Maine's highest court concluded that the parties did not create an escrow in relation to a transaction with a complex history.[113] Foundationally, the controversy stemmed from three failed attempts by Alan and Ada Perry to sell the Pleasant Point Inn in Lovell, Maine, and two resulting lawsuits.[114] The plaintiff in the pending case, Pearse Associates, LLC (Pearse) was formed by Michael Biszko for the purpose of acquiring and developing the inn.[115] Biszko was in business with Nick Castel, who was, in turn, affiliated with Conway Lake Resorts (Conway) and Kezar Lake Management Co. (Kezar).[116] Conway and Kezar had previously tried to buy the inn.[117] Paul Driscoll of Norman, Hanson & DeTroy, LLC represented Biszko, Castel, and their respective businesses.[118]

In June 2006, the Perrys and Conway settled their lawsuit over one of the failed sales.[119] Under the settlement agreement, (1) Conway received an option to buy the inn that expired on March 1, 2007; (2) the new purchase agreement would supersede a failed 2002 agreement; (3) Conway could assign its rights under the settlement agreement; and (4) if the parties failed to close the transaction by March 1, 2007, both the new agreement and the 2002 agreement would become null and void, and

110. *Id.* at 329.

111. *Id.* at 334.

112. *Boozer*, 674 S.W.3d at 334.

113. *See* Pearse Assocs., LLC v. Perry, 960 A.2d 1116, 1172–73 (Me. 2008) ("Based on the summary judgment record, we agree with the Superior Court's conclusion that no valid escrow agreement arose between the parties.").

114. *Id.* at 1168.

115. *Id.*

116. *Id.*

117. In August 2002, the Perrys signed a purchase agreement to sell the Pleasant Point Inn to Conway, Kezar, and Castel. *Id.* at 1168–69. But disputes arose, leading the Perrys to file a lawsuit in 2004. *Id.* at 1168. The litigation was later resolved through a 2006 settlement agreement, which granted Conway an option to purchase the property but ultimately expired without a closing. *Id.*

118. *Pearse Assocs.*, 960 A.2d at 1168.

119. *Id.*

Conway would release any liens on the property and all documents relating to title.[120]

Beginning in July 2006, the Perrys and Driscoll, acting as Pearse's lawyer, negotiated a new purchase agreement.[121] On January 15, 2007, the Perrys signed a new agreement prepared by Driscoll to sell the inn to Pearse, with closing due by March 1, 2007.[122] Alan Perry mailed several copies of the signed agreement to Driscoll on January 17, 2007.[123] In a cover letter, Perry confirmed Driscoll's plan to "hold these agreements in escrow" until Perry received "satisfactory documentation" of Conway's and Kezar's effective release of the prior agreements.[124] Driscoll responded by email two days later writing, "I am holding everything in escrow per the terms of our agreement subject to getting a formal termination of the existing Purchase and Sale Agreement in place which, I understand, is imminent."[125]

The next month, Driscoll sent the Perrys a termination agreement signed by Conway terminating the 2002 purchase agreement with the expectation that the Perrys would also sign it.[126] Instead of executing the termination agreement, however, Alan Perry questioned one of its provisions and expressed his concerns to Driscoll in a responsive letter.[127]

Despite Perry's refusal to sign the termination agreement, Driscoll believed the condition permitting him to release the purchase agreement signed by the Perrys to Pearse had been met and he sent the agreement to Pearse.[128] Consistent with their history of failed deals, the parties did not close this sale because Pearse believed the Perrys had breached warranties in the new agreement.[129] Pearse then sued the Perrys, who counterclaimed and filed a third-party complaint against Driscoll.[130] The Perrys alleged that Driscoll breached an escrow agreement when he released the 2007 purchase agreement to Pearse before Alan Perry received satisfactory documentation of Conway's and Kezar's releases as specified in Perry's January 17, 2007 letter.[131]

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120. *Id.*
121. *Id.* at 1169.
122. *Pearse Assocs.*, 960 A.2d at 1169.
123. *Id.*
124. *See id.* (detailing a portion of the cover letter sent by Perry).
125. *Id.*
126. *Id.*
127. *Pearse Assocs.*, 960 A.2d at 1169–70.
128. *Id.* at 1170.
129. *Id.*
130. *Id.*
131. *Id.*

The trial court awarded Driscoll summary judgment on the basis that there was no escrow agreement because Driscoll never acted as an escrow agent for the Perrys.[132] The Perrys appealed the trial court's decision.[133] On appeal, the Perrys argued that because the parties' intent primarily determines if an escrow has been created, and because Alan Perry instructed Driscoll to hold the 2007 purchase and sale agreement in escrow, a valid escrow agreement was created when Driscoll embraced that instruction in his return email message.[134] Driscoll countered that Perry's use of the term "escrow" in the January 17 letter was inadequate to establish an escrow agreement and that Perry knew he was always functioning as Pearse's agent rather than as a neutral third party.[135] The *Pearse Associates* court agreed with the trial court that the parties never had a valid escrow agreement.[136]

The court observed that while a party generally cannot deposit funds in escrow with an agent of a counterparty to a transaction, a counterparty's agent may become an escrow agent "'if acting in an individual capacity and where it would not be antagonistic to the principal's interest.'"[137] When evaluating whether a party's lawyer acted as an escrow agent, the parties' intent at the time of deposit controls.[138] Although the parties' employment of the term "escrow" indicates their intent, it does not necessarily form an escrow.[139]

In their January 17 and February 2 communications, Alan Perry and Driscoll both referred to Driscoll holding the purchase and sale agreement in escrow.[140] Without more, however, this exchange did not express the intent required to create an escrow, especially since Perry admitted in the trial court that he knew Driscoll was representing Pearse in their negotiations.[141] Perry's knowledge that Driscoll was never acting as a neutral third party was further evidenced by a February 21, 2007 letter in which he referred to Pearse as Driscoll's client and by a pleading in which he similarly described Pearse.[142]

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132. *Pearse Assocs.*, 960 A.2d at 1170.
133. *Id.*
134. *Id.* at 1172.
135. *Id.*
136. *Pearse Assocs.*, 960 A.2d at 1172–73.
137. *Id.* at 1173 (quoting Johnson v. Exclusive Props. Unlimited, 720 A.2d 568, 573 (Me. 1998)).
138. *Id.* (quoting Progressive Iron Works Realty Corp. v. E. Milling Co., 150 A.2d 760, 762 (Me. 1959)).
139. *Id.* (quoting *Johnson*, 720 A.2d at 573).
140. *Id.*
141. *Id.*
142. *See Pearse Assocs.*, 960 A.2d at 1168 1173 (discussing Perry's letter to Driscoll).

At bottom, the record indicated that the Perrys viewed Driscoll as an agent for Pearse rather than as a disinterested escrow agent.[143] The *Pearse Associates* court therefore affirmed the trial court's grant of summary judgment to Driscoll.[144]

C. Implied or De Facto Escrow Agency

Although escrows and thus escrow agencies usually are created by express agreement, some courts may impose escrow agents' fiduciary duties on lawyers holding funds or property in circumstances closely analogous to an escrow arrangement.[145] *Newington Ltd. v. Forrester*[146] is a case in point.

In *Newington*, Joseph Kristul, the CEO of Telava Networks, Inc. (Telava), sought potential investors in Telava.[147] Newington Ltd. (Newington) learned of the opportunity and, through an agent, began negotiating the purchase of restricted Telava stock.[148] Kristul asked Newington to deposit $1 million toward the stock purchase.[149] Newington agreed and deposited the money in a trust account held by Telava's lawyer, Robert Forrester.[150] Newington's agent explicitly instructed Forrester "to hold the money until Newington and Telava finalized a deal."[151] Forrester instead diverted $200,000 of Newington's money to a stranger.[152] Newington thereafter sued Forrester on several theories in an effort to recover the missing funds, including breach of fiduciary duty.[153]

Forrester argued in a motion to dismiss that Newington could sue him only for breach of contract based on the parties' agreement that Forrester would hold Newington's $1 million in trust until Newington and Telava completed the stock purchase.[154] The essential problem for Forrester was

143. *Id.*

144. *Id.*

145. *See, e.g.,* Badger Cap., LLC v. Chambers Bank of N. Ark., 650 F.3d 1125, 1130 (8th Cir. 2011) (applying Arkansas law); Hoffman v. Atlas Title Sols., Ltd., 214 N.E.3d 1271, 1280 (Ohio Ct. App. 2023) (recognizing implied escrow agreements).

146. *See generally* Newington Ltd. V. Forrester, No. 3:08-CV-0864-G ECF, 2008 WL 4908200 (N.D. Tex. Nov. 13, 2008).

147. *Id.* at *1.

148. *Id.*

149. *Id.*

150. *Id.* (stating that Forrester had represented Telava for nearly a decade).

151. *Id.*

152. *See Newington*, 2008 WL 4908200, at *1 ("Nevertheless, after Forrester received the funds, he transferred $200,000 of Newington's money to an unknown third party.")

153. *Id.*

154. *Id.* at *2.

the fact that Newington never alleged their agreement was a contract.[155] Additionally, under controlling Texas law, an underlying contract between feuding parties does not always limit the plaintiff's remedy to contract damages.[156] Sometimes a contract may involve a special relationship giving rise to duties actionable in tort,[157] as was the case here.[158]

The court reasoned that Forrester owed Newington the duties of an escrow agent.[159] The court noted that in *City of Fort Worth v. Pippen*,[160] the Texas Supreme Court imposed an escrow agent's duties on a party holding funds where the party's role "closely parallel[ed] an escrow agent."[161] The *Newington* court leaned on *Pippen* in framing its own approach:

> In *Pippen*, . . . the city placed funds in the hands of a title company, and instructed the company to close its transactions with the sellers. . . . The title company spent the majority of the money closing the transactions, per the city's instructions, but it spent the remainder of the money in a way the city had not authorized. . . . Though, as here, there was no formal escrow agreement between the city and the title company, the court imposed on the title company the duties of an escrow agent. . . . The court reasoned that the city had sent its funds to the title company for a specific purpose and that using them for any other purpose entitled the city to sue. . . . The court stated that, even where no formal escrow agreement exists, the title company owed the party remitting those funds "the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money and pay it only to those persons who are entitled to receive it."[162]

The *Newington* court concluded the only difference between *Pippen* and this case was Forrester's status as a lawyer instead of a corporate depositary.[163] This distinction did not compel a different ruling.[164] Like the title company in *Pippen*, Forrester held a third party's funds with explicit instructions on how to apply them.[165] Under Texas law, such an arrangement requires the person or entity holding the funds "to act as an

155. *Id.*
156. *Newington,* 2008 WL 4908200, at *2 (citing Sw. Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991)).
157. *Id.* (quoting *DeLanney*, 809 S.W.2d at 494, n.1).
158. *See id.* at *3 (discussing the special relationship between Forrester and Newington).
159. *Id.*
160. 439 S.W.2d 660 (Tex. 1969).
161. *Newington*, 2008 WL 4908200, at *2–3.
162. *Id.* (citing *Pippen*, 439 S.W.2d at 662, 664–65).
163. *Id.*
164. *Id.*
165. *Id.*

escrow agent and to comply with the duties inherent in that role."[166] In sum, Forrester owed Newington a duty independent of any contract between them, and his failure to follow Newington's instructions regarding the money entrusted to him exposed him to tort liability for breach.[167]

D. Recommendations for Lawyers

A lawyer generally must agree to accept the duties of an escrow agent to owe them to the parties to a transaction and to be potentially liable for allegedly breaching those duties.[168] Neither lawyers nor anyone else can be forced to act as escrow agents over their objections.[169] Lawyers who do not want to serve as escrow agents or who hope to avoid being boxed into analogous roles should expressly decline to assume associated responsibilities. For lawyers who are willing to serve as escrow agents, on the other hand, it is critical to understand their roles and the fiduciary duties they owe the parties as discussed in the next Part.

II. LAWYERS' FIDUCIARY DUTIES AS ESCROW AGENTS

A. Overview

Lawyers are fiduciaries to their clients.[170] Lawyers generally do not owe fiduciary duties to third parties.[171] In comparison, escrow agents owe fiduciary duties to all parties to the escrow agreement.[172]

166. *Newington*, 2008 WL 4908200, at *3 (citing *Pippen*, 439 S.W.2d at 665).

167. *Id.* at *3.

168. *See* Friedman v. Stern, No. 91-Civ-0985 (LJF), 1992 WL 58878, at *2 (S.D.N.Y. Mar. 13, 1992) (citations omitted) ("In an action based on the breach of an alleged escrow agreement, the party claiming that another party acted as his escrow agent must prove the existence of the escrow agreement. That party must also show the alleged escrow agent agreed to accept that responsibility.").

169. *See* Tinker Nat'l Bank v. Grassi, 293 N.Y.S.2d 847, 849 (Sup. Ct. 1968) (citation omitted) ("It is obvious that no one, against his will, can be forced to act as an escrow agent.").

170. *See, e.g*, Delaney v. Dickey, 242 A.3d 257, 268 (N.J. 2020); N.C. State Bar v. Merritt, 877 S.E.2d 892, 904 (N.C. Ct. App. 2022) (quoting Booher v. Frue, 392 S.E.2d 105, 106 (N.C. Ct. App. 1990)); *In re* S.C. NAACP Hous. Advocate Prog., 897 S.E.2d 691, 696 (S.C. 2024). Lawyers owe clients two basic fiduciary duties: confidentiality and loyalty. Costa v. Allen, 274 S.W.3d 461, 462 (Mo. 2009) (en banc); Slota v. Imhoff & Assoc., P.C., 949 N.W.2d 869, 876–77 (S.D. 2020) (quoting Behrens v. Wedmore, 698 N.W.2d 555, 576 (S.D. 2005)).

171. *See* Burns v. Stratos, 581 F. Supp. 3d 687, 695 (E.D. Pa. 2022) ("And 'it is well-settled that an attorney's only duty is to his or her own client,' so an attorney owes no fiduciary duty to the opposing party." (quoting Dowd v. Walsh, No. 98-cv-5743, 1999 WL 619338, at *2 (E.D. Pa. Aug. 16, 1999))).

172. Cengiz v. Huron Title Co., No. 4:22-CV-04049-KES, 2024 WL 1744297, at *7 (D.S.D. Apr. 22, 2024) (quoting Wandler v. Lewis, 567 N.W.2d 377, 384 (S.D. 1997)); Kim v. DP Cap. LLC, No. 23-1101 (TJK), 2024 WL 4253168, at *4 (D.D.C. Sept. 20, 2024) (quoting World Class

Accordingly, in serving as an escrow agent, a lawyer owes a fiduciary duty both to the lawyer's client and to third parties—that is, to the other parties to the escrow agreement.[173] An escrow agent's fiduciary relationship with the parties to the escrow agreement, however, is "much narrower in scope" than the attorney-client fiduciary relationship.[174] Limiting the extent or scope of an escrow agent's fiduciary relationships is necessary because of the agent's obligation to act on behalf of all parties to the escrow agreement.[175]

Although an escrow agent's fiduciary duties may vary depending on state law, courts generally recognize (1) a duty to strictly comply with the escrow agreement's terms;[176] (2) a duty to impartially perform the escrow function;[177] (3) the duty to disclose to the parties matters known to the agent that are material to the parties' escrow agreement;[178] and (4) a duty to safeguard the funds or property entrusted to the agent.[179] A lawyer

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Constr. Mgmt. Grp. v. Baylor, 962 F. Supp. 2d 296, 299 (D.D.C. 2013)); Summit Fin. Holdings, Ltd. v. Cont'l Laws. Title Co., 41 P.3d 548, 551 (Cal. 2002); Cap. River Enters., LLC v. Abod, 301 A.3d 1234, 1242 (D.C. 2023); Innes v. Marzano-Lesnevich, 136 A.3d 108, 116 (N.J. 2016); Penklor Props. LLC v. Buehler, No. W2018-00630-COA-R3-CV, 2019 WL 1343583, at *4 (Tenn. Ct. App. Mar. 25, 2019); Cottonwood Dev. Corp. v. Longhorn Title Co., No. 03-23-00032-CV, 2024 WL 1334327, at *6 (Tex. App. Mar. 29, 2024); Pyper v. Reil, 437 P.3d 493, 499 (Utah App. 2018).

173. *See* Boozer v. Fischer, 674 S.W.3d 314, 327 (Tex. 2023) ("Attorneys understand that when they agree to serve as an escrow holder, they take on fiduciary duties to *both* parties for the limited purpose of the escrow agreement."); Fla. State Bar Ass'n Comm. on Pro. Ethics, Op. 02-06, at *2 (2003) [hereinafter Fla. Eth. Op. 02-06] ("Generally, an attorney's first duty is to the client. However, . . . when an attorney is also acting as an escrow agent, the attorney may also have a duty to third parties. An escrow agent is a trustee of both parties. . . .").

174. Gilmore v. Chi. Title Ins. Co., 926 S.W.2d 695, 699 (Mo. Ct. App. 1996).

175. Am. State Bank v. Adkins, 458 N.W.2d 807, 810 (S.D. 1990).

176. *See* Avila v. CitiMortgage, Inc., 801 F.3d 777, 783 (7th Cir. 2015) (applying Illinois law); Alereza v. Chi. Title Ins. Co., 211 Cal. Rptr. 3d 469, 476 (Ct. App. 2016); Hancock v. Kulana Partners, 452 P.3d 371, 380 (Haw. 2019) (quoting DeMello v. Home Escrow, Inc., 659 P.2d 759, 763 (Haw. Ct. App. 1983)); Naimou v. Philip F. Greco Title Co., No. 264503, 2006 WL 397940, at *1 (Mich. Ct. App. Feb. 21, 2006); Spalla v. Fransen, 936 N.E.2d 559, 564 (Ohio Ct. App. 2010); *see, e.g.*, Zhang v. Lau, 178 N.Y.S.3d 545, 548 (App. Div. 2022) ("An escrow agent has a duty not to deliver the escrow funds to anyone except upon strict compliance with the conditions imposed.").

177. Wells Fargo Bank Minn., NA v. Envirobusiness, Inc., 22 N.E.3d 125, 135 (Ill. App. Ct. 2014).

178. *See* Cap. River Enters., LLC v. Abod, 301 A.3d 1234, 1242 (D.C. 2023) (quoting Aronoff v. Lenkin Co., 618 A.2d 669, 687 (D.C. 1992)); *see, e.g.*, SMP, Ltd. v. Syprett, Meshad, Resnick & Lieb, P.A., 584 So. 2d 1051, 1053 (Fla. Dist. Ct. App. 1991) (recognizing a possible duty to disclose under the circumstances).

179. *See* Hanover Ins. Co. v. Ross, No. 23-CV-80829-ROSENBERG, 2024 WL 2976762, at *1 (S.D. Fla. June 13, 2024) ("As escrow agent, Ross had a duty to make sure that funds in the escrow account were safeguarded."); Bonde v. Wexler & Kaufman, PLLC, 345 F.R.D. 31, 41 (S.D.N.Y. 2023) ("Lawyers and escrowees, like trustees, are fiduciaries, whose fiduciary duties include safeguarding their clients' funds."); Fam. Fed. Sav. & Loan v. Davis (*In re* Davis), 172 B.R. 437, 451 (Bankr. D.D.C. 1994) (footnote omitted) ("Absent forfeiture or settlement, an escrow agent has no right to surrender the deposit."); Gardner v. Deer (*In re* Deer), Bankr. No. 06-02460-NPO,

serving as an escrow agent owes these fiduciary duties to the parties to the escrow agreement just as would a non-lawyer or corporate depositary filling the role.[180]

Essential as these fiduciary duties are, an escrow agent owes them only to the parties to the escrow agreement.[181] An escrow agent owes no fiduciary duties to non-parties.[182] Again, an escrow agent's status as a lawyer does not alter these principles.

B. Compliance with the Escrow Agreement's Terms

1. Foundational Principles

An escrow agent's duties are defined by the terms of the escrow agreement.[183] A clear corollary of that principle is an escrow agent's obligation to strictly comply with the parties' instructions contained in the escrow agreement.[184] An escrow agent's failure to adhere to the escrow agreement's terms exposes the agent to potential liability to any

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Adversary No. 07-00060-NPO, 2008 WL 723982, at *6 (Bankr. S.D. Miss. Mar. 14, 2008) (stating that the lawyer-escrow agent "had a fiduciary duty to safeguard the funds" wired to his trust account); *In re* Luti, No. 15-O-11994, 2018 WL 3968218, at *4 (Cal. State Bar Ct. Aug. 6, 2018) ("Luti's fiduciary duty . . . as the escrow agent was as simple as it was sacred: to safeguard the $15,000 escrow funds and disburse them according to the express terms of the Escrow Agreement."); Trevino v. Brookhill Cap. Res., Inc., 782 S.W.2d 279, 281 (Tex. App. 1989) (describing an escrow agent's duty as "exercis[ing] a high degree of care to conserve the money and pay it only to those persons entitled to receive it").

180. *See, e.g.*, *SMP, Ltd.*, 584 So. 2d at 1054–55 ("[T]he escrow holder in this case is a law firm. . . . [T]he fact that the escrow holder is a law firm should not increase or diminish its duties to the parties as depositary."); Boozer v. Fischer, 674 S.W.3d 314, 327 (Tex. 2023) (explaining that when lawyers agree to serve as escrow agents, they assume the fiduciary duties escrow agents owe the parties to the escrow agreement).

181. Jafari v. FDIC, 2 F. Supp. 3d 1125, 1133 (S.D. Cal. 2014) (applying California law); Neukranz v. Conestoga Settlement Servs., LLC, No. 3:19-CV-1681-L, 2022 WL 19518465, at *15 (N.D. Tex. Nov. 14, 2022) (applying Texas law); Carter Dev. of Mass., LLC v. Howard, 285 So. 3d 367, 371 (Fla. Dist. Ct. App. 2019) (applying Florida law).

182. *See, e.g.*, *Carter Dev. of Mass.*, 285 So. 3d at 371 (holding an escrow agent owed no duty to a real estate developer who was not a party to the escrow agreement); Gary Patterson & Assocs., P.C. v. Holub, 264 S.W.3d 180, 203 (Tex. App. 2008) (ruling that an escrow agent owes no duty to a creditor of a party to the escrow agreement).

183. S.F. Residence Club, Inc. v. Baswell-Guthrie, 897 F. Supp. 2d 1122, 1205 (N.D. Ala. 2012) (applying Alabama law); Hayber v. Dep't of Consumer Prot., 866 A.2d 732, 736 (Conn. Super. Ct. 2004); Trahan v. Lone Star Title Co. of El Paso, Inc., 247 S.W.3d 269, 287 (Tex. App. 2007).

184. Gomez v. Huntington Tr. Co., N.A., 129 F. Supp. 2d 1116, 1123 (N.D. Ohio 2000) (applying Ohio law); Maxfield v. Martin, 173 P.3d 476, 478 (Ariz. Ct. App. 2007); Tung v. Chi. Title Ins. Co., 278 Cal. Rptr. 3d 182, 189 (Ct. App. 2021) (quoting Amen v. Merced Cnty. Title Co., 375 P.2d 33, 35 (Cal. 1962)); Hancock v. Kulana Partners, 452 P.3d 371, 380 (Haw. 2019); Blaine Cnty. Title Assocs. v. One Hundred Bldg. Corp., Inc., 66 P.3d 221, 224 (Idaho 2002); Int'l Cap. Corp. v. Moyer, 806 N.E.2d 1166, 1172 (Ill. App. Ct. 2004); Fla. Eth. Op. 02-06, *supra* note 173, at *2.

party to the agreement allegedly harmed by the agent's breach.[185] Lawyers serving as escrow agents have certainly found themselves in parties' crosshairs for failing to abide by escrow agreements' terms.[186] A lawyer doubling as an escrow agent may safely diverge from the escrow agreement's terms in performing her duties only if all parties consent.[187]

On the other side of the coin, the parties cannot impose duties on the escrow agent beyond those expressly established in the escrow agreement.[188] A lawyer-escrow agent who complies with the escrow agreement's terms cannot be held liable for failing to perform other alleged obligations.[189]

185. *See, e.g.*, Henley Fin., Ltd. v. Goyette & Assocs., Inc., No. 2:20-cv-01834-DJC-KJN, 2023 WL 6387151, at *10 (E.D. Cal. Sept. 29, 2023) (finding that a reasonable jury could conclude the lawyer serving as escrow agent violated the duty to strictly comply with a preauthorization instruction before disbursing escrowed funds); R&J Oil v. Rodgers, No. 3:18-CV-00117-GNS-CHL, 2020 WL 201053, at *4–7 (W.D. Ky. Jan. 13, 2020) (concluding the lawyer-escrow agent was guilty of breach of contract and breach of fiduciary duty when he did not comply with the escrow agreement); Weisz v. Great Am. Title Q 1-103-1, LLC, 603 S.W.3d 336, 342 (Mo. Ct. App. 2020) (explaining that an escrow agent who fails to abide by the terms of the escrow agreement may be liable for breach of contract and breach of fiduciary duty); First Manhattan Energy Corp. v. Meyer, 56 N.Y.S.3d 28, 30 (App. Div. 2017) (concluding that a lawyer serving as an escrow agent who failed to release the escrowed funds could be sued for breach of fiduciary duty, conversion, and unjust enrichment).

186. *See, e.g.*, *Henley Fin.*, 2023 WL 6387151, at *10; *R&J Oil*, 2020 WL 201053, at *6; *First Manhattan Energy*, 56 N.Y.S.3d at 30.

187. *See* N.C. State Bar Ass'n, Ethics Op. RPC 66 (Jul. 14, 1989), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-66/?opinionSearchTerm=escrow [https://perma.cc/84H3-V4XJ] (opining "that an attorney serving as an escrow agent may not disburse in a manner not contemplated by the escrow agreement unless all parties agree").

188. *See* BSD Mgmt., LLC v. Rozen, No. 22-11763, 2024 WL 710612, at *3 (E.D. Mich. Feb. 21, 2024) ("Here, BSD seeks to impose a fiduciary duty on Defendants that contradicts its fiduciary duties to Salpai under the Escrow Agreement. This it cannot do under Michigan law."); *In re* Liddle, 608 B.R. 356, 362 (Bankr. S.D.N.Y. 2019) ("Thus, 'parties to an escrow agreement cannot impose upon [the escrow agent] any obligations in addition to its limited duties under the express terms of its contract.'" (quoting H&H Acquisition Corp. v. Fin. Intranet Holdings, Inc., 669 F. Supp. 2d 351, 363 (S.D.N.Y. 2009))); LEM 2Q, LLC v. Guar. Nat'l Title Co., 144 A.3d 174, 180 (Pa. Super. Ct. 2016) (stating that the escrow agent could owe no duties beyond those stated in the escrow agreement); Flagstar Bank, FSB v. Walker, 451 S.W.3d 490, 499 (Tex. App. 2014) (footnote omitted) ("[A]n escrow agent's duties are strictly limited to those set forth in the escrow agreement.").

189. *See, e.g.*, Egnotovich v. Katten Muchin Zavis & Roseman LLP, No. 604101/06, 2008 WL 199757, at *4–9 (N.Y. Sup. Ct. Jan. 23, 2008) (concluding the law firm serving as escrow agent could not be liable for making disbursements after being presented with executed documents which reflected transactions clearly authorized by the escrow agreement and the agreement expressly relieved the law firm of any duty to investigate the authenticity of documents that were facially genuine); Trahan v. Lone Star Title Co. of El Paso, Inc., 247 S.W.3d 269, 288 (Tex. App. 2007) (finding no breach of duty where the escrow agent distributed the disputed funds "consistent with its proscribed duties as escrow agent for the transaction").

An escrow agent is not charged with construing or interpreting the escrow agreement.[190] The agent must perform her duties according to the agreement's plain terms.[191] If the escrow agreement is definite about how or when the funds or property should be distributed, the lawyer serving as escrow agent must disburse the funds or deliver the property accordingly.[192] If the escrow agreement or instructions are ambiguous or the parties' intentions are unclear, on the other hand, the escrow agent must ask the parties for clarification and seek explicit instructions.[193] Similarly, if a lawyer-escrow agent

> cannot determine whether the contingency has occurred or there has been performance—either because the terms of the escrow agreement are too vague or the parties have a factual dispute—he may not release the funds until both parties consent or there is a court order directing that the funds [or property] be released.[194]

Escrow agents who are unsure about their obligations have no right to self-help.[195] If the parties dispute the distribution of the escrowed funds or property, the escrow agent may mediate the controversy, but the agent cannot assume the role of a tribunal and release the funds or property to one party or the other based on the agent's evaluation of the merits or individual sense of fairness.[196]

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190. Hayber v. Dep't of Consumer Prot., 866 A.2d 732, 736 (Conn. Super. Ct. 2004) (quoting Norwich Lumber Co. v. Yatroussis, 243 A.2d 311, 315 (Conn. Cir. Ct. 1967)); Lewis v. Shawnee State Bank of Shawnee, 596 P.2d 116, 120 (Kan. 1979) (quoting Southern v. Chase State Bank, 61 P.2d 1340, 1343 (Kan. 1996)).

191. Hayber, 866 A.2d at 736 (quoting *Norwich Lumber*, 243 A.2d at 315); *Lewis*, 596 P.2d at 120.

192. *See generally* Conn. State Bar Ass'n, Eth. Op. 00-15, (Jun. 16, 2000) ("One fundamental principle of an escrow agreement is the expectation that the attorney holding escrowed funds shall act independently in strict compliance with the terms of the escrow agreement."); Fla. Eth. Op. 02-06, *supra* note 173, at *2 ("An escrow agent has a duty to perform in accordance with the express terms of the escrow agreement."); Phila. Bar Ass'n, Pro. Guidance Comm., Op. 89-4 (1989), https://philadelphiabar.org/?pg=EthicsOpinion89-4 [https://perma.cc/FTS4-URFW] ("If under the terms of the agreement of sale your-client-relative or the buyer is now entitled to the security deposit, it must be paid.").

193. *See* Kirk Corp. v. First Am. Title Co., 270 Cal. Rptr. 24, 37 (Ct. App. 1990) ("In the event of a conflict or apparent error in instructions, the escrow holder is obliged to take corrective steps before obeying questionable instructions.").

194. N.C. State Bar, Eth. Op. 11, 1998 WL 609891, at *1 (Jul. 16, 1998) [hereinafter 1998 N.C. Eth Op. 11].

195. *See* Zang v. NRT New Eng. Inc., 933 N.E.2d 694, 700 (Mass. App. Ct. 2010).

196. *See* Takayama v. Schaefer, 669 N.Y.S.2d 656, 658 (App. Div. 1998) ("An attorney-escrowee . . . is absolutely prohibited from disposing of [escrowed funds] unilaterally."); *id.* at 659 (stating that while an escrow agent may attempt to facilitate a settlement of a dispute between the parties to the escrow agreement, it would have been improper for the lawyer-escrow agent to give the entrusted money either to his client or to his client's adversary); N.Y. State Bar Ass'n, Eth. Op. 710, 1998 WL 957925, at *1 (Nov. 6, 1998) [hereinafter NY Eth. Op. 710] (quoting Brooklyn Op. 1993-1 (1993)).

Lawyers asked to serve as escrow agents who are uncomfortable with the role or who do not believe they can respect the parties' escrow instructions should decline to hold the funds or property from the start.[197] Alternatively, a lawyer asked to serve as an escrow agent with reservations about the role might insist the parties include a dispute resolution procedure in the escrow agreement to be followed should a disagreement arise over the disposition of the escrowed funds or property.[198] Absent a dispute resolution provision in the agreement, the lawyer-escrow agent is left to wait for the parties to agree on disbursement of the escrowed funds or property, await the outcome of litigation between the parties and comply with the court's judgment, or interplead the funds or property and allow a court to decide how they should be distributed.

2. Limitations of Liability and Indemnification Provisions

Lawyers considering service as escrow agents might hope to limit their liability to the parties.[199] For instance, lawyers might want to limit their potential liability to damages directly resulting from their gross negligence or intentional malfeasance as escrow agents; cap their liability at the amount of money or value of property entrusted to them; or disclaim liability for certain damages.[200] Provided the client had the opportunity to consult separate counsel, requiring such a provision in the escrow agreement as a condition of serving as escrow agent would initially seem to be permissible under Rule 1.8(h)(1) of the Model Rules of Professional Conduct (Model Rules). Model Rule 1.8(h)(1) allows lawyers to prospectively limit their malpractice liability to clients who are independently represented in making such agreements.[201] Model Rule 1.8(h) further permits lawyers to limit their liability to third parties

197. *See Zang*, 933 N.E.2d at 700.

198. *See* NY Eth. Op. 710, *supra* note 196, at *2 ("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."); *see also id.* (emphasizing "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").

199. *See, e.g.*, Conn. State Bar Ass'n, Eth. Op. 99-17, 1999 WL 958023, at *1 (Jun. 8, 1999) [hereinafter Conn. Eth. Op. 99-17] (approving, with conditions, a clause in a real estate purchase agreement limiting the lawyer-escrow agent's liability for any mistake or misconduct except "his own gross negligence or willful misconduct").

200. *See, e.g.*, Kelly v. Regions Bank, No. 3:11cv252–MCR/EMT, 2013 WL 5436674, at *4 (N.D. Fla. Sept. 27, 2013) (enforcing a provision in an escrow agreement limiting the escrow agent's liability to losses primarily caused by the agent's gross negligence or willful misconduct and disclaiming liability for "incidental, indirect, special, consequential or punitive damages").

201. MODEL RULES OF PRO. CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2024); *see also* Conn. Eth. Op. 99-17, *supra* note 199, at *1 (equating a lawyer's misjudgments and errors or omissions when serving as an escrow agent with legal malpractice for Rule 1.8(h) purposes).

without those parties being independently represented.[202] In fact, depending on state law, lawyer-escrow agents may be able limit their liability to the parties to the escrow agreement provided they do not attempt to exculpate themselves from liability for gross negligence or willful misconduct.[203] If lawyer-escrow agents limit their liability to clients in transactions, some jurisdictions may require the limitations to satisfy their versions of Model Rule 1.8(h).[204] Any limitation of liability will not, however, excuse the lawyer's compliance with rules of professional conduct or inoculate the lawyer against discipline for violating those rules.[205]

Going one step further, a lawyer-escrow agent might also consider asking the parties for indemnification if one of them sues the lawyer for alleged misconduct. There is authority, however, barring a lawyer from doing so.[206] The rationale for this refusal is that allowing the lawyer-escrow agent to obtain indemnification would elevate "the attorney's own interests ahead of his or her duties to the client and third party as an attorney and escrow agent."[207] At first blush, this appears to be shaky reasoning. Again, Model Rule 1.8(h)(1) allows lawyers to prospectively limit their malpractice liability to clients if the client is independently represented.[208] Such arrangements elevate the lawyer's interests over the client's interests. Allowing lawyer-escrow agents to partially limit their liability to clients also prioritizes the lawyers' interests. So, why can a lawyer not similarly request indemnification from a client when functioning as an escrow agent? And it certainly seems that a lawyer-

202. *See* Conn. Eth. Op. 99-17, *supra* note 199, at *1 (discussing Connecticut's version of Rule 1.8(h)).

203. *See, e.g.*, *Kelly*, 2013 WL 5436674, at *4 (enforcing a provision in an escrow agreement limiting the escrow agent's liability to losses primarily caused by the agent's gross negligence or willful misconduct and disclaiming liability for "incidental, indirect, special, consequential or punitive damages"); Home Healthcare of Ill., Inc. v. Jesk, 112 N.E.3d 594, 596, 603–06 (Ill. App. Ct. 2017) (upholding a limitation on a lawyer-escrow agent's "liability for accidental or negligent breaches of contract but not from intentional breaches or breaches resulting from gross negligence"); Lynch v. Santa Fe Nat'l Bank, 627 P.2d 1247, 1249–53 (N.M. Ct. App. 1981) (enforcing an exculpatory clause that absolved the escrow agent from liability except for willful misconduct or gross negligence); Conn. Eth. Op. 99-17, *supra* note 199, at *1 (allowing the lawyer-escrow agent to limit his liability for any mistake or misconduct except "his own gross negligence or willful misconduct"). *But see* Chen v. U.S. Bank Nat'l Ass'n, 507 F. Supp. 3d 1254, 1257, 1259–62 (W.D. Wash. 2020) (holding that an exculpatory clause was void as against public policy to the extent it purported to exculpate the escrow agent from liability for ordinary negligence).

204. *See, e.g.*, Conn. Eth. Op. 99-17, *supra* note 199, at *1–2.

205. *See id.* at *2 (discussing the implications of Rule 1.15, which concerns the safekeeping of property for a lawyer-escrow agent).

206. *See, e.g.*, Fla. Eth. Op. 02-06, *supra* note 173, at *3.

207. *Id.*

208. MODEL RULES OF PRO. CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2024).

escrow agent should be able to request indemnification from any non-client participating in the transaction. Unfortunately for lawyer-escrow agents, obtaining indemnification from any party to the escrow agreement generally fails on contract and fiduciary duty grounds, as explained in *R&J Oil v. Rodgers*.[209]

The plaintiffs in *R&J Oil*, Keith and Nikkoll Johnson, formulated a retirement savings strategy focused on investments in oil and gas interests.[210] They entered into a "Refurbishing Contract Agreement" with Ronnie Charles Rodgers (Rodgers) and R&R Plus, LLC (R&R Plus), under which Rodgers and R&R Plus promised to convey the mineral rights to a parcel of land, together with a well and related personal property, and to refurbish the well.[211] The Johnsons, Rodgers, and R&R Plus entered into a separate escrow agreement to facilitate the sale of the mineral rights.[212] They appointed Rodgers and R&R Plus's lawyer, Elmer George, who drafted the deal documents, as escrow agent.[213] George was a party to the escrow agreement.[214]

The escrow agreement provided that the Johnsons would deposit $105,000 with George, who was to hold the funds until he received from the parties all documents required to accomplish the transfer of ownership or assignment of the mineral rights, including the assignment of an oil and gas lease and the Refurbishing Contract Agreement.[215] The parties also signed an "Assignment of Oil and Gas Lease" (the Assignment), which oddly conveyed only a partial interest in one well and did not transfer the essential oil and gas lease.[216] Despite these flaws in the Assignment, George paid the Johnsons' escrowed funds to Rodgers upon receiving the signed Assignment and Refurbishing Contract Agreement.[217]

After the sale closed, Rodgers breached the Refurbishing Contract Agreement.[218] The Johnsons' investment cratered, and they consequently sued George for breach of contract and breach of fiduciary duty for failing to transfer of the oil and gas lease from Rodgers to them

209. R&J Oil v. Rodgers, No. 3:18-CV-00117-GNS-CHL, 2020 WL 201053 (W.D. Ky. Jan. 13, 2020)
210. *Id.* at *1.
211. *Id.*
212. *Id.*
213. *Id.* n.2.
214. *R&J Oil*, 2020 WL 201053, at *1.
215. *Id.*
216. *Id.*
217. Rodgers was the sole member of the limited liability company R&R Plus. *Id.*
218. *Id.* at *2.

as the escrow agreement provided.[219] The Johnsons next moved for summary judgment.[220]

The Johnsons' motion for summary judgment on their breach of contract claim implicated an indemnification provision in the escrow agreement, which George raised as a complete defense.[221] The indemnification provision stated:

> First Party agrees to indemnify and hold harmless the Escrow Agent from any and all claims, liabilities, losses, expenses, actions, suits, or proceedings at law or in equity, or any other expense, fees, or charges of any character or nature whatever that it may incur by reason of acting as the Escrow Agent under this Escrow Agreement except for the Escrow Agent's gross negligence, bad faith or willful misconduct.[222]

The court rejected George's defense.[223] Even if this was an appropriate case for the application of indemnity, which it was not given the lack of a third-party claim, a contracting party is not entitled to "'indemnification from another contracting party for a breach . . . the first party caused or substantially helped to cause.'"[224]

Essentially, George argued that the Johnsons were required to indemnify him for the harm he caused them by breaching the escrow agreement.[225] George's defense ran afoul of controlling Kentucky law, which disapproves of a contract interpretation that would either nullify the contract or neuter the parties' intent.[226] Here, requiring the Johnsons to indemnify George for his own misconduct would effectively excuse his breach of his agreed duties.[227] But voiding George's duties was out of the question because Kentucky law disfavors contract interpretations that would produce illusory promises, and accepting George's argument that he could not be held liable for breaching the escrow agreement would render his promises as escrow agent illusory.[228] The court therefore concluded that the Johnsons were not obligated to indemnify George for his breach of the escrow agreement.[229]

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219. *See R&J Oil*, 2020 WL 201053, at *2.
220. *Id.*
221. *Id.*
222. *Id.*
223. *See id.* at *3–4.
224. *R&J Oil*, 2020 WL 201053, at *3 (quoting Turner v. Glob. Seas, Inc., 505 F.2d 751, 754 (6th Cir. 1974)).
225. *Id.*
226. *Id.* (citing Henderson v. Cont'l Cas. Co., 39 S.W.2d 209, 211 (Ky. 1935)).
227. *R&J Oil*, 2020 WL 201053, at *3
228. *Id.* (citing Com. Movie Rental, Inc. v. Larry Eagle, Inc., 738 F. Supp. 227, 230–31 (W.D. Mich. 1989)).
229. *R&J Oil*, 2020 WL 201053, at *4.

After resolving the indemnification question, the court analyzed whether George had breached the escrow agreement and was thus liable to the Johnsons for breach of contract.[230] The court quickly concluded that George's breach of the escrow agreement was clear and accordingly granted the Johnsons summary judgment on their contract claim.[231] The court then turned to George's argument that the Johnsons must indemnify him against their breach of fiduciary duty claim, which had to be analyzed separately from indemnification for the breach of contract claim.[232]

Kentucky law presumes that an indemnification provision does not operate to indemnify the indemnitee against his own tortious acts.[233] Courts are most likely to invalidate such provisions if one contracting party is at a clear disadvantage.[234] In comparing the parties' positions, "courts consider disparities in the parties' education as well as whether the terms of the contract are particularly one-sided."[235] All these factors favored the Johnsons:

> George enjoyed a superior bargaining position . . . by virtue of his training and experience as an attorney. . . . Moreover, it is "not only important for the court to consider the language employed in the contract, but the circumstances surrounding the parties, and the object in view which induced the making of it." Courts examining such provisions should assess the probability that one party would agree to indemnify the other against the other party's own negligence. . . . [I]t is inconceivable that [the Johnsons] would have agreed to entrust George with their retirement savings if they understood that George would not be held responsible in the event he failed to perform his duties. Such unlikelihood weighs against enforcement of the indemnification provision.[236]

In addition, enforcing the indemnification provision was incompatible with George's fiduciary duties as lawyer acting as an escrow agent.[237] An escrow agent's fiduciary duties are imposed by law rather than being creatures of the escrow agreement.[238] Also, under Kentucky law, a lawyer "serving as an escrow agent is 'subject to an expectation of a

230. *Id.* (citing Home Ins. Co. of N.Y. v. Wilson, 275 S.W.691, 693 (Ky. Ct. App. 1925)).

231. *Id.*

232. *Id.*

233. *See R&J Oil*, 2020 WL 201053, at *5 (citing Mitchell v. S. Ry. Co., 74 S.W. 216, 217 (Ky. Ct. App. 1903)).

234. *R&J Oil*, 2020 WL 201053, at *5 (citing Speedway SuperAmerica, LLC v. Erwin, 250 S.W.3d 339, 344 (Ky. Ct. App. 2008)).

235. *Id.* (citing *Speedway*, 250 S.W.3d at 342).

236. *Id.* (citations omitted).

237. *Id.*

238. *Id.* (quoting Jaffee v. Davis, No. 2001-CA-000817-MR, 2003 WL 2002783, at *5 (Ky. Ct. App. May 2, 2003)).

greater degree of integrity than the average nonprofessional person acting in the same capacity.'"[239] A fiduciary duty is more exacting than the usual duty of reasonable care.[240]

One of an escrow agent's principal fiduciary duties is safeguarding the entrusted funds or property.[241] Here, George was duty-bound to protect the Johnsons' funds, and he could not escape that duty by inserting the indemnification provision in the escrow agreement he drafted.[242] The court thus concluded that the Johnsons were not required to indemnify George against his own tortious conduct.[243]

With George's indemnification argument again discarded, the court easily decided he breached the escrow agreement and, in the process, violated the Johnsons' trust in him.[244] As a result, the *R&J Oil* court also awarded the Johnsons summary judgment on their breach of fiduciary duty claim.[245]

C. The Duty of Impartiality

Again, a lawyer serving as an escrow agent is an agent for, and a fiduciary to, all parties to the escrow agreement for purposes of fulfilling the agreement.[246] Whether a lawyer or not, "an escrow agent must act impartially toward all of the parties."[247] In other words, an escrow agent owes the parties a duty of impartiality,[248] which some courts describe as

239. *R&J Oil*, 2020 WL 201053, at *5 (quoting Fisk v. People's Liberty Bank & Tr. Co., 570 S.W.2d 657, 660 (Ky. Ct. App. 1978)).

240. *Id.* (citing Associated Ins. Serv., Inc. v. Garcia, 307 S.W.3d 58, 63 (Ky. 2010)).

241. *See id.* at *6 (quoting Trevino v. Brookhill Cap. Res., Inc., 782 S.W.2d 279, 281 (Tex. App. 1989)) (describing the law of an escrow agent's fiduciary duties on funds or properties).

242. *Id.*

243. *Id.*

244. *Id.*

245. *R&J Oil*, 2020 WL 201053, at *6

246. *See* Summit Fin. Holdings, Ltd. v. Cont'l Laws. Title Co., 41 P.3d 548, 551 (Cal. 2002) ("An escrow holder is an agent and fiduciary of the parties to the escrow."); Boozer v. Fischer, 674 S.W.3d 314, 327 (Tex. 2023) ("Attorneys understand that when they agree to serve as an escrow holder, they take on fiduciary duties to *both* parties for the limited purpose of the escrow agreement.").

247. Wells Fargo Bank Minn., NA v. Envirobusiness, Inc., 22 N.E.3d 125, 135–36 (Ill. App. Ct. 2014) (citing Patel v. Lacey, 561 N.E.2d 455, 457 (Ill. App. Ct. 1990)).

248. *See* Johnson v. Maki & Assocs., Inc., 682 N.E.2d 1196, 1199 (Ill. App. Ct. 1997) ("An escrowee has been described as a "trustee" of both the party making the deposit of property and the party for whose benefit it is made and, therefore, has a duty to act impartially toward all parties.") (citing Meyers v. Rockford Systems, Inc., 625 N.E.2d 916 (Ill. App. Ct. 1993)); Bowers v. Transamerica Title Co., 675 P.2d 193, 200 (Wash. 1983) ("[T]he attorney escrow agent's duty of impartiality").

a duty of loyalty.[249] Escrow agents breach their duty of impartiality through self-dealing or engaging in conduct that constitutes a conflict of interest.[250]

Lawyers serving as escrow agents must be attuned to conflicts of interest in their agency roles just as they should be sensitive to conflicts when practicing law.[251] Unfortunately, lawyer-escrow agents still suffer conflicts and the consequences.[252] Conflict of interest claims against lawyer-escrow agents usually allege the lawyers favored their clients over the other parties in the transactions instead of performing their duties impartially.[253] A California case, *Virtanen v. O'Connell*,[254] is exemplifying.

Jorma Virtanen owned stock in Burstein Technologies, Inc. (BTI).[255] He agreed to sell his BTI stock to Burstein-Goldstein Investors LLC (B-G), an entity formed by BTI's CEO, Richard Burstein, for $1.75 million.[256] B-G was to pay $70,000 at closing, with the remainder of the purchase price to be paid over time.[257] Virtanen's lawyer, Steven Dunning, delivered an executed stock purchase agreement, stock certificates and stock assignments, and attendant documents to B-G's lawyer, Christopher O'Connell of Parker, Milliken, Clark, O'Hara & Samuelian (Parker Milliken).[258] In his cover letter, Dunning instructed O'Connell to hold the documents until (1) O'Connell obtained B-G's executed closing documents and was authorized to deliver them to Dunning; (2) Virtanen confirmed to O'Connell his receipt of the $70,000

249. *See, e.g.*, Corral Group, LP v. SMIC, Ltd. (*In re* SMIC, Ltd.), Bankr. No. 10-40120-DML-11, Adversary No. 10-040541-DML, slip op., 2013 WL 4078704, at *11 (Bankr. N.D. Tex. Aug. 13, 2013) (discussing Texas law).

250. Trevino v. Brookhill Cap. Res., Inc., 782 S.W.2d 279, 281–82 (Tex. App. 1989) (citing Slay v. Burnett Trust, 187 S.W.2d 377, 387–88 (Tex. 1945); Black v. Metro Title, Inc., 712 N.W.2d 395, 398 (Wis. App. 2006) (citing *Trevino*, 782 S.W.2d at 281).

251. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2024) (regulating concurrent conflicts of interest).

252. *See, e.g.*, Fla. Bar v. Toothaker, 477 So.2d 551, 551–52 (Fla. 1985) (reciting the disciplinary referee's findings that the lawyer breached his fiduciary duty as an escrow agent in a real estate transaction by prioritizing his client's interests over the other party's interests and thereby granting his client an unfair advantage, and publicly reprimanding the lawyer for that and another violation); State *ex rel.* Okla. Bar Ass'n v. Williams, 911 P.2d 905, 906–07 (Okla. 1995) (suspending a lawyer-escrow agent who admitted he favored his long-term client over the other party to the escrow agreement and acknowledged that his loyalty to his client was inconsistent with his duties as escrow agent).

253. *Toothaker*, 477 So. 2d at 551–52; *Williams*, 911 P.2d at 906.

254. 44 Cal. Rptr. 3d 702 (Ct. App. 2006).

255. *Id.* at 706.

256. *Id.*

257. *Id.*

258. *Id.*

initial payment; and (3) the stock certificates and stock assignments had been delivered to another law firm, Guzik & Associates, to be held until B-G made the remaining payments under the promissory note.[259]

Apparently frustrated by a looming delay in closing the stock sale, and with his three conditions being unmet, Virtanen rescinded the transaction in a letter to Burstein.[260] He demanded that B-G return the documents he previously provided.[261] The next day, another of Virtanen's lawyers, J. Russell Tyler, sent O'Connell a copy of a letter from Virtanen informing O'Connell of the rescission and requesting the return of Virtanen's documents.[262] In response, O'Connell sent a letter to Virtanen declaring the sale closed and stating that he was forwarding the stock certificates to BTI.[263] Despite Tyler's contrary demands, O'Connell promptly sent Virtanen's stock certificates to BTI.[264] He further instructed BTI to register the transfer, reissue the certificates in B-G's name, and deliver the reissued certificates to Guzik & Associates.[265]

Virtanen sued Burstein, B-G, O'Connell, and Parker Milliken.[266] Virtanen successfully enjoined the transfer of his stock.[267] He then settled with B-G and Burstein and went to trial against O'Connell and Parker Milliken on claims for conversion, negligence, and breach of fiduciary duty.[268] Virtanen won a $1.985 million judgment.[269] Both sides appealed from the judgment on different issues.[270]

On appeal, O'Connell did not contest the jury's finding that he held Virtanen's stock in escrow.[271] Rather, he argued he had no duty to return Virtanen's stock when instructed to do so.[272] In making this argument, he relied on case law holding that an escrow agent faced with competing demands for funds or property must either hold the property or interplead it.[273] O'Connell's argument defied the facts:

> O'Connell neither held the property nor interpleaded it. His remarkable choice was to close escrow and forward the stock certificates to [BTI]

259. *Virtanen*, 44 Cal. Rptr. 3d at 706–07.
260. *Id.* at 707.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Virtanen*, 44 Cal. Rptr. 3d at 707.
265. *Id.*
266. *Id.* at 708.
267. *Id.*
268. *Id.*
269. *Virtanen*, 44 Cal. Rptr. 3d at 708.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 708–09 (citing Diaz v. United Cal. Bank, 139 Cal. Rptr. 314, 320 (Ct. App. 1977)).

> with instructions to register the transfer and reissue the shares. O'Connell does not explain how this action [complied] with his duties as an escrow holder who had received competing demands. It could not be more clear that in taking this action, rather than continuing to hold the shares or interpleading them, he breached his duties as an escrow holder.[274]

O'Connell countered that he breached no duties because his delivery of Virtanen's stock to BTI anticipating that Virtanen would swiftly sue to enjoin the transfer, was "the *functional equivalent* of filing an interpleader action."[275] The court disagreed.[276] Noting that O'Connell cited no authority for his position, the court explained that "[b]y definition, closing escrow, i.e., delivering property to parties on the completion of a transaction or the satisfaction of identified conditions, is not the same thing as filing an interpleader action, i.e., depositing property into the court until the rights thereto" are judicially resolved.[277] In the event of a dispute, closing escrow "harbors obvious dangers for an aggrieved party" that interpleading entrusted funds or property does not.[278]

More to the immediate point, O'Connell asserted that any duty he owed Virtanen conflicted with his duty of undivided loyalty to his client, B-G.[279] According to O'Connell, those opposing duties left him no choice but to prioritize B-G's demands over Virtanen's.[280] To affirm the judgment for Virtanen, O'Connell argued, "would be to enunciate a rule that an attorney who acts as an escrow holder cannot provide his or her client with legal advice pertaining to the transaction."[281] The court was not persuaded.[282]

The court accepted O'Connell's representation that B-G instructed him in a fashion that contradicted the instructions he received from Virtanen.[283] But the question before the court was whether O'Connell violated his fiduciary duty to Virtanen, not whether O'Connell owed

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274. *Virtanen*, 44 Cal. Rptr. 3d at 709.
275. *Id.* (emphasis added).
276. *Id.*
277. *Id.*
278. *Virtanen*, 44 Cal. Rptr. 3d at 710.
279. *Id.* at 711.
280. *Id.* at 711–12.
281. *Id.* at 711.
282. *See id.* at 711–12 (explaining that the court was not persuaded by O'Connell's argument that affirming the judgment would prevent attorneys acting as escrow holders from providing legal advice to their clients regarding the transaction).
283. *Id.* at 712.

duties to B-G.[284] O'Connell's duties to B-G did not absolve him of liability for breaching his fiduciary duty to Virtanen and consequently converting Virtanen's stock.[285] If O'Connell believed that Virtanen and B-G were not going to resolve their competing demands, his remedy was an interpleader action.[286] Interpleader was available to him even though one of the conflicting demands came from his own client—"[h]e just chose not to take advantage of that method."[287]

In the end, the court affirmed the judgment for Virtanen.[288] The court also remanded the case to the trial court for a trial over O'Connell's liability for punitive damages.[289] In a passage nicely capsulizing a lawyer-escrow agent's duty of impartiality, the *Virtanen* court explained that a lawyer "fac[ing] conflicting demands from his or her own client and another party to the escrow . . . cannot favor his or her own client and completely disregard the rights of the other party, to whom he or she owes a duty as an escrow holder."[290] Lawyer-escrow agents who succumb to conflicts of interest do so at personal peril.

Although not discussed in *Virtanen*, it may be possible for a lawyer facing conflicting demands from the lawyer's client and the other party to the escrow agreement to resign as escrow agent and thereafter represent the client against the other party in their dispute over the entrusted funds or property.[291] To do so, the lawyer would need the other party's advance consent to the arrangement.[292] This option is consistent with lawyers' ability in other contexts to obtain advance waivers of conflicts of interest.[293] It also tracks case law permitting a lawyer to

284. *See Virtanen*, 44 Cal. Rptr. 3d at 712 ("[T]he question is not what [O'Connell's] duty to his clients may have been given those competing instructions, but whether [he] violated a duty owed to Virtanen by closing escrow when none of the conditions to close had been met, the parties had not reached written agreement on material contract terms, and Virtanen had delivered a notice of rescission and request for return of documents.").

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 717.

289. *Virtanen*, 44 Cal. Rptr. 3d at 724.

290. *Id.* at 706.

291. *See* 1999 NC Eth. Op. 8, 1999 WL 33262185, at *1 (N.C. State Bar 1999) ("Former service as an escrow agent does not disqualify a lawyer from assuming the role of advocate for one party in a dispute over escrowed funds.").

292. *See id.* (discussing an escrow agreement concerning a real estate sale that provided in the event of a dispute, the entrusted funds would be given to another escrow agent and the lawyer would represent the buyer in the escrow dispute).

293. *See id.* (stating that advance waivers involving lawyer-escrow agents are permissible so long as they satisfy the conditions on waivers of future conflicts of interest set forth in a prior North Carolina ethics opinion); *see generally* Gregory C. Sisk, *Duties of Loyalty: Conflicts of Interest and*

withdraw from one co-client's representation and continue to represent another co-client in a matter provided the joint clients knowingly agree to that option up front.[294]

Lawyers favoring this approach face three potential obstacles. First, the other party need not consent to the lawyer's proposed conflict waiver. The lawyer cannot compel the party's consent. Second, advance waivers of conflicts of interest can be difficult to enforce.[295] No two courts seem to view advance waivers the same way.[296] Third, it is possible that the lawyer will be disqualified from representing her client at the trial of the dispute because the lawyer is likely to be a necessary witness.[297] In the last instance, however, another lawyer in the same firm could represent the client at trial.[298]

D. The Duty of Disclosure

Confidentiality is essential to the practice of law.[299] With limited exceptions, a lawyer cannot reveal information related to a client's

Professional Independence, *in* GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 420–21 (2018) (discussing § 4-7.7 (f) advance waivers of conflicts of interest).

294. *See, e.g.*, *In re* Rite Aid Corp. Sec. Litig., 139 F. Supp. 2d 649, 656–60 (E.D. Pa. 2001) (denying a disqualification motion where a law firm defending a corporation and its CEO in securities litigation withdrew from the CEO's representation and continued to represent the corporation as contemplated by the engagement letter); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 759–65 (Ct. App. 1995) (permitting a law firm to continue representing companies in litigation adverse to an agent where the agent agreed not to seek the law firm's disqualification in a detailed consent form); Gem Holdco, LLC v. Changing World Techs., L.P., No. 650841/2013, 2015 WL 120843, at *5–7 (N.Y. Sup. Ct. Jan. 9, 2015) (enforcing the conflict waiver in the firm's engagement letter and thus refusing to disqualify the law firm).

295. *See generally* Douglas R. Richmond, *Understanding Conflicts of Interest in Environmental Law*, 68 KAN. L. REV. 69, 104–06 (2019) (discussing the enforceability of advance conflict waivers).

296. *See* William Freivogel, *Waivers/Consents, Advance Waivers*, FREIVOGEL ON CONFLICTS, https://www.freivogelonconflicts.com/waiversconsents.html [https://perma.cc/ZR53-4J2P] (last visited Jan. 7, 2025) (listing the key issues courts consider when deciding whether advance conflict waivers are enforceable and reporting that so far, "no two courts have treated these issues the same.").

297. *See* MODEL RULES OF PRO. CONDUCT r. 3.7(a) (AM. BAR ASS'N 2024) (stating that a lawyer cannot act as an advocate at a trial in which the lawyer is likely to be a necessary witness, with three exceptions).

298. *See id.* r. 3.7(b) ("A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.").

299. *See In re* Skinner, 740 S.E.2d 171, 173 (Ga. 2013) (stating that a lawyer's duty of confidentiality "is a fundamental principle in the client-lawyer relationship."); Commonwealth v. Downey, 793 N.E.2d 377, 381 (Mass. App. Ct. 2003) (branding confidentiality one of lawyers' "highest duties"); *In re* Lane's Case, 889 A.2d 3, 12–13 (N.H. 2005) (describing a lawyer's duty of confidentiality as "the foundation of the attorney-client relationship."); State v. Aiken, 129 A.3d

representation without the client's consent.[300] At the same time, lawyers have a broad duty to communicate with their clients.[301] For instance, a lawyer must "keep the client reasonably informed about the status of the matter."[302] Additionally, a lawyer is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[303]

Agents also owe their principals a duty of confidentiality, although agents' duty of confidentiality is narrower than lawyers' corresponding duty under rules of professional conduct.[304] "An agent has a duty . . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party."[305] With respect to an agent's duty to communicate with the principal:

> An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.[306]

The comparison of lawyers' and agents' duties of confidentiality and communication tees up escrow agents' duty of disclosure. Framed as a question, what information must an escrow agent disclose to the parties? The answer to this question is critical for lawyers serving as escrow

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87, 92 (Vt. 2015) (calling confidentiality the "cornerstone of the attorney-client relationship"); State *ex rel.* Ash v. Swope, 751 S.E.2d 751, 756 (W. Va. 2013) ("[I]t is a fundamental principle in the lawyer-client relationship that the lawyer maintain the confidentiality of information relating to the representation of a client.").

300. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2024) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); *see also In re* Harris FRC Corp. Merger & Appraisal Litig., 310 A.3d 1011, 1020 (Del. Ch. 2024) ("A lawyer's ethical duty of confidentiality is a broad, affirmative duty not to disclose information relating to the representation of a client, subject to specific exceptions.").

301. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2024) (governing the duties a lawyer owes to a client regarding communication).

302. *Id.* r. 1.4(a)(3).

303. *Id.* r. 1.4(b).

304. *Compare id.* r. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."), *with* RESTATEMENT (THIRD) OF AGENCY § 8.05(2) (AM. L. INST. 2007) ("An agent has a duty . . . not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.").

305. RESTATEMENT (THIRD) OF AGENCY § 8.05(2) (AM. L. INST. 2007).

306. *Id.* § 8.11.

agents because of the potential for the lawyer's duty of confidentiality owed to the lawyer's client to collide with the lawyer's fiduciary duty of disclosure to the other party to the escrow agreement.[307]

The parties to an escrow agreement can contractually provide that the escrow agent owes no duty of disclosure.[308] Otherwise, the scope of escrow agents' duty of disclosure varies by jurisdiction. Courts generally take two approaches to escrow agents' duty of disclosure. First, under what might be described as the broad approach, an escrow agent owes a duty to disclose all material facts known to the agent that might affect the rights of the parties to the escrow agreement.[309] As should be clear from this standard—and as should be clear as a matter of common sense—an escrow agent must know of the facts or information allegedly required to be disclosed for the duty to arise.[310] There can be no duty of disclosure and thus no breach if the agent is unaware of the contested facts or information.[311]

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307. *See, e.g.*, *In re* Austern, 524 A.2d 680, 684 (D.C. 1987) (censuring a lawyer-escrow agent who did not disclose that his client gave him a worthless check to ostensibly fund the escrow).

308. *See, e.g.*, LEM 2Q, LLC v. Guar. Nat'l Title Co., 144 A.3d 174, 182–83 (Pa. Super. Ct. 2016) (holding the escrow agent had no duty to disclose the existence of certain loans because the escrow agreement limited the agent's duties to those set forth in the agreement and provided that no additional obligations could be implied); *see also* Int'l Fid. Ins. Co. v. W. Va. Water Auth., No. 7:11-cv-00441, 2012 WL 2357368, at *7 (W.D. Va. June 20, 2012) (stating that parties to an escrow agreement may contractually limit the escrow agent's fiduciary duties).

309. *See* Schoepe v. Zions First Nat'l Bank, 750 F. Supp. 1084, 1089 (D. Utah, 1990) (interpreting Utah law in the absence of guidance from the Utah Supreme Court); Cap. River Enters., LLC v. Abod, 301 A.3d 1234, 1242 (D.C. 2023) (quoting Aronoff v. Lenkin Co., 618 A.2d 669, 687 (D.C. 1992)); Watkins v. NCNB Nat'l Bank of Fla., N.A., 622 So. 2d 1063, 1064 (Fla. Dist. Ct. App. 1993) ("[A]s agents escrow holders have a duty to disclose all material facts."); Kitchen Krafters, Inc. v. Eastside Bank of Mont., 789 P.2d 567, 573 (Mont. 1990) (citation omitted) ("As an escrow, the Bank was an agent who owed a fiduciary duty to both Kitchen Krafters and Schell in all matters affecting the escrow relationship. Furthermore in its capacity as an agent, the Bank had a duty to make full disclosure to its principals of all material facts relevant to the agency."), *overruled on other grounds by* Busta v. Columbus Hosp. Corp., 916 P.2d 122, 139 (Mont. 1996); Home Loan Corp. v. Tex. Am. Title Co., 191 S.W.3d 728, 731 (Tex. App. 2006) ("Ordinarily, a fiduciary duty of full disclosure requires disclosure of all material facts known to the fiduciary that might affect the rights of the person to whom the duty is owed."); Owen v. Shelton, 277 S.E.2d 189, 191 (Va. 1981) ("[I]ncorporated in every contract between a fiduciary and his principal is an obligation, imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal's decision whether or how to act."); *see, e.g.*, Fisher v. Comer Plantation, Inc., 772 So. 2d 455, 468 (Ala. 2000) (concluding the escrow agent breached its fiduciary duty by failing to notify the plaintiff of a declaratory judgment action concerning money held in escrow).

310. *See, e.g.*, Holder-McDonald v. Chi. Title Ins. Co., 188 S.W.3d 244, 248–49 (Tex. App. 2006) (concluding that the escrow agent could not have breached its fiduciary duty of full disclosure by failing to disclose a problem with an easement when it did not know of an error in the legal description of the subject property).

311. *Id.* at 248–49.

Whether facts are material to a transaction depends on the circumstances or situation.[312] Materiality is thus a case-specific inquiry.[313] Whether facts or information are material is evaluated against an objective standard.[314] Once a dispute escalates to litigation, materiality generally is a question of fact for the court or jury.[315]

Certainly, acts or events that jeopardize the security the escrow is intended to provide or diminish the escrow's value warrant disclosure.[316] Thus, in *Sedler v. Select Properties, Inc.*, the court held that the escrow agent breached its fiduciary duty to the sellers under a real estate sales contract by failing to inform them that the buyer's deposit check had been dishonored due to a stop payment order.[317] The court characterized the escrow agent's duty of disclosure in that scenario as "a basic and natural obligation" of a fiduciary.[318] Similarly, in *In re Austern*, the court publicly censured the lawyer-escrow agent for failing to disclose that his client had written a bad check to ostensibly fulfill the client's duty to fund an escrow backing the sales of condominium units.[319] The client later funded the escrow account as required, so no buyers were harmed by the lawyer's silence.[320] The lawyer nonetheless deserved professional discipline because, as an escrow agent, he "owed a fiduciary duty to . . . purchasers to protect their investment; instead, he aided his client in inducing the buyers to proceed to settlement although there was no escrow protection."[321]

Second, other courts confine escrow agents' duty of disclosure to (1) situations where the escrow agreement imposes a duty of disclosure; or (2) cases of known fraud.[322] An escrow agent's duty of disclosure

312. Capcor at Kirbymain, L.L.C. v. Moody Nat'l Kirby Hous. S, L.L.C., 509 S.W.3d 379, 385 (Tex. App. 2014).

313. *See id.* at 385 (stating that "a fact that is pertinent in one context may be inapposite in another").

314. *See* Roberts v. Lomanto, 5 Cal. Rptr. 3d 866, 876 (Ct. App. 2003) (stating that "[t]he test of materiality is objective"); Thomas v. D1 Sports Holding, LLC, No. 1-20-1194, 2022 WL 1135682, at *3 (Ill. App. Ct. Apr, 18 2022) ("Materiality is an objective concept.").

315. *Capcor*, 509 S.W.3d at 385.

316. *See, e.g.*, City of Fort Worth v. Pippen, 439 S.W.2d 660, 665 (Tex. 1969) (failing to disclose the misapplication of deposited funds was a breach of the escrow agent's fiduciary duty).

317. No. 31489, 2004 WL 3392897, at *3 (Va. Cir. Ct. Jun. 18, 2004).

318. *Id.* at *4.

319. *In re* Austern, 524 A.2d 680, 682, 684 (D.C. App. 1987) (explaining that the lawyer failed to disclose that there were insufficient funds in the escrow account and that this type of behavior warrants public censure).

320. *Id.* at 684.

321. *Id.*

322. *See, e.g.*, Qureshi v. Peoples United Bank, No. 2:18-cv-00163, 2020 WL 2079922, at *16 (D. Vt. Apr. 30, 2020) (stating that under Vermont law, an escrow agent has a fiduciary duty to the

regarding fraud may be expressed as a duty "to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow."[323] Courts recognizing this duty of disclosure do not expect escrow agents to function as detectives.[324] An escrow agent is not obligated to investigate facts or circumstances possibly indicating fraud; the agent's duty is limited to disclosing suspicious facts that come to the agent's attention.[325] An escrow agent cannot, however, practice willful blindness.[326]

Lawyer-escrow agents must appreciate the differences in their disclosure obligations with respect to fraud when acting as lawyers as compared to serving as escrow agents—the latter duty being significantly broader. Under Model Rule 1.6(b)(3), a lawyer whose services are used by a client to perpetrate a fraud may reveal the client's fraud to mitigate, prevent, or rectify serious related financial harm to others.[327] Such

parties "to disclose known fraud."); Powell v. H.E.F. P'ship, 793 F. Supp. 91, 94 (D. Vt. 1992) (requiring disclosure of known fraud); Gurley v. Bank of Huntsville, 349 So. 2d 43, 45 (Ala. 1977) ("There is no duty to disclose information received by an escrow agent unless such a duty is required by the terms of the agreement."); Burkons v. Ticor Title Ins. Co. of Cal., 813 P.2d 710, 718 (Ariz. 1991) ("Although not required to investigate, when the agent is aware of facts and circumstances that a reasonable escrow agent would perceive 'as evidence of fraud,' then there is a duty to disclose."); Summit Fin. Holdings, Ltd. v. Cont'l Laws. Title Co., 41 P.3d 548, 552 (Cal. 2002) ("Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions."); Fong v. Oh, 172 P.3d 499, 512 (Haw. 2007) (agreeing with a lower court that escrow agents' "duty of disclosure is limited to agreements or instructions imposing such a duty. . . ."); Wildcat Inns v. First Am. Title Ins. Co., No. 09-1195, 2010 WL 1875730, at *7 (Iowa Ct. App. May 12, 2010) (imposing a duty to disclose "when the escrow agent knows that a fraud is being committed on a party to an escrow and the failure of the escrow agent to disclose the information of the fraud will assist in accomplishing the fraud."); Mark Props., Inc. v. Nat'l Title Co., 34 P.3d 587, 591 (Nev. 2001) (adopting the *Burkons* characterization of escrow agents' duty of disclosure); Am. State Bank v. Adkins, 458 N.W.2d 807, 810–11 (S.D. 1990) (citation omitted) ("[T]he escrow agent has a fiduciary duty to disclose information about a known fraud being committed on a party to the escrow agreement. However, an escrow agent has no duty to disclose other information to a party of the escrow agreement unless required by the agreement.").

323. Maxfield v. Martin, 173 P.3d 476, 478 (Ariz. Ct. App. 2007).

324. *See, e.g.*, Schultz v. R.I. Hosp. Tr. Nat'l Bank, N.A., et al., 94 F.3d 721, 729 (1st Cir. 1996) (rejecting the plaintiffs' argument that the escrow agent had a duty "to actively root out fraud of which it had no knowledge . . . ."); Berry v. McLeod, 604 P.2d 610, 616 (Ariz. 1979) ("[A]n escrow agent has no duty to look for fraud. . . ."); Gilmore v. Chi. Title Ins. Co., 926 S.W.2d 695, 699 (Mo. Ct. App. 1996) ("It is not the escrow agent's duty to discover fraud committed by one party upon another. . . .").

325. Moldovan v. Long, No. 1 CA-CV 23-0470, 2024 WL 2783788, at *3 (Ariz. Ct. App. May 30, 2024); Anderson v. Reliant Title Agency, LLC, No. 85379-COA, 2023 WL 6939945, at *5 (Nev. Ct. App. Oct. 19, 2023).

326. *See, e.g.*, *Burkons*, 813 P.2d at 718 (stating that an escrow agent cannot "close its eyes in the face of known facts and console itself with the thought that no one has yet confessed fraud."); *Mark Props.*, 34 P.3d at 591 (describing and adopting Arizona's approach under *Burkons*).

327. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(3) (AM. BAR ASS'N 2024) (positing that a lawyer may similarly reveal information related to a client's representation to prevent the client

disclosures are an exception to lawyers' broad duty of confidentiality.[328] They are also permissive rather than mandatory; that is, a lawyer may reveal the client's fraud in accordance with the rule, but the lawyer is not required to do so.[329] Plus, the client must use the lawyer's services in furtherance of the fraud to trigger the lawyer's right to disclosure.[330] A lawyer's knowledge of a client's fraud separate from the lawyer's services does not entitle the lawyer to disclose the fraud.[331]

In contrast, an escrow agent's duty to disclose known frauds is mandatory rather than discretionary.[332] Furthermore, the wrongdoer does not need to involve the escrow agent in the fraud to trigger the agent's duty of disclosure.[333]

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from committing fraud in the first place); MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N 2024).

328. *See* Gregory C. Sisk, *Duties to Protect Confidentiality of Client Information*, *in* GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 4-6.3(c)(4), at 330 (2018) (explaining that the exceptions to confidentiality in Model Rule 1.6(b) are departures from lawyers' broad duty of confidentiality imposed under Model Rule 1.6(a)).

329. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(3) (AM. BAR ASS'N 2024) (providing that a lawyer "may reveal" such information).

330. Douglas R. Richmond, *Lawyers' Duty of Confidentiality and Clients' Crimes and Frauds*, 38 GA. ST. U.L. REV. 493, 525 (2022).

331. *See id.* at 526 ("A lawyer's knowledge of a client's criminal or fraudulent conduct in which the lawyer has or had no role does not empower the lawyer to disclose the client's information to prevent, mitigate, or rectify any associated financial harm.").

332. *See, e.g.*, Burkons v. Ticor Title Ins. Co. of Cal., 813 P.2d 710, 718 (Ariz. 1991)("[W]hen the agent is aware of facts and circumstances that a reasonable escrow agent would perceive 'as evidence of fraud,' then there is a duty to disclose."); Wildcat Inns v. First Am. Title Ins. Co., No. 09-1195, 2010 WL 1875730, at *7 (Iowa Ct. App. May 12, 2010) (imposing a duty to disclose "when the escrow agent knows that a fraud is being committed on a party to an escrow and the failure of the escrow agent to disclose the information of the fraud will assist in accomplishing the fraud."); Mark Props., Inc. v. Nat'l Title Co., 34 P.3d 587, 591 (Nev. 2001) (adopting the *Burkons* approach); Am. State Bank v. Adkins, 458 N.W.2d 807, 810 (S.D. 1990) (explaining that "[T]he escrow agent has a fiduciary duty to disclose information about a known fraud being committed on a party to the escrow agreement.").

333. *See,e.g., Burkons*, 813 P.2d at 718; *Wildcat Inns*, 2010 WL 1875730, at *7; *Mark Props.*, 34 P.3d at 591; *Adkins*, 458 N.W.2d at 810.

E. The Duty to Safeguard Entrusted Funds or Property

Of all an escrow agent's fiduciary duties, none exceeds the duty to safeguard entrusted funds or property.[334] Indeed, this duty may fairly be described as "sacred."[335]

As suggested by earlier references to lawyers' duties to communicate with clients and to preserve client confidentiality, a lawyer serving in a dual capacity as an escrow agent is subject to rules of professional conduct.[336] Adherence to rules of professional conduct while concurrently serving as an escrow agent is required by the lawyer's license to practice law in the jurisdiction—not by the lawyer's status as

334. *See, e.g.,* Hanover Ins. Co. v. Ross, No. 23-CV-80829-ROSENBERG, 2024 WL 2976762, at *4 (S.D. Fla. June 13, 2024) (reciting the undisputed fact that the lawyer-escrow agent "had a duty to safeguard funds in the escrow account"); Bonde v. Wexler & Kaufman, PLLC, 345 F.R.D. 31, 41 (S.D.N.Y. 2023) ("Lawyers and escrowees, like trustees, are fiduciaries, whose fiduciary duties include safeguarding their clients' funds."); Gardner v. Deer (*In re* Deer), Bankr. No. 06-02460-NPO, Adversary No. 07-00060-NPO, 2008 WL 723982, at *6 (Bankr. S.D. Miss. Mar. 14, 2008) (stating that the lawyer-escrow agent "had a fiduciary duty to safeguard the funds" wired to his trust account); *In re* Luti, No. 15-O-11994, 2018 WL 3968218, at *4 (Cal. State Bar Ct. Aug. 6, 2018) ("Luti's fiduciary duty . . . as the escrow agent was as simple as it was sacred: to safeguard the $15,000 escrow funds and disburse them according to the express terms of the Escrow Agreement."); Flagstar Bank, FSB v. Walker, 451 S.W.3d 490, 499 (Tex. App. 2014) (listing as one of an escrow agent's fiduciary duties "the duty to exercise a high degree of care to conserve the money and pay only those entitled to receive it.").

335. *In re Luti*, 2018 WL 3968218, at *4.

336. *See, e.g.,* Gruetter v. Witherspoon Brajcich McPhee LLC, No. 2:23-CV-0227-TOR, 2024 WL 4425677, at *5 (E.D. Wash. Oct. 4, 2024) (quoting Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 199 (Wash. 1983)) (explaining that a lawyer-escrow agent has a duty to follow the escrow instructions and the Rules of Professional Conduct); Kelly v. State Bar, 808 P.2d 808, 812 (Cal. 1991) (stating that an attorney providing non-legal services to a client must conform to the Rules of Professional Conduct); Ky. Bar Ass'n v. Craft, 208 S.W.3d 245, 258 (Ky. 2006) ("[A] licensed attorney undertaking to act as an escrow agent remains subject to the Kentucky Rules of Professional Conduct."); MODEL RULES OF PRO. CONDUCT r. 5.7(a)(1) cmts. 2–3 (AM. BAR ASS'N 2024) (regulating lawyers' provision of law-related services). In contrast, if a lawyer serves solely as an escrow agent in connection with a transaction rather than in a dual capacity, the lawyer generally will not be subject to professional discipline. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.15 cmt. 5 (AM. BAR ASS'N 2024) ("[A] lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule."). Lawyers serving exclusively as escrow agents may, however, be disciplined for dishonesty in their agency roles under Model Rule 8.4(c), which makes it professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 2024); *see also* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2(d), at 1353 (2024–2025) ("[V]iolations of fiduciary obligations (whether or not undertaken in one's capacity as a lawyer) would be disciplinable if they indicate dishonesty.").

an escrow agent.[337] Courts have repeatedly disciplined lawyers for violating ethics rules in their dual capacities as escrow agents.[338]

Several ethics rules may apply to a lawyer-escrow agent's failure to protect entrusted funds or property depending on the facts.[339] The overlap between an escrow agent's fiduciary duty to safeguard the escrow and a lawyer's ethical obligations, however, is most apparent from Model Rule 1.15, titled "Safekeeping Property."[340] Model Rule 1.15 provides in relevant part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account. . . . Other property shall be identified as such and appropriately safeguarded. . . .
> * * *
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person

337. *Craft*, 208 S.W.3d at 258.

338. *See, e.g.*, Fla. Bar v. Marrero, 157 So. 3d 1020, 1024–26 (Fla. 2015) (concluding the lawyer-escrow agent violated Florida's rules of professional conduct by breaching his fiduciary duty of disclosure and by breaching his duty to safeguard the entrusted funds); *In re* McVey, 523 P.3d 900, 910 (Kan. 2023) (holding the lawyer-escrow agent violated the Kansas version of Model Rule 1.15 by failing to safeguard escrowed funds); Ky. Bar Ass'n v. Dixon, 373 S.W.3d 444, 449–50 (Ky. 2012) (concluding the lawyer-escrow agent violated Rule 1.15(b)); Att'y Grievance Comm'n of Md. v. Ghatt, 192 A.3d 656, 679, 686 (Md. 2018) (disbarring the lawyer who, while acting as escrow agent, basically allowed her clients to misuse her trust account to perpetrate a fraudulent scheme); Irek v. N.J. Laws. Fund for Client Prot., No. A-1384-20, 2022 WL 1561461, at *2 (N.J. Super. Ct. App. Div. May 18, 2022) (citation omitted) ("It seems a self-evident proposition, and one supported by caselaw, that licensed attorneys must honor their oath, even if acting only as an escrow agent, regardless of any attorney-client relationship with the owner of the funds. . . . Attorneys may be disbarred even for conduct unrelated to the practice of law."); *In re* Goldstein, 218 N.Y.S.3d 858, 858–60 (App. Div. 2024) (imposing reciprocal discipline and suspending a lawyer who admitted to misappropriating $30,000 while serving as escrow agent in a New Jersey real estate transaction); *In re* Schneider, 13 N.Y.S.3d 539, 546 (App. Div. 2015) (disbarring the lawyer-escrow agent for violating Rules 1.15 and 8.4(c)).

339. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2024) (mandating competence); *id.* r. 1.8(h)(1) (restricting lawyers' ability to make agreements limiting their liability for malpractice); *id.* r. 4.1 (prohibiting false statements of material fact or law to third persons); *id.* r. 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation).

340. MODEL RULES OF PRO. CONDUCT r. 1.8(h)(1), r. 1.15 (AM. BAR ASS'N 2024); *see* Chesapeake Tr. v. Chesapeake Bay Enter. (*In re* Potomac Supply Corp.), No. 12-30347-BFK, 2014 WL 1661288, at *10 (Bankr. E.D. Va. Apr. 24, 2014) (stating that "Rule 1.15 is consistent with the duties of any common law agent" holding funds belonging to another); Conn. Eth. Op. 99-17, *supra* note 199, at *2 ("Rule 1.15 applies in any case where the attorney's service as escrow agent arises from, or in connection with, the representation of a client. In such situations, the attorney is required to exercise the care required of a professional fiduciary.").

> is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (e) When in the course of representation a lawyer is in possession of property in which two or more persons . . . claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.[341]

Model Rule 1.15 basically requires lawyers holding clients' and third parties' funds and property to exercise the care expected of professional fiduciaries.[342] *In re McDonald* is a recent case in which the lawyer's conduct mocked that standard.[343]

Diana McDonald was a Georgia solo practitioner.[344] She acted as escrow agent in a transaction in which her long-time client—who she knew from experience rarely, if ever, kept his promises—agreed to sell 1,000 Bitcoin to a third party.[345] On January 3, 2019, the third party electronically transferred $4 million to one of McDonald's IOLTA accounts with the understanding that McDonald would hold the funds in escrow and not release them until her client deposited the Bitcoin in the third party's digital wallet.[346] Several days later, with the promised Bitcoin nowhere to be found, the third party's lawyer emailed McDonald and demanded she return the funds.[347] Over the next few days, McDonald asked the third party to give her client more time to deliver the Bitcoin, falsely assuring the third party that her history with the client gave her confidence he would come through.[348] On January 7, she tried to soothe the third party by saying its funds were "safe and protected."[349] At some point, she promised the third party that if her client did not deliver the Bitcoin, she would return the $4 million on January 8, 2019.[350] She broke that promise and undertook a series of knowingly dishonest stalling tactics that culminated in the third party filing a grievance against her with the State Bar of Georgia (the Bar) on January 18, 2019.[351]

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341. MODEL RULES OF PRO. CONDUCT r. 1.8(h)(1), r. 1.15 (AM. BAR ASS'N 2024).

342. *Id.* r. 1.15 cmt. 1; *see also* Conn. Eth. Op. 99-17, *supra* note 199, at *2.

343. *See In re* McDonald, 903 S.E.2d 35, 38–39 (Ga. 2024) (describing the lawyer's initial poor judgment and subsequent dishonesty).

344. *Id.* at 38.

345. *Id.*

346. *Id.*

347. *Id.*

348. *In re McDonald*, 903 S.E.2d at 38.

349. *Id.* at 39.

350. *Id.* at 38.

351. *See id.* at 39 (detailing the Bar's initial correspondence with McDonald regarding the formal grievance).

The Bar emailed a copy of the grievance to McDonald on January 18 and specifically asked whether the $4 million was still in her IOLTA account.[352] McDonald did not respond to the Bar's message; instead, she wired $2 million to the third party the same day.[353] The other $2 million was long gone because McDonald began looting the escrow the day she received the funds.[354] "By January 7, when she assured the third party that its funds were 'safe and protected,' she had already disbursed approximately $2,000,000 of the third party's funds out of her IOLTA account to herself and others unaffiliated with [the] transaction."[355]

The third party sued McDonald in federal court in a largely fruitless effort to recoup the missing $2 million.[356] She defended the conduct on the basis that "she did not need the third party's permission to distribute its funds to herself or any other entity, because she was doing so at her client's direction and for his benefit."[357] That argument failed and the court ordered her to return to the third party what few funds could be recouped.[358] The Bar later charged her with multiple rule violations, including violations of Georgia Rules 1.15(I) and 1.15(II), which correspond to Model Rule 1.15.[359] McDonald grudgingly acknowledged her failures as a fiduciary in her disciplinary case:

> McDonald finally admitted that, in hindsight, the third party was the owner of the $4,000,000; that she had received the money into her escrow account in a "fiduciary capacity"; that the third party's money was in her "protective care"; that she owed a fiduciary duty to the third party with regard to the funds on deposit with her; and that she "probably" knew as early as January 5, 2019 that the third party expected or understood that she was supposed to hold the money until the Bitcoin had been delivered. She further agreed that the third party's control of the money never terminated because performance of the agreed-upon conditions never happened; that all of the money should have gone back to the third party as the deal never closed; . . . that she was not authorized by the third party to collect any fees or make any disbursements from its funds, at least until the deal was consummated; and that she did not advise anyone affiliated with the third party . . . (or ask anyone there for permission) before she distributed its money.[360]

352. *Id.*
353. *In re McDonald*, 903 S.E.2d at 39.
354. *Id.*
355. *Id.*
356. *See id.* at 39–40 (explaining that the third party only recovered an additional $414,200).
357. *Id.* at 39.
358. *In re McDonald*, 903 S.E.2d at 39–40.
359. *See id.* at 43–45 (outlining the violations).
360. *Id.* at 40.

The Special Master in McDonald's disciplinary case observed that McDonald knew the third party wanted the $4 million back but she did not return even the remaining portion of the escrow and the few other traceable funds until the third party filed its grievance and sued her.[361] The Special Master also noted McDonald's admissions concerning her many fiduciary breaches as escrow agent.[362] Accordingly, the Special Master determined that regardless of McDonald's claim that she was acting at her client's direction when she wrongfully disbursed the escrowed funds from her IOLTA account, she violated her duties as a lawyer under Georgia Rules 1.15(I) and 1.15(II) by not holding the funds and then returning them to the third party when the Bitcoin transaction did not close.[363] The Special Master thus recommended that the Georgia Supreme Court disbar McDonald for those and other ethics violations.[364]

The Georgia Supreme Court accepted the Special Master's recommendation.[365] McDonald's lies to the Bar and to the third party about the security of the escrowed funds combined with her conversion of around half the funds supported disbarment.[366] Moreover, her "complete disregard" for her fiduciary duties as escrow agent was "staggering" and independently justified disbarment.[367] So, disbar her the court did.[368]

III. APPLYING THE CORRECT STATUTE OF LIMITATIONS

When a lawyer serves in a dual capacity as an escrow agent and is sued for alleged misconduct arising out of the related transaction, the applicable statute of limitations may become an issue.[369] For example, if a lawyer-escrow agent breaches the escrow agreement, must the aggrieved party sue the lawyer-escrow agent within the time required by the statute of limitations applicable to professional negligence claims or the presumably longer limitation period applicable to breach of contract

361. *In re* McDonald, 903 S.E.2d at 44.
362. *Id.*
363. *In re McDonald*, 903 S.E.2d at 44–45.
364. *Id.* at 46.
365. *Id.* at 48.
366. *Id.*
367. *In re* McDonald, 903 S.E.2d at 48.
368. *Id.* at 48–49.
369. *See, e.g.*, Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A., 671 So. 2d 805, 806 (Fla. Dist. Ct. App. 1996) (holding that an escrow agent did not qualify as a professional under a Florida statute, and thus a four-year statute of limitations, rather than two-year professional malpractice statute of limitations, controlled).

actions?[370] That was the question presented to an Ohio court in *Saad v. Rodriguez*.[371]

In *Saad*, Mathile Saad engaged lawyer Peter Weinberger to help her buy a property from Angel Rodriguez.[372] Weinberger drafted a purchase agreement that named his law firm as escrow agent and recited the firm's responsibilities in that capacity.[373] The agreement also specified that Rodriguez was to furnish a title insurance policy; however, Rodriguez never bought title insurance and, thus, the anticipated policy was never escrowed.[374] Although he was never instructed to do so, Weinberger ordered a title examination and delivered a title commitment to Saad.[375] Unfortunately, a third party who had a judgment against Rodriguez filed a lien against the property after the title search was performed but before Saad's deed to the property was recorded.[376] The lack of title insurance combined with the judgment lien resulted in defective title to the property and potential liability for Saad.[377]

Saad sued Rodriguez and Weinberger and his law firm.[378] She alleged that Weinberger and his firm (1) negligently allowed title to pass without obtaining title insurance on the property; and (2) failed to comply with the escrow instructions in the purchase agreement by failing to obtain title insurance before releasing the funds she placed in escrow.[379] The trial court awarded Weinberger and his law firm summary judgment on the basis that any alleged misconduct on their parts constituted legal malpractice, such that the applicable one-year statute of limitations barred Saad's claims.[380]

Saad appealed, and the Ohio Court of Appeals partly reversed the trial court's ruling.[381] The *Saad* court explained that Weinberger and his firm acted in a dual capacity when assisting Saad in acquiring Rodriguez's property.[382] "Part of their work entailed legal services but a separate and distinct aspect of their services was governed by the escrow instructions

370. *Compare* MICH. COMP. LAWS § 600.5805(8) (2024) (imposing a two-year period of limitations for actions charging malpractice), *with id.* § 600.5807(9) (establishing a six-year limitations period for an action to recover damages or money due for breach of contract).

371. Saad v. Rodriguez, 506 N.E.2d 1230, 1231 (Ohio Ct. App. 1986).

372. *Id.* at 1231.

373. *Id.*

374. *Id.* at 1231–32.

375. *Saad*, 506 N.E.2d at 1232.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Saad*, 506 N.E.2d at 1232.

380. *Id.*

381. *See id.* at 1232, 1234.

382. *Id.* at 1233.

and thus constituted escrow services."[383] It was therefore necessary to remand the case to the trial court to determine (1) which actions by the firm were legal services and thus time-barred under the one-year statute of limitations for legal malpractice; and (2) which actions reflected escrow agent services under the purchase agreement and were governed by the 15-year statute of limitations for written contracts.[384] If the alleged misconduct was committed as an escrow agent, the action would then proceed to decide proximate cause and damages.[385]

Mizrahi v. Valdes-Fauli, Cobb & Petrey, P.A.[386] is a simpler case. There, lawyer Rodney Petrey and his law firm (VFCP) represented Genway Corp. in selling land to Isaac Mizrahi and Ralph Mizrahi.[387] Petrey and VFCP also acted as the escrow agent in connection with the sale.[388] The Mizrahis sued Petrey and VFCP for fraud and breach of fiduciary duty as escrow agent.[389] The trial court dismissed the case as being barred by Florida's two-year statute of limitations for professional malpractice claims.[390] In reversing the trial court, the *Mizrahi* court explained that an escrow agent does not qualify as a professional under the Florida statute because a person can serve as an escrow agent without a four-year college degree.[391] Whatever benefits Petrey and VFCP may have derived from their legal knowledge in serving as escrow agent, they were not acting as the Mizrahis' lawyers.[392] Accordingly, Florida's four-year statute of limitations applicable to range of actions, rather than the two-year professional malpractice statute of limitations, controlled.[393]

For plaintiffs, a practical solution to statute of limitations concerns is to sue within the shortest potentially applicable limitation period. Timing may also dictate the causes of action a plaintiff pursues. To use the example mentioned earlier, there might be a case where the plaintiff's tort claims are time-barred but a breach of contract claim is not.

383. *Saad*, 506 N.E.2d at 1233.
384. *Id.* at 1233–34.
385. *Id.* at 1234.
386. 671 So.2d *805 (Fla. Dist. Ct. App. 1996).
387. *Id.* at *806.
388. *Id.*
389. *Id.*
390. *Id.*; *see also* FLA. STAT. § 95.11(5)(b) (2024) (referencing statute of limitation at issue in *Mizrahi*).
391. *Mizrahi*, 671 So.2d at *806.
392. *Id.*
393. *Id.*

IV. THE NEED FOR EXPERT TESTIMONY CONCERNING ESCROW AGENTS' LIABILITY

If a party timely sues a lawyer-escrow agent for breach of fiduciary duty, negligence, or other causes of action, both the plaintiff and the defendant may question the need for expert testimony to establish the lawyer-escrow agent's liability. When a lawyer is in a dual role as an escrow agent, there is authority for the proposition that the lawyer's misjudgments or misconduct in handling the escrow may reasonably be considered malpractice.[394] Although not as direct, a court's assertion that "[a]n attorney serving as an escrow agent has a fiduciary duty to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property" arguably implies the application of a professional negligence test when evaluating a lawyer-escrow agent's conduct.[395] How a lawyer-escrow agent's role is characterized matters because courts normally require expert testimony to prove professional negligence,[396] including legal malpractice.[397] Likewise, expert testimony is generally necessary to establish lawyers' breaches of fiduciary duty because the related standards may not be within jurors' common knowledge.[398]

On the other hand, expert testimony is not required in a legal malpractice case "where the alleged errors are so simple and obvious that it is not necessary for an expert's testimony to demonstrate the breach of the attorney's standard of care."[399] Nor is expert testimony necessary to

394. *See* Conn. Eth. Op. 99-17, *supra* note 199, at *1 (assuming the parties do not limit the lawyer-escrow agent's actions).

395. Fla. Bar v. Marrero, 157 So.3d 1020, 1024 (Fla. 2015).

396. MALLEN, *supra* note 42, § 37:123, at 1430.

397. *See, e.g.,* O'Shea v. Lindenberg, 278 Cal. Rptr. 3d 654, 661 (Ct. App. 2021) ("The general rule is that expert evidence is required to establish legal malpractice."); Kuehl v. Koskoff, 190 A.3d 82, 93–94 (Conn. App. Ct. 2018) ("Expert testimony is required because to know the outcome if an attorney had not been negligent is beyond the ken of the ordinary trier of fact."); Mitzel v. Vogel Law Firm, Ltd., 11 N.W.3d 717, 722 (N.D. 2024) ("Generally, expert testimony is necessary to establish the professional's standard of care (duty) and whether the professional's conduct in a particular case deviated from that standard of care (breach of duty)." (quoting Johnson v. Bronson, 830 N.W.2d 595, 603–04 (N.D. 2013))); Loepp v. Ford, 550 P.3d 96, 101 (Wyo. 2024) (citation omitted) ("Expert testimony is generally required to establish the standard of care, a breach of that standard, and whether that breach was a proximate cause of the plaintiff's injuries. The expert is needed because 'most lay people are not competent to pass judgment on legal questions.'").

398. MALLEN, *supra* note 42, § 37:124, at 1441.

399. Fahey Banking Co. v. Grady & Assocs., 234 N.E.3d 1103, 1111–12, 1114 (Ohio Ct. App. 2024); *see also O'Shea*, 278 Cal. Rptr. 3d at 661 (stating that expert testimony is not required where the lawyer's malpractice is "utterly egregious and obvious"); Rice v. Poppe, 881 N.W.2d 162, 169 (Neb. 2016) (footnote omitted) ("Under the common-knowledge exception, expert testimony is not needed if the alleged negligence is within the comprehension of laypersons."); Kendall v. Utah Est. Planners PLLC, 534 P.3d 1140, 1148 (Utah Ct. App. 2023) ("If an attorney's error is obvious, even

prove a lawyer's breach of fiduciary duty if the alleged breach does not require specialized expertise or knowledge by the factfinder.[400]

Analogizing the general need for expert testimony in legal malpractice and breach of fiduciary cases against lawyers to the need for such testimony in lawsuits against escrow agents, however, is not necessarily a fair comparison. Escrow agent services—even if performed by a lawyer—are non-legal services.[401] Outside of legal malpractice and other professional negligence cases, expert testimony is only periodically required. For example, federal courts permit expert testimony with some conditions if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[402] For expert testimony to help a jury or court and thus to be admissible, it "must be outside the common knowledge or function of the fact finder."[403] As a Kansas court similarly explained that state's law, "expert testimony is not required to establish causation and deviations from the reasonable standard of care in cases involving nonprofessional services or subject matter within common knowledge of the lay juror."[404]

Given escrow agents' special role, the additional factors in play when an escrow agent is a lawyer concurrently representing a client in the transaction, the varying allegations of wrongdoing that may be made, and the fact-specific nature of litigation, it is not surprising that courts differ on the need for expert testimony in cases against escrow agents.[405] Some courts have reasoned that expert testimony is required to establish an

to a layperson, a plaintiff is entitled to present the case to the factfinder even without the assistance of a legal expert witness.").

400. *See, e.g.*, Lane v. Oustalet, 873 So. 2d 92, 99 (Miss. 2004) (concluding that expert testimony was not required where a closing attorney allegedly breached his fiduciary duty by not informing home buyers about termite damage to the house).

401. Ne. Credit Union v. CUMIS Ins. Soc'y, Inc., No. 09-cv-88-SM, 2010 WL 2108296, at *4 (D.N.H. May 24, 2010); *see* Harlandale Indep. Sch. Dist. v. Cornyn, 25 S.W.3d 328, 332 (Tex. App. 2000) (stating that a lawyer is "employed in a non-legal capacity" when acting as an "escrow agency").

402. FED. R. EVID. 702.

403. Dew v. E.I. du Pont de Nemours & Co., No. 5:18-CV-73-D, 2024 WL 4349883, at *3 (E.D.N.C. Sept. 30, 2024).

404. S.B. v. Sedgwick Cnty. Area Educ. Servs. Interlocal Coop. #618, 556 P.3d 902, 908 (Kan. Ct. App. 2024).

405. *See, e.g.*, Cap. Rivers Enters., LLC v. Abod, 301 A.3d 1234, 1243 (D.C. 2023) (implying that expert testimony *might* be required to establish that the escrow agent had a duty to determine whether a document was forged).

escrow agent's liability because most people do not know how escrow accounts operate.[406]

Other courts have permitted expert testimony concerning an escrow agent's duties and their alleged breach without deciding whether such testimony was *required*.[407] On the other hand, several courts have held that plaintiffs were not required to offer expert testimony to prove escrow agents' liability.[408] In *JGD, LLC v. American Title Service Agency, LLC*, for example, the court held that "an escrow agent's duties to strictly comply with the escrow agreement and to disclose evidence of fraud are not beyond a layperson's common understanding and can be determined without expert testimony."[409] Similarly, in *Pettennude v. Transnation Title Insurance Co.*, the court concluded that properly instructed jurors did not need expert assistance to decide whether the escrow agent had reason to suspect fraud in the transaction at issue.[410]

In *Zaftr Inc. v. Lawrence*, the court concluded expert testimony was not required to support two of the plaintiff's theories against the lawyer-escrow agent.[411] *Zaftr* arose out of aborted Bitcoin transactions in which the defendants who facilitated the convoluted deals allegedly acted in concert to defraud Zaftr Inc. (Zaftr).[412] The defendants included BVFR & Associates, LLC (BVFR), which played a leading role in the affair, and lawyer John Kirk and his firm, Kirk Law PLLC (collectively, Kirk), who represented BVFR in the transactions and served as escrow agent.[413]

406. *See, e.g.*, Roman v. Sage Title Grp., LLC, 146 A.3d 479, 495 (Md. Ct. Spec. App. 2016) (concluding expert testimony was required to establish the escrow agent's negligence "because most lay people are not familiar with the operation of escrow accounts").

407. *See, e.g.*, McLaughlin v. Langrock, Sperry & Wool, LLP, No. 2:19-cv-0012, 2020 WL 3118646, at *8 (D. Vt. June 12, 2020) (involving a lawyer-escrow agent); Pleasant Valley Biofuels, LLC v. Sanchez-Medina, No. 13-23046-CIV-COHN/SELTZER, 2014 WL 11881019, at *5–6 (S.D. Fla. Nov. 21, 2014) (relying on an expert witness's testimony concerning the lawyer-escrow agent's duty of care in denying a post-trial motion).

408. *See, e.g.*, Mago v. Ariz. Escrow & Fin. Corp., No. 1 CA-CV 19-0753, 2021 WL 829259, at *3 (Ariz. Ct. App. Mar. 4, 2021) (involving a simple real estate transaction and stating that a reasonable escrow agent's ability to "perceive potential fraud is not necessarily beyond a layperson's understanding"); Penklor Props. LLC v. Buehler, No. W2018-00630-COA-R3-CV, 2019 WL 1343583, at *6 (Tenn. Ct. App. Mar. 25, 2019) (holding that expert testimony was not required where the escrow agent improperly released funds under suspicious circumstances and for purposes neither contemplated in the escrow agreement nor related to the underlying transaction).

409. JGD, LLC v. Am. Title Serv. Agency, LLC, No. 1 CA-CV 10-0466, 2011 WL 3475392, at *4 (Ariz. Ct. App. Aug. 9, 2011) (holding that an escrow agent's duties to strictly comply with an escrow agreement and disclose fraud are not beyond a layperson's common understanding and does not require expert testimony).

410. Pettennude v. Transnation Title Ins. Co., No. 2:07-cv-2071-HRH, 2009 WL 10673445, at *12 (D. Ariz. May 6, 2009).

411. Zaftr Inc. v. Lawrence, No. 21-2177, 2023 WL 349256, at *26 (E.D. Pa. Jan. 20, 2023).

412. *See id.* at *1 (summarizing the disputed transactions).

413. *See id.* at *1–2 (detailing the roles of each party in the dispute).

Among its many claims against the various defendants, Zaftr sued Kirk for negligent misrepresentation for Kirk's alleged role in inducing Zaftr to enter into the failed transactions and for breach of contract in improperly disbursing funds from the escrow account.[414] Kirk argued that Zaftr had to support its negligent misrepresentation claim with expert testimony because it was basically a legal malpractice claim, and controlling Pennsylvania law required expert testimony to establish legal malpractice.[415] Kirk also contended that expert testimony was necessary because his alleged misconduct was beyond lay jurors' understanding.[416]

The court first rejected Kirk's argument regarding the need for expert testimony on Zaftr's negligent misrepresentation claim because Zaftr did not sue Kirk for legal malpractice.[417] The court explained its reasoning by quoting from an order entered earlier in the case excluding proposed expert testimony:

> The first issue . . . is that . . . as defendants, Kirk and his law firm do not have the power to decide what claims Plaintiff asserts against them. . . . The second problem is that though the Kirk Defendants maintain that any claims asserted against them when they were "acting as counsel in the applicable transactions" must be "viewed through that lens" of a legal malpractice claim, they cite no authority in support of this position. . . . [T]he Kirk Defendants' third issue is that their position does not sound in logic. It cannot be the case that any and all claims brought against a lawyer or a law firm somehow transform into ones for legal malpractice.[418]

Second, to the extent Kirk argued that expert testimony was necessary to make a submissible negligence case against a lawyer, Pennsylvania law offered no support.[419] The Third Circuit case Kirk cited as authority for this argument was inapposite.[420] For that matter, Pennsylvania law does not mandate expert testimony in all legal malpractice cases.[421]

Third, Zaftr's claims against Kirk did not present issues beyond average jurors' skills or knowledge but instead raised basic questions that jurors with ordinary experience could answer in framing the standard of

414. *See id.* at *25–26 (discussing Zaftr's negligent misrepresentation and breach of contract claims against Kirk).

415. *Id.* at *25.

416. *Id.* (quoting Lentino v. Fringe Emp. Plans, Inc., 611 F.2d 474, 480–83 (3d Cir. 1979); then citing Ovitsky v. Cap. City Econ. Dev. Corp., 846 A.2d 124, 126 (Pa. Super. Ct. 2004)).

417. *Zaftr Inc.*, 2023 WL 349256, at *25.

418. *Id.* (citation omitted) (quoting Order, Zaftr Inc. v. Lawrence, No. 21-2177, 1, 2 (Aug. 26, 2022)).

419. *Id.*

420. *Id.* (referring to *Lentino*, 611 F.2d at 480–83).

421. *Id.* (citing Rizzo v. Haines, 555 A.2d 58, 67 (Pa. 1989)).

care.[422] Zaftr's tort claims against Kirk did not arise out of Kirk's role as escrow agent or as BFVR's lawyer; rather, they presented routine conspiracy and misrepresentation theories easily within typical jurors' wheelhouse.[423]

Kirk also argued that Zaftr's breach of contract claims required expert testimony.[424] According to Kirk, a lawyer's contractually defined duties raise fact issues beyond ordinary jurors' understanding.[425] The court again disagreed, reasoning that Zaftr's contract claims involved no issues "outside of the ken of an ordinary juror."[426]

Zaftr is not a typical case against a lawyer-escrow agent because Zaftr's claims against Kirk seemingly focused little on Kirk's escrow agency and instead targeted his broader role in the failed transactions. The case is, however, instructive in at least two respects. First, lawyer-escrow agents' argument that expert testimony should be required to establish their liability by analogy to legal malpractice cases loses force if a plaintiff does not allege the lawyer-escrow agent's professional negligence.[427] Second, a court is unlikely to require expert testimony where the lawyer-escrow agent's liability is predicated on fraud or breach of contract because related determinations are generally within lay jurors' common or ordinary experience.[428] Of course, courts' general aversion to expert testimony on those two subjects does not mean they will always exclude it; every case pivots on its own facts.

Setting *Zaftr* aside, the fact that expert testimony may not be essential to establishing a lawyer-escrow agent's liability does not necessarily mean that lawyers for either side should forgo expert testimony. Although expert testimony may not be required to establish or defeat a lawyer-escrow agent's liability, that does not mean it is inadmissible. There may be cases where expert testimony is beneficial even if it is not required.

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422. *Id.* at *26.

423. *Id.*

424. *Id.*

425. *See Zaftr Inc.*, 2023 WL 349256, at *26 (quoting Hemphill v. Siegel, No. 866 EDA 2015, 2016 WL 266587, at *5 (Pa. Super. Ct. Jan. 21, 2016)).

426. *Id.*

427. *See id.* at *25 (indicating that expert testimony is not required to establish a lawyer-escrow agent's liability, especially when the case is not a professional negligence case against the lawyer-escrow agent).

428. *See id.* at *26 (concluding that Zaftr's tort claims are simple issues where laypersons do not need expert testimony to understand the conflict); *see also supra* notes 409–413 and accompanying text (providing examples of when a court is unlikely to require expert testimony where the lawyer-escrow agent's liability is predicated on fraud or breach of contract).

V. APPLYING THE ATTORNEY-CLIENT PRIVILEGE TO LAWYER-ESCROW AGENTS

Finally, and as previously noted, courts view escrow agent services—even if performed by a lawyer—as non-legal services.[429] This categorization is critical where lawyer-escrow agents are concerned because of the applicability or inapplicability, as the case may be, of the attorney-client privilege to their communications with their clients.[430] After all, the attorney-client privilege attaches only to confidential communications between a lawyer and client made for the purpose of giving or receiving legal advice.[431] When a lawyer serves a client in a manner "that is not legal in nature," on the other hand, their communications are not privileged.[432] Phrased another way, when a client engages a lawyer to perform services a non-lawyer could deliver as easily, "then the client is not a 'client' for purposes of the attorney-client privilege."[433] It might be just as accurate, though, to say that when a client engages a lawyer not to provide legal services but rather to perform services that a non-lawyer could perform as readily, then the lawyer is not a "lawyer" for purposes of the attorney-client privilege.

Consistent with the general rule that clients' communications with lawyers acting in other capacities are not protected by the attorney-client privilege,[434] it is now an entrenched principle that lawyers' actions or

429. Ne. Credit Union v. CUMIS Ins. Soc'y, Inc., No. 09-cv-88-SM, 2010 WL 2108296, at *5 (D.N.H. May 24, 2010); Harlandale Indep. Sch. Dist. v. Cornyn, 25 S.W.3d 328, 332 (Tex. App. 2000).

430. The attorney-client privilege applies to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." RESTATEMENT (THIRD) OF THE L. GOVERNING LAW. § 68 (AM. L. INST. 2000); *see also id.* § 70 (specifying the meaning of "privileged persons" in § 68 to include the client or prospective client, the lawyer, agents of the client or prospective client and the lawyer who facilitate communications between them, and agents of the lawyer who assist in the client's representation).

431. *See* Baines v. City of Atlanta, Ga., No. 1:19-CV-0279-TWT-JSA, 2020 WL 10058115, at *1 (N.D. Ga. Oct. 2, 2020) ("[T]he proponent of the attorney-client privilege must show, irrespective of whether one or more lawyers sent or received the communication, that the communication was confidential and that the primary purpose of the communication was to relay, request or transmit legal advice."); *In re* People In Interest of J.P., 538 P.3d 337, 343 (Colo. 2023) ("[T]he privilege applies to 'confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations.'" (quoting People v. Lesslie, 24 P.3d 22, 26 (Colo. App. 2000))).

432. Gaddy v. Terex Corp., 1:14-cv-1928-WSD, 2015 WL 13545486, at *3 (N.D. Ga. Oct. 28, 2015).

433. Thomas v. Marshall Pub. Schs., 690 F. Supp. 3d 941, 958 (D. Minn. 2023) (quoting Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603 (8th Cir. 1977)).

434. *See* S.F. Pac. Gold Corp. v. United Nuclear Corp., 175 P.3d 309, 318 (N.M. Ct. App. 2007) ("The privilege protects communications generated or received by an attorney giving legal advice but does not protect communications derived from an attorney . . . acting in some other capacity.").

communications as escrow agents do not implicate the privilege.[435] *In re Reyes*[436] is a representative case. The lawyer in *In re Reyes*, Linda Tirelli, represented debtors in Chapter 13 bankruptcy cases.[437] Tirelli assured the bankruptcy court she was holding the debtors' post-petition mortgage payments in escrow for creditors' benefit when, in fact, she often was not escrowing those payments.[438] When her misrepresentations were exposed, the court ordered her to show cause why she should not be sanctioned.[439]

In opposing sanctions, Tirelli argued that her ethical obligations prevented her from informing the court that the debtors were not paying into the escrow.[440] The court rejected Tirelli's apparent argument that reports of the debtors' payments for the benefit of creditors or lack thereof were protected by the attorney-client privilege.[441] The payments,

435. *See In re* Reyes, 651 B.R. 99, 144 (Bankr. S.D.N.Y. 2023) (quoting Raspberry Junction Props. LLC v. Edwards Fam. P'ship LP, 3:18-cv-01243-WWE, 2019 WL 2602871, at *1 (D. Conn. June 25, 2019)) (finding that when holding money in escrow, an attorney is acting as an escrow agent for the funds, not as an attorney); *see, e.g.*, United States v. Davis, 636 F.2d 1028, 1044 (5th Cir. 1981) (footnote omitted) ("An attorney who acts as his client's . . . agent for receipt or disbursement of money or property to or from third parties . . . is not acting in a legal capacity, and records of such transactions are not privileged."); *Raspberry Junction Props.*, 2019 WL 2602871, at *1 (stating that communications about escrow arrangements were not privileged because they did not involve legal advice); CCS Assocs., Inc. v. Altman A.M.A., Inc., No. CIV. A. 93-4725, 1994 WL 176898, at *2 (E.D. Pa. May 9, 1994) ("[C]ourts have specifically held that an attorney in the role of escrow agent does not transform communications pertaining to the administration of the escrow account into privileged documents."); Olive v. Isherwood, Hunter & Diehm, 656 F. Supp. 1171, 1174 (D.V.I. 1987) (passing money through a lawyer's escrow account does not cloak an otherwise unprivileged transaction); Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376, 1378 (Fla. Dist. Ct. App. 1980) ("[W]here a lawyer is . . . employed to act simply as an agent to perform some non-legal activity for a client the authorities uniformly hold there is no privilege."); Att'y Grievance Comm'n of Md. v. Zdravkovich, 852 A.2d 82, 95 (Md. 2004) ("Escrow account bank records are not subject to the confidentiality requirements of . . . the attorney-client privilege."); Greenwood Tr. Co. v. Andrew F. Capoccia Law Ctr., L.L.C., 706 N.Y.S.2d 844, 846 (Sup. Ct. 2000) (concluding that funds placed in escrow accounts to fund a debt reduction program were not submitted for the purpose of seeking legal advice and services and therefore were subject to attachment and execution); Art Bd., Inc. v. Worldwide Bus. Exch. Corp., 510 N.Y.S.2d 973, 974 (Civ. Ct. 1986) (holding the attorney-client privilege does not prevent inquiry into whether a lawyer is holding money on a client's behalf because "an attorney holds funds or property in escrow in his capacity as escrow agent rather than as attorney providing legal advice or representation."); Randy Int'l, Ltd. v. Automatic Compactor Corp., 412 N.Y.S.2d 995, 998 (Civ. Ct. 1979) (citations omitted) (stating that lawyers holding money in escrow for clients are not "acting as attorneys at all," such that disclosing whether money is held in escrow "does not involve the giving of evidence of a 'confidential' communication made 'in the course of professional employment'").

436. *In re Reyes*, 651 B.R. at 99.

437. *Id.* at 108.

438. *Id.*

439. *Id.* at 110–11.

440. *Id.* at 144.

441. *In re Reyes*, 651 B.R. at 144.

whether made or missed, were simply facts contained in documents voluntarily filed with the court and thereafter matters of public record.[442]

Furthermore, in holding money in escrow, Tirelli was not acting as a lawyer, "but rather in the non-legal capacity of an escrow agent for those funds."[443] And, the court continued, it was "well established that 'an attorney's actions as an escrow agent do not implicate the attorney-client privilege.'"[444] Ultimately, the court sanctioned Tirelli by referring her to the judicial district's grievance committee for investigation and possible discipline, and by directing her to provide a copy of the court's decision to the judge in any bankruptcy case in which she represented the debtor.[445]

In summary, lawyer-escrow agents should assume that any communications with their clients while functioning as escrow agents are not privileged. They should also advise their clients of that aspect or effect of their dual roles in agreeing to serve as escrow agents.[446]

Lawyer-escrow agents' assumption of dual roles, however, also means courts must consider the roles separately when deciding the application of the attorney-client privilege to lawyer-escrow agents' communications with their clients.[447] Although lawyer-escrow agents' communications with their clients communications while fulfilling their escrow agent responsibilities will not be privileged, communications with their clients while serving as the client's lawyer will be protected by the attorney-client privilege so long as all elements of the privilege are met.[448] The lawyer-escrow agent's dual roles do not abrogate the attorney-client privilege in situations where the lawyer-escrow agent communicates with

442. *See id.* (explaining that the payments in dispute are considered facts in a document voluntarily submitted to the court).

443. *Id.*

444. *Id.* (quoting Raspberry Junction Props. LLC v. Edwards Fam. P'ship LP, 3:18-cv-01243-WWE, 2019 WL 2602871, at *1 (D. Conn. June 25, 2019)).

445. *In re Reyes*, 651 B.R. at 145–46.

446. *See* MODEL RULES OF PRO. CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2024) (obligating a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"); *id.* r. 1.4(b) (requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

447. *See generally* EDNA S. EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 443 (6th ed. 2017) ("Lawyers often wear two hats. And a communication may be relevant to both capacities. Thus, it is often necessary to determine in what capacity the particular communication was made.").

448. *See, e.g.*, Skorman v. Hovnanian of Fla., Inc., 382 So. 2d 1376, 1378 (Fla. Dist. Ct. App. 1980) ("Regardless of their acting as escrowee of the deposit money, the law firm continued to represent the petitioner and correspondence between them and their client which would ordinarily fall within the purview of the privilege should be none the less privileged because of the performance of that additional function.").

the client as the client's lawyer.[449] Again, the roles of lawyer and escrow agent are separate and distinct.[450] The challenge for lawyer-escrow agents is ensuring their clients understand the differences in the roles and their effects when they communicate.

CONCLUSION

Clients sometimes ask their lawyers to serve as escrow agents in connection with transactions in which the lawyer represents the client. Regardless of the specific situation, lawyers are generally permitted to serve as escrow agents concerning their clients' transactions so long as all parties involved knowingly consent to the arrangement. Whether a lawyer *should* serve as an escrow agent in a matter in which the lawyer also represents the client is a risk management question different lawyers and law firms may answer in various ways. Lawyers who agree to serve in a dual capacity as escrow agent must understand the fiduciary duties they are assuming as escrow agents. They must also help their clients understand those duties and other issues that attend their service as escrow agents, such as the attorney-client privilege implications. Lawyers may also want to consider taking some basic risk management measures, at a minimum including in the escrow agreement (1) explicit instructions regarding their duties as escrow agent; (2) a dispute resolution procedure should the parties disagree over the disposition of the escrowed funds or property; and (3) a provision stating that, in the event of a dispute between the parties over the escrow or the underlying transaction, the lawyer-escrow agent may resign as escrow agent, deliver the escrow to a new agent, and thereafter represent her client in the parties' dispute. Lawyers planning to assume dual roles as escrow agents are also wise to confirm they have coverage for their service as escrow agents under their professional liability insurance policies.

449. *See id.* ("[A]ny correspondence between the petitioner and his lawyers relative to his transaction which is privileged under the principles heretofore discussed should not be produced.").

450. Saad v. Rodriguez, 506 N.E.2d 1230, 1233 (Ohio Ct. App. 1986); Moore v. Weinberg, 681 S.E.2d 875, 878 (S.C. 2009).