



Committee on Professional Ethics

ETHICS OPINION #89-6

Topic: Escrow Funds

Digest: An attorney, as escrow agent may release escrow funds for the payment of taxes, so long as there is full disclosure.

Code: DR 9-102, 9-102(B)

QUESTION

MAY AN ATTORNEY, ACTING AS ESCROW AGENT, RELEASE ESCROW FUNDS FOR THE PAYMENT OF REAL ESTATE TAXES, EVEN THOUGH THE CLIENT REFUSES TO AUTHORIZE THE RELEASE, WHERE IT IS CLEAR THAT THE TAXES HAVE NOT BEEN PAID?

OPINION

NYSBA Professional Ethics Committee Opinion #575 states that an attorney for one party to a real estate transaction may act as escrow agent for both parties, provided that there is full disclosure of the facts and that the agent acts with the consent of both parties.

As such escrow agent, the attorney owes fiduciary duties to both parties to the contract, with regard to the preservation, safekeeping and use of such funds.

If the escrow agent acts in good faith and without negligence in releasing escrow funds, he is acting properly.

In the case presented, the Committee is hampered by not being able to review the escrow agreement in question. However, the facts, as presented, indicate that the seller's attorney was acting as the escrow agent for both parties, and was holding funds pending verification that real estate taxes remained unpaid. The seller received a refund from his bank of funds which the bank had been holding for the payment of the taxes. Now, seller refuses to authorize the release of the escrow funds being held by his attorney for the payment of taxes.

It is clear that the escrow agent owes a duty to the buyer to release the escrow funds for the payment of the taxes. The escrow fund was created for just that purpose. As long as proof is given to the escrow agent to show that the taxes were not paid, and that there is an amount owed for those taxes, the attorney-escrow agent has a duty to pay the taxes. If the escrow agent were to refuse to fulfill his obligations, then the interest on those taxes would mount, and he could, as a consequence thereof, be found to be acting in bad faith.

CONCLUSION

For the reasons hereafter stated, the question posed is answered in the affirmative.
