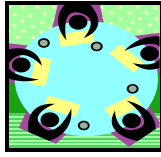


ETHICS AND THE ESCROW OFFICER



PRESENTED BY
Teresa Frost, CTIA
Texas Agency Manager



National Investors' Title Insurance Company
INNOVATIVE BY INSTINCT

INTRODUCTION

Explore the ethical situations and considerations escrow officers and attorneys who are handling and closing real estate transaction are placed in on a daily basis



ADDRESSING THE QUESTIONS

Is there a duty to explain the effect of the parties' acts or to question the parties' business decisions in the escrow transaction?

Is there a duty to disclose information about the state of title?

WHAT IS ETHICS?

Discipline of dealing With what is good and bad

Set of or a theory of moral principles and values

A guiding philosophy

Doing the right thing



Conduct

“Conduct” is defined in the 2013 Merriam Webster, Inc. Dictionary as:



- ▶ *the act, manner, or process of carrying on*
- ▶ *a mode or standard of personal behavior especially as based on moral principles*



OATH OF A TEXAS LAWYER



To support the Constitution of the United States and the State of Texas

To honestly demean himself in the practice of law

To discharge the attorney's duty to his client to the best of the attorney's ability

REALTOR CODE OF ETHICS

- ▶ Adopted 1913
- ▶ Detailed document spells out professional responsibilities
- ▶ Based on professionalism and protection of the public
- ▶ 17 Articles and related Standards of Practice.



WHO MAKES THE ETHICAL DECISION IN YOUR OFFICE

Title Insurance Underwriter?

Title Agent/Escrow Agent?

Morgan Stanley?



LEGAL REALITY VERSUS PRACTICAL REALITY

Because of the possibility of litigation, the escrow agent is often in a "no win" situation.

Ultimate decision must be a practical one



THE ESCROW RELATIONSHIP

Written instrument that imports a legal obligation. What is this instrument? Do we receive instructions from more than one party?

Hold money or property until the happening or non-happening of a specific event in accordance with the escrow instructions



Tasks of the Escrow Agent

They vary transaction to transaction, and include, but are not limited to:

1. Receiving and depositing earnest money and loan disbursements
2. Ordering loan payoffs
3. Supervising the execution of closing documents



Tasks of the Escrow Agent

4. Determining tax payoffs
5. Preparing the settlement statements
6. Determining that closing documents are prepared in accordance with the real estate contract and the lender's closing instructions
7. Disbursing settlement funds
8. Reporting federal income tax information to the IRS- and
9. Recording closing documents

The acceptance and execution of these tasks demonstrate that an escrow relationship is created in the typical real estate transaction.

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GENERAL DUTIES- LIMITED FIDUCIARY

Under the law of agency, an agent owes a fiduciary duty to its principal.

This creates a relationship of trust and confidence.



fiduciary duty generally consists of:

Duty of loyalty

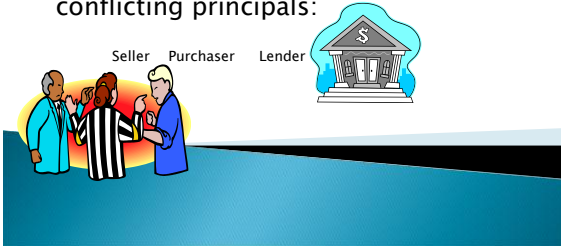
Duty to make full disclosure

Duty of confidentiality- and

Duty to exercise a high degree of care



The law of agency is not necessarily applicable to a real estate transaction. Instead of one principal, the escrow agent serves two or three potentially conflicting principals:



An escrow agent cannot owe each party to a real estate transaction full fiduciary duties–

For example, how can you reconcile a duty of loyalty and confidentiality to one party, yet a duty of full disclosure to the other?





The potential conflict between the parties is the very reason there is a need for an agent.

Since the escrow agent owes duties to both parties, courts have recognized that the escrow agent is a LIMITED FIDUCIARY.



As a limited fiduciary, the escrow agent is a neutral stakeholder whose primary duties are:



Remain neutral– and

Carry out the instructions
of the escrow agreement

GENERAL DUTIES- GOOD FAITH AND NO SELF-DEALING

As a neutral stakeholder, escrow agent must act with utmost good faith and avoid any act of self-dealing– cannot profit from the transaction



Attorneys– must be conscious of the Rules of Professional Conduct that govern “conflicts of interest”

Key– avoid conflicts of interest or make full disclosure



GENERAL DUTIES- NO DUTY TO DISCOVER AND DISCLOSE FRAUD?



Generally, there is no duty to investigate and discover fraud.

A neutral stakeholder cannot remain neutral if required to investigate and disclose whether, in his opinion, one party is attempting to defraud the other.

Most courts recognize this “no win” situation for the escrow agent.



If the escrow agent makes a disclosure of fraud to one party and it proves to be incorrect, he runs the risk of a suit for tortious interference of contract, slander, or other legal action.

Caution: There have been cases in other states that hold if the escrow agent becomes aware of fraud, it must be disclosed to the parties to the escrow.



**GENERAL DUTIES- NO DUTY TO ADVISE
PARTIES OF THE CONSEQUENCES OF
THEIR ACTIONS OR GIVE LEGAL ADVICE**



The escrow agent is not the attorney for either party, and is not required to “police” the transaction

No duty to explain the legal effect of documents



GENERAL DUTIES- NO DUTY TO DISCLOSE THE STATE OF TITLE

In Texas, the courts recognize and hold that:

A title policy is a contract of indemnity– not a guarantee or warranty that title is good

A title examination is done for the benefit of the title company only



DUTIES IMPOSED BY SPECIFIC FEDERAL AND STATE STATUTES

In addition to general fiduciary duties, the escrow agent must follow the legal requirements set forth in various federal/state statutes and regulations related to the closing of a real estate transaction.



Examples of Texas Insurance Regulations:

Rate Rule R-2– Consent of all parties to the “pass-through” of the title insurance premium on a “flip transaction”

Procedural Rule P-11– no “insuring around” a known lien in certain circumstances without the written consent of the insured



SUGGESTED PROCEDURES

Get a written escrow agreement signed by all parties

Do not take sides

Follow the escrow instructions

Obtain written confirmation of modifications to the escrow instructions



SUGGESTED PROCEDURES

Avoid all appearances of "self dealing"

Do not give legal advice

Avoid temptation to explain effect or purpose of documents

Silence is "golden" (generally)



SUGGESTED PROCEDURES

Be careful about making disclosures—it is not the duty of the escrow agent to investigate and discover fraud – but you may have a duty to disclose known or suspicions of fraud

If you are uncomfortable or concerned, exercise your right to withdraw from the transaction



SUGGESTED PROCDURES

Do not make representations about the status of title.
The only duty is to provide a copy of the title commitment
to the potential insured.



OUR RESPONSIBILITES

Remain Neutral
Carry out the instructions of the Contract
Carry out the instructions of the Lender's Closing Instructions
Prepare the Settlement Statement
Review the Legal Documents
File all Necessary Documents for Record
Be Honest
Don't Lie
Ask Questions – Remember Silence is now always Golden