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Malpractice Prevention Education for Oregon Lawyers

Lawyers Acting as Escrow Agents Excluded Under PLF Plans

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The PLF has encountered a number of claims in which the lawyer has been acting in the role of an escrow agent. A claim is then made arising from the release, or failure to release the funds. While there were various reasons under the previous Plan language that these types of claims generally fell outside coverage, the PLF decided to address these types of claims through an additional exclusion. We wanted to make sure the scope of this risk, including the likely lack of coverage already in place, was specifically called to the attention of lawyers who may consider acting in the role of an escrow agent.

For the reasons discussed below, acting as an escrow agent either exposes a lawyer to heightened risks arising from actual or alleged conflicts or is not the type of professional service a lawyer should perform. Further, the risks of serving as an escrow agent can be highly disproportionate to the fee charged by the lawyer. Frequently, the lawyer is taking responsibility for very large sums of money for very little reward. As a result, the PLF is of the opinion that if the parties need an escrow agent, they should hire a title company or some other person or entity that regularly provides these services as a neutral.

Taking on the role of an escrow agent is particularly risky if the lawyer is representing one of the parties in the transaction but is also acting as a neutral keeper of the funds. Under some circumstances, these facts may create a conflict and the lawyer risks violation of ethics rules. See, Formal Opinion No. 2005-55.

There are also coverage concerns when the lawyer is acting only as a neutral and does not represent any of the parties. In that situation, there is no attorney-client relationship, a fundamental requirement that is generally necessary to come within the scope of the PLF Plan. In addition, even when the lawyer does not actually represent any of the parties in such a transaction, there is a risk of confusion. One or more of the parties may subjectively believe that the lawyer was representing one or more of the parties, or will take this position in litigation.

The escrow/holding exclusion is intended to apply to cases in which the lawyer is doing the type of work that the PLF believes should be performed by a title company or professional escrow agent. It is not intended to apply to a lawyer holding funds for settlement purposes. It also does not apply to the situation in which a domestic relations lawyer is applying funds held in trust to make payments pursuant to a judgment or an estate-planning lawyer is holding money from the trust until all debts are paid before distribution to the beneficiaries.

For all the foregoing reasons, the 2018 PLF Plan added the following language:

> **21. Escrow/Holding Exclusion.** This Plan does not apply to any Claim arising from a Covered Party entering into an express or implied agreement with two or more parties to a transaction that in order to facilitate the transaction, the Covered Party will hold documents, money, instruments, titles, or property of any kind until certain terms and conditions are satisfied, or a specified event occurs. This exclusion does not apply to a Claim based on: (1) a Covered Party's distribution of settlement funds received from the Covered Party's client, or from an opposing party, in order to close a settlement; or (b) a Covered Party's distribution of funds pursuant to and consistent with a limited or general judgment in a domestic relations proceeding.

The following illustrative examples, not intended to be exhaustive, are provided for the purpose of assisting a Covered Party or court in interpreting the PLF's intent as to the scope of Exclusion 21:

Example 1: Lawyer is hired to act as a neutral third party to hold money in a transaction between non-clients. The parties do not provide written instructions, but agree that the lawyer should determine when it is appropriate to release the money and deliver it to one of the parties. Claims arising from this engagement are excluded. Even if the parties agreed upon and provided the lawyer with written instructions regarding when the money should be delivered, the claims are excluded.

Example 2: Lawyer represents one party to a transaction with another party and pursuant to instructions from both parties, holds money or other property to disburse in accordance with those instructions. Claims arising from this engagement, including the wrongful disbursement or withholding of money or property, are excluded.

Example 3: Lawyer represents one party in a dispute and, upon settlement of the dispute, receives settlement proceeds from the adverse party's lawyer with instructions not to distribute the funds until various contingencies have occurred. Because of an innocent mistake, Lawyer incorrectly believes all contingencies are satisfied and distributes the settlement funds prematurely. Exclusion 21 does not apply to a claim based on this distribution. (But note that Exclusions 2 and 14 would apply to knowingly wrongful distributions or conversion of settlement funds.)

Example 4: Lawyer represents the trustee of a trust and is holding money to be distributed to the trust beneficiaries pending the payment of debts owed by the trust. After payment of the debts, and distribution to the beneficiaries, one of the beneficiaries claims the lawyer negligently paid a debt that was not owed. This claim is not excluded by Exclusion 21 because

the lawyer has not "entered into an express or implied agreement with two or more parties to a transaction" within the intended meaning of Exclusion 21. ■

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