

Ethics Inquiry Question of the Month – April 2026
Lawyer’s Duties as an Escrow Agent When Funds Are Tendered by a Third Person

When a lawyer representing a purchaser in a sales transaction agrees to hold earnest money in escrow in connection with the transaction, but the lawyer receives the earnest money from a third person who is not a party to the transaction, to whom should the lawyer return the funds if the transaction is cancelled?

Quick Answer: The escrow agreement in the contract governing the transaction dictates who, as between the purchaser and seller, receives the earnest money when the transaction is cancelled. If the contract calls for the earnest money to be returned to the purchaser, and a dispute arises between the purchaser and the third person, the lawyer should consult Rule of Professional Conduct 1.15(f).

Analysis: The issue raised has the potential to be covered by both contract law and the Rules of Professional Conduct. First, though, a few initial issues need to be considered. A lawyer acting as an escrow agent in a transaction owes fiduciary duties to both parties to the transaction with regard to the escrow funds. *In re Reich*, 08 CH 100 (Review Bd., June 20, 2012) at 8, *approved and confirmed*, No. M.R. 25504 (Nov. 19, 2012)). When a lawyer agrees to act as an escrow agent in a transaction in which the lawyer represents a party, the lawyer must obtain the informed, written consent to that status from all the parties. *See generally* Rule of Professional Conduct 1.7. Further, the lawyer cannot allow the third person supplying the earnest money to influence the lawyer’s independent judgment in the matter. Finally, the lawyer cannot unilaterally determine whether the escrow conditions have been fulfilled. *Reich*, Review Bd. at 9-11; *In re Lofchie*, 90 CH 370 (Review Bd., Oct. 13, 1993) at 13, *approved and confirmed in part, and restitution amount adjusted*, No. M.R. 9563 (Jan. 25, 1994).

The lawyer should first look at the escrow agreement in the contract governing the transaction to see what it says about who gets all or part of the earnest money based on what circumstances caused the contract to fail. *See Filosa v. Pecora*, 44 Ill. App. 3d 912, 917 (1st Dist. 1976) (disposition of escrow funds is controlled by escrow agreement). If it is agreed or determined by a court or arbitrator that the earnest money is to be forfeited to the seller, then the attorney should pay the earnest money to the seller. If it is agreed or determined by a court or arbitrator that the earnest money is to be returned to the purchaser, then the next step is for the attorney to determine who, as between the purchaser and the third person, should receive the funds. If the purchaser and third person agree who should receive the earnest money funds, the attorney should honor that agreement. If the purchaser and the third person disagree as to who should receive the funds, the lawyer is now holding disputed funds within the meaning of Rule of Professional Conduct 1.15(f), which states:

When in the course of representation a lawyer is in possession of funds or property in which two or more persons (one of whom may be the lawyer) claim interests, the funds or property must be kept separate by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the funds or property as to which the interests are not in dispute.

The dispute can be resolved by way of an agreement between the purchaser and the third person or by way of a court or arbitration order, such as in an interpleader action.