Serving as Escrow Agent Beyond the Contract

Presented by:
LEGAL EDUCATION DEPARTMENT
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SERVING AS ESCROW AGENT

Beyond the Contract

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Serving as escrow agent – An Overview

- Who serves as escrow agent in real estate transactions
- Duties imposed
- Escrow agent liability
- Escrow agency in various contexts
- Escrow disputes and resolution

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Real estate brokers as escrow agent

Subject to statutory requirements

Rules imposed by the DBPR

Enforcement by FREC

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Real estate brokers as escrow agent

A deposit must be

- Delivered to broker no later than the next business day, and
- Deposited into an escrow account no later than the end of the third business day following receipt from customer

61J2-14.008(1)(b), F.A.C.

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Real estate brokers as escrow agent

YES: bank or trust company; title company having trust powers; credit union, savings & loan in Florida

NO: securities firm's account, commingling, more than $1000 of personal or brokerage funds in account

61J2-14.008(2)(a), F.A.C.; 61J2-14.009, F.A.C.; 61J2-14.010(1)&(2), F.A.C.

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Real estate brokers as escrow agent

With written permission, escrow may be maintained in an interest bearing account.

Must name payee entitled to the interest.

Broker may collect the interest if so designated by all of the parties.

61J2-14.014, F.A.C.

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Real estate brokers as escrow agent

If broker elects not to hold escrow:

1) special contract requirements if title company or attorney serves as escrow agent.

2) written verification of receipt of deposits.

61J2-14.008(1)(b), F.A.C.

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Title insurers & title agents

Sec. 628.151, F.S. - title insurer as escrow agent

Sec. 626.8473, F.S. - title agent as escrow agent

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Title agents as escrow agent

Title agent may act as an escrow agent if:

(i) funds are intended to be distributed by agent acting as closing agent,

(ii) in a future real property closing,

(iii) where the agent is expected to issue title insurance in the transaction.

Sec. 626.8473(1), F.S.

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Title agents as escrow agent

Funds are received in a fiduciary capacity.

Immediate deposit to financial institution located within the state which is a member of the FDIC or the National Credit Union Share Insurance Fund.

Sec. 626.8473(2)&(3), F.S.

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Licensed title agents as escrow agent

May deposit into interest bearing escrow account with written consent.

Address disposition of the interest accrual.

Agent not entitled to interest unless seller and buyer voluntarily release their interests.

Rule 69O-186.008, F.A.C.

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Attorneys as escrow agent

Attorney shall deposit all funds received in real estate transaction in which attorney is serving as title or settlement agent into separate trust account.

Trust account subject to underwriter audit unless maintaining funds in a separate account for a particular client would violate applicable rules of the Florida Bar.

Sec. 626.8473(8), F.S.

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Attorneys as escrow agent

Florida Bar Rule 5-1.1 Trust Accounts

Lawyer may maintain own funds in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges

- Nominal or short-term funds must be in an IOTA account
- Non-nominal or long-term funds can be held in interest-bearing account with interest accruing to the client or third person

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Duties of escrow agent

A lawyer must hold the property of others with the care of a professional fiduciary.

Comment to Rule 5-1.1, Rules Regulating the Florida Bar.

The relationship established is that of principal and agent.

The Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996)

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Duties of escrow agent

Generally, an attorney's first duty is to the client, but where attorney is also acting as escrow agent, the attorney may have a duty to third parties.

Fla Bar Ethics Opinion 02-6 (March 7, 2003)

When serving as escrow agent, cannot place client's interest ahead of adverse party who is a principal to the escrow agreement.

The Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996)

Escrow agent bound to terms of escrow agreement, but not to terms of purchase agreement if not a party to same.

Carter Dev. of Mass, LLC v. Howard, 285 So.3d 367 (Fla. 1st DCA 2019)

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Duties of escrow agent

Agent charged with knowledge of express escrow agreement. Absent that, law will imply a legal obligation:

(i) to know the provisions of the principals' agreement, and

(ii) to exercise reasonable skill and ordinary diligence in holding & disbursing the escrowed funds.

United American Bank of Central Florida, Inc. v. Seligman, 599 So.2d 1014 (Fla. 5th DCA 1992)

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Duties of escrow agent

Escrow agent may be liable to third parties, including assignees and third-party beneficiaries

> *United American Bank of Central Florida, Inc. v. Seligman*, 599 So.2d 1014 (Fla. 5th DCA 1992)

But, a narrowly drawn escrow agreement may protect against such claims

> *Resolution Trust Corp. v. Broad & Cassel, P.A., 88*9 F. Supp. 475 (M.D. Fla. 1995)

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Escrow agent & closing agent duties

Escrow agent is under duty to inquire into facts and circumstances surrounding the transaction.

Do not take directions from non-principals.

The Florida Bar v. Marrero, 157 So.3d 1020 (Fla. 2015)

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Escrow Agent & Closing Agent Duties

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

Title agent found guilty of 3 violations of engaging in dishonesty, fraud, deceit or misrepresentation and one violation of trust account rules when:

- Title agent represented to private lender that loan was for a 2d mortgage on a home in need of repairs currently owned by the borrowers;
- Borrowers in fact did not own the property at the time the loan proceeds were disbursed;
- Borrowers did not sign a note and mortgage related to the loan until 25 days after loan proceeds were disbursed;
- Title agent did not record loan documents until 6 months after disbursement in order to hide the second mortgage from the 1st (institutional) mortgage lender; and
- Title agent did not disclose second mortgage on owners' or loan policies.

Title agent found to have violated his duties to both the private and institutional lenders.

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Escrow agent liability

Escrow agents need to know what their E&O policy covers and does not cover

Failure to “safeguard funds” not ambiguous and excluded from coverage

St. Paul Fire & Marine Ins. Co. v. Llorente, 156 So.3d 511 (Fla. 3d DCA 2015)

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Escrow agent liability

Is underwriter liable for escrow agent's errors and improprieties?

It depends!

Sec. 627.792, F.S., imposes liability on insurer for defalcation, conversion or misappropriation by a licensed agent or agency of funds held by agent pursuant to Sec. 627.8473, F.S.

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Escrow agent liability

Does Sec. 627.792, F.S. cover attorneys?

No!

Hechtman v. Nations Title Ins. of NY, 840 So.2d 993 (Fla. 2003)

Reminder: CPLs can cover owner insureds!

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Escrow agent liability

Underwriter not liable for escrow agent's defalcation where escrow agent not identified in PSA as title agent.

> *Winkler v. Lawyers Title Ins. Corp.*, 41 So.3d 414 (Fla. 3d DCA 2010)

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Escrow agent - timeshare

Those who may serve as escrow agent

- Florida Bar attorney
- Licensed title agent or agency
- Title insurer
- Real estate broker
- Bank or other financial institution located within the state with a net worth of more than $5 million.

  Sec. 721.05(14), F.S.

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Escrow agent - timeshare

All funds, including reservation deposits, must be paid into the escrow account.

Sec. 721.08(6), F.S.

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Escrow agent - timeshare

Escrow agent

- Owes a fiduciary duty to each purchaser
- Charged with ensuring that the escrow account is maintained under his direct control and supervision

Sec. 721.08(1), F.S.

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Escrow agent - timeshare

Steep criminal penalties for an escrow agent's violations

- Predicate for RICO Act claim

Sec. 895.02(8)(a)(21), F.S.

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Escrow agent - timeshare

Concept of "independence"

- Not relative or employee of developer
- No financial relationship exists (other than payment of fees for escrow services)
- Escrow funds not to be used to pay compensation to the escrow agent.

Sec. 721.03(7), F.S.

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Escrow agent - timeshare

No disqualification because escrow agent

- Provides nonemployee legal services
- Provides brokerage services
- Provides routine banking services, not including construction financing
- Performs closings for the developer and issues title policies in connection therewith.

Sec. 721.05(20), F.S.

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Escrow agent - timeshare

Collection of real estate taxes is unique

- Single entry on rolls
- Responsibility of managing entity
- Pre-turnover, escrow agent must be retained to hold escrow
- Interest accrual for benefit of owners

Sec. 192.037(6)(d), F.S.

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Escrow agent - timeshare

Timeshare escrow agreement must provide for release of the escrowed funds when

- Purchaser cancels
- Purchaser defaults
- Purchaser closes
  - Developer has satisfied very specific affidavit and clear title requirements at closing

Sec. 721.08, F.S.

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Escrow agent - condominiums

Escrow account must be established at

- Bank, S&L, or any financial lending institution having a net worth in excess of $5 million
- Fla Bar attorney
- Real estate broker registered under chapter 475
- Title insurer authorized to do business in the state, acting through its employees
- Title insurance agent licensed under chapter 626

Sec. 718.202(8), F.S.

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Escrow agent - condominiums

Reservation deposits may be placed into an interest bearing escrow account, with the interest due the purchaser

Sec. 718.202(6), F.S.

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Escrow agent - condominiums

Before construction, etc., is substantially completed, escrow all payments received up to 10% of the sale price

Payments in excess of 10% to be held in special escrow account

Secs. 718.202(1)&(2), F.S.

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Escrow agent - condominiums

Special account need not be separate account

- But separate accounting records must be kept

Sec. 718.2102 (11), F.S.

North Carillon, LLC v. CRC 603, LLC, 135 So.3d 274 (Fla. 2014)

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Escrow agent - condominiums

Release of escrow

- Buyer terminates, deposit and any interest to buyer
- Buyer defaults, deposit and any interest to developer
- At closing, to the developer with interest (if contract is silent about the interest), unless
    - Prior to disbursement, escrow agent receives written notice from buyer of a dispute

Sec. 718.202(1), F.S.

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Escrow agent - condominiums

Pre-closing withdrawals from special account

- If contract so provides
- Construction has begun
- Hard, not soft, costs
- Requires conspicuous boldfaced legends

Sec. 718.202(3), F.S.

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Escrow agent - condominiums

Escrow agent need be independent of the developer.

Sec. 718.202(8), F.S.

DBPR rule looks at ability to influence.

- Nonemployee attorney may serve as escrow agent and represent developer

Rule 61B-20.003, F.A.C.

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Escrow agent - new construction closings

Contract must conspicuously alert purchaser that up to 10% of the purchase price will be held in escrow.

- Unless the buyer elects in writing to waive escrow
- Criminal and civil penalties

Sec. 501.1375(2), F.S.

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Escrow agent - new construction closings

Statute exempts

- FHA and VA deposits
- Deposits held by real estate broker

Sec. 501.1375(12), F.S.

Applies to developer/builder sellers 10+ units per year, not to mere GCs

JPG Enterprises v. McLellan, 31 So.3d 821 (Fla. 4th DCA 2010)

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Escrow agent - new construction closings

Escrow agent need be

- Bank or S&L
- Trust company
- Licensed real estate broker
- Fla Bar attorney
- Title ins. co. authorized to insure title in FL

Sec. 501.1375(2), F.S.

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Escrow agent - new construction closings

Deposit may be held in non-interest bearing account

- But if in interest bearing account, the interest is paid at closing to the builder

Sec. 501.1375(4), F.S.

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Escrow agent - new construction closings

If deposit escrowed, no withdrawal unless agreed to in writing

Exceptions

- For construction purposes only, with notice to buyer, builder can obtain a surety bond
- If no bond available, builder can borrow amount equal to the escrow, for up to one year

Sec. 501.1375(4), F.S.

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Escrow agent - new construction closings

Statute exonerates escrow agent from confirming proper use of deposit

Sec. 501.1375(6), F.S.

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Escrow agent - new construction closings

Buyer’s default and the release of the deposit to the builder

- If builder is not also in default
- Seventy-two hour advance written notice of intention to make withdrawal
- Deliver to escrow agent certifying affidavit

Sec. 501.1375(7)(d), F.S.

But see *Edelberg v. Monogram Building & Design*, 630 So.2d 1227 (Fla. 4th DCA 1994)

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Escrow disputes

Look first to contract

- Is escrow with real estate broker?
- In the absence of *conflicting demands* or *good faith doubt*, a broker can disburse w/o facing disciplinary action from FREC

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Escrow disputes

280 **ESCROW AGENT AND BROKER**

281 **13. ESCROW AGENT:** Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds
282 and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow
283 within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with terms and conditions
284 of this Contract. Failure of funds to become **COLLECTED** shall not excuse Buyer's performance. When conflicting
285 demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may
286 take such actions permitted by this Paragraph 13, as Agent deems advisable. If in doubt as to Agent's duties or
287 liabilities under this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until
288 the parties agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine
289 the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the
290 dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon
291 notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the
292 extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will
293 comply with provisions of Chapter 475, F.S., as amended and FREC rules to timely resolve escrow disputes through
294 mediation, arbitration, interpleader or an escrow disbursement order.
295 In any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder,
296 or in any proceeding where Agent interpleads the subject matter of the escrow, Agent shall recover reasonable
297 attorney's fees and costs incurred, to be paid pursuant to court order out of the escrowed funds or equivalent. Agent
298 shall not be liable to any party or person for mis-delivery of any escrowed items, unless such mis-delivery is due to
299 Agent's willful breach of this Contract or Agent's gross negligence. This Paragraph 13 shall survive Closing or
300 termination of this Contract.

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Escrow disputes

If Broker faces conflicting demands or has good faith doubt, four "escape" options

- Seek EDO from FREC
- Submit to arbitration
- Submit to mediation, which must be completed within 90 days
- Seek adjudication by the court

Sec. 475.25(1)(d), F.S.

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Escrow disputes

Broker must

- Give written notice to FREC w/in 15 business days of the last demand
- Institute escape option w/in 30 days of last demand

61J2-10.032, F.A.C.

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Escrow disputes

Note

- No bar to buyer or seller suing to recover the escrow
- The Request for EDO is not available in a contract utilized by HUD in the sale of HUD property

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Escrow disputes

Attorney for seller also acting as escrow agent

- Must first determine if there's a legal duty to the buyer under the escrow agency
  - If none, or
  - Escrow agreement requires to release of funds to seller-client

  Then must release as soon as possible

  Florida Bar Rule 5-1.1

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Escrow disputes

Attorney-escrow agent may not conditionally release escrow to his client.

Fla Bar Ethics Opinion 02-6

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Escrow disputes

When conflicting demands or good faith doubt as to entitlement, hold escrow until

- Parties agree to its distribution
- Final judgment
- OR interplead the funds – and represent client

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Escrow disputes

Seller and Buyer 10 days to resolve the dispute ("cool down period")

- Failing which, submit to mediation

- Then interplead

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Escrow disputes

Entitlement to fees and costs.

From out of the escrowed funds.

Non-prevailing party liable for fees and costs paid to escrow agent.

Clerk’s fee of +/- 4% taken from deposit.

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Escrow disputes

Interpleader Rule 1.240, Fl.R.Civ.P

- Stakeholder possesses single fund claimed by more than one party
- Protects the stakeholder from expense of multiple lawsuits

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Escrow disputes

Interpleader requires a two-step procedure

- Bona fide fear of exposure to multiple liabilities
- Determination of the underlying merits

N & C Prop. v. Vanguard Bank & Trust Co., 519 So.2d 1048 (Fla. 1st DCA 1988)

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Escrow disputes

Fees awardable if

- Escrow agent is a disinterested, innocent stakeholder
- Escrow agent not responsible for creating the conflicting claims
- Suit filed in a reasonable time

Rafter v. Miami Gardens Realty, Inc., 428 So.2d 351 (Fla. 3d DCA 1983)

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Escrow Agency – Beyond the Contract

[1] **Who serves as escrow agent?**

In the world of Florida real estate transactions, there are typically four categories of persons acting as escrow agent: real estate brokers, title insurers, title agents and attorneys. Banks and other financial institutions may serve as escrow agent in certain statutorily prescribed scenarios. A review of various laws and regulations affecting escrow agents follows.

[1.1] *Real Estate Brokers*

Real estate brokers less frequently act as escrow agent, largely due to the onerous rules and regulations specifically pertaining to them. In addition to the statutory requirements imposed on all real estate licensees, real estate brokers are also separately subject to escrow agency rules promulgated by the Department of Business and Professional Regulation, with compliance enforced by the Florida Real Estate Commission, or "FREC."

[1.2] *Liability for deposits*

A broker is not responsible for payment of any check or draft unless the broker, through "culpable negligence," fails to deposit same in the regular course of business. A salesperson receiving a deposit must deliver it to her broker no later than the next business day, and the broker must deposit it into an escrow account no later than the end of the third business day following its receipt from the customer.

61J2-14.008(1)(b), F.A.C.

[1.3] *Escrow depositories*

A broker must maintain the escrow account in a bank or trust company, title company having trust powers, credit union or at a savings and loan association within the State of Florida. Deposits may not be escrowed in a securities firm's

account. Escrowed funds cannot be commingled with non-escrow funds, and no more than $1,000.00 of personal or brokerage funds may be placed into each escrow account. A broker must be a signatory on all escrow accounts.

61J2-14.008(2)(a), F.A.C.
61J2-14.009, F.A.C.
61J2-14.010(1)&(2), F.A.C.

[1.4] *Third party escrow agent – broker's duties*

If a real estate licensee elects to have a title company or attorney hold the escrow, the contract must set forth the name, address and telephone number of such title company or attorney. No later than 10 days after each deposit is due, the broker must make written request to the title company or attorney for written verification of receipt of the deposit -- unless the title company or attorney was "nominated in writing by the seller or seller's agent."

61J2-14.008(1)(b), F.A.C.

[1.5] *Interest on escrow funds*

With the written permission of all parties to the transaction, a broker may place the escrow funds into an interest bearing escrow account. The permission document must name the payee entitled to the interest. The broker may collect the interest if so designated by all of the parties.

61J2-14.014, F.A.C.

[2] **Title Insurers as escrow agent**

The statutory authority of a title insurer to be engaged in the business of an escrow agent is found at Sec. 628.151, F.S. This outline will not focus attention on title insurers as escrow agents.

[3] **Title agents as escrow agents**

The statutory authority of a title agent to be engaged in the business of escrow agent is found at Sec. 626.8473, F.S. This statute provides that a title insurance agent may hold funds as an escrow agent (i) if the funds are intended to be distributed by the title agent acting as closing agent, (ii) in a future real property closing, where (iii) the agent is expected to issue title insurance in the transaction.

[3.1] *Escrow depositories*

The escrow statute, Sec. 626.8473, F.S., directs that escrow funds entrusted to a title insurance agent are received in a fiduciary capacity and are to be immediately deposited into a financial institution located within the state and which is a member of the FDIC or the National Credit Union Share Insurance Fund.

Sec. 626.8473(3), F.S.

[3.2] *Licensed title agents and interest on escrowed funds*

The Department of Financial Services has issued administrative rules for licensed title agents relative to escrow requirements. Rule 69O-186.008 addresses, among other things, that funds received by a licensed title agent, in a closing transaction involving the issuance of title insurance, may not be deposited into an interest bearing trust account without the written consent of the seller and buyer. The permission letter need also address the disposition of the interest accrual. The title agency may not receive the interest unless both seller and buyer voluntarily release their right to it.

Rule 69O-186.008, F.A.C.

[3.3] *Licensed title agents holding escrows in non-title insured transactions*

In the FAQs section of its website, the Department of Financial Services is asked whether a licensed title agency can take in escrow funds for a transaction that does not include the issuance of title insurance. Its response advises that the Florida Statutes do not prohibit the acceptance of escrow funds outside a title insurance transaction, but adds a comment that holding an escrow in a non-title

insurance transaction may not be covered under an agency's surety and fidelity bonds.

[4] **Attorneys as escrow agents**

[4.1] *Separate trust account required*

An attorney must deposit and maintain all funds received in connection with a real estate transaction in a separate trust account, maintained exclusively for such transactions. The attorney must permit the account to be audited by his title insurers, unless maintaining funds in a separate account, for a particular client, would violate applicable rules of the Florida Bar.

Sec. 626.8474(8), F.S.

[4.2] *IOTA accounts and interest on long-term deposits*

Per Florida Bar Rule 5-1.1, a lawyer may maintain a lawyer's own funds in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges. This same rule mandates that a client's or third person's nominal or short-term funds must be maintained in an IOTA account. Funds that are not nominal or short term, which may at times include real estate deposits, may be held in an interest-bearing account with the interest accruing to the benefit of the client or third person, unless otherwise directed in writing by the client or third person.

[5] **Duties of Escrow Agents**

The unique duties and obligations imposed on escrow agents are, by and large, determined by the Florida Bar rules and Florida case law. It is often said that closing agents wear multiple hats in a real estate transaction. Serving as escrow agent is one such hat, and imposes separate and independent duties which may give rise to both ethical violations and legal claims for damages.

[5.1] *Fiduciary relationship established*

A lawyer must hold the property of others with the care of a professional fiduciary.

Comment to Rule 5-1.1, Rules Regulating the Florida Bar

The relationship established is that of principal and agent, with the escrow agent being an agent of, and owing a fiduciary to, all of the principal parties.

The Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996)

[5.2] *Duties may extend to third parties*

A lawyer who serves as an escrow agent is governed by the laws relating to fiduciaries even if the lawyer does not render legal services in the transaction. Generally, an attorney's first duty is to the client. However, in circumstances where an attorney is also acting as escrow agent, the attorney may have a duty to third parties. An escrow agent is, therefore, a trustee of both parties, charged with the performance of an express trust as set forth in the trust agreement. In other words, an escrow agent has a duty to perform in accordance with the terms of the escrow agreement.

Florida Bar Ethics Opinion 02-6 (March 7, 2003)

[5.3] *Obligation to know the principals' agreement*

An escrow agent is charged with knowledge of an express escrow agreement. In the absence of same, the law will imply from the circumstances that the agent has undertaken a legal obligation (i) to know the provisions and conditions of the principals' agreement concerning the escrowed property, and (ii) to exercise reasonable skill and ordinary diligence in holding and disbursing the escrowed funds in strict accordance with the principals' agreement.

United American Bank of Central Florida, Inc. v. Seligman, 599 So.2d 1014 (Fla. 5th DCA 1992)

[5.4] *Fiduciary duties extend to client's adversaries*

It is imperative for the attorney-escrow agent to bear in mind that a fiduciary duty may be found owing to persons adverse to the attorney's own client. An escrow agent may not place a client's interest ahead of the adversary if a fiduciary duty is owed to the adversary.

[5.5] *Fiduciary duties extend to third parties*

Many cases involving escrow agent liability involve claims brought by persons not even party to the escrow agreement. These third parties might be assignees or pledgees or alleged third party beneficiaries. A careful escrow agent will be cognizant of the fact that she may have liability to third parties.

> *United American Bank of Central Florida, Inc. v. Seligman*, 599 So.2d 1014 (Fla. 5th DCA 1992)

[5.6] *Escrow agreements may limit escrow agent's* liability

A prudent escrow agent will give strong consideration to reducing his obligations and duties to a written escrow agreement signed by all principals that will limit his responsibilities as much as practicable. As one court observed, in not imposing liability on an escrow agent that refused to deviate from the strict terms of the express escrow agreement and paying-out the escrowed funds to an assignee, "[o]ur reading of fiduciary duty under Florida law does not require an escrow agent to disregard the escrow agreement and the direct instructions of the authorizing party by paying an assignee."

> *Resolution Trust Corp. v. Broad & Cassel, P.A.*, 889 F.Supp. 475 (M.D. Fla. 1995)

[6] **Escrow agent liability**

[6.1] *Professional liability insurance coverage*

A diligent practitioner is cautioned to closely examine his errors and omissions policy and make certain that the policy covers negligent acts of an attorney or

title agent acting as escrow agent. One court has held that an exclusion for the agent's failure to safeguard the escrow deposit is enforceable where the agent was charged with negligently disbursing the escrowed funds.

> *St. Paul Fire & Marine Insurance Co v. Llorente,* 156 So.3d 511 (Fla. 3d DCA 2014)

[6.2] *Title underwriter's responsibility for escrow agent's malfeasance*

Sec. 627.792, F.S., imposes liability on a title insurer for the defalcation, conversion or misappropriation by a licensed title insurance agent, or agency, of funds held in escrow by the agent or agency pursuant to Sec. 627.8473, F.S. However, in *Hechtman* v. *Nations Title Ins. of New York*, 840 So.2d 993 (Fla. 2003), the Florida Supreme Court held that this statute does not apply to attorneys. Accordingly, a wary practitioner may consider obtaining a Closing Protection Letter for the benefit of her purchaser-insured.

In *Winkler v. Lawyers Title Ins. Co*., 41 So.3d 414 (Fla. 3d DCA 2010), the Third District Court of Appeal ruled that an underwriter will not be held liable for the defalcation of escrow deposits where the escrow agent was not identified in the Purchase and Sale Agreement as the title insurance agent. Where an agent merely serves as escrow agent, no liability will be imposed on the underwriter where the agent misappropriates the escrow.

Thus, as the cases stand as of this writing, an underwriter will only be liable for escrow agent defalcations by licensed title agents – not attorneys – and only where the escrow agent was serving as title agent.

[7] **Escrow agency in various contexts –timesharing**

[7.1] *Timesharing*

All references herein are to timeshare estates, which by definition contemplates the conveyance of a specific fee interest in the timeshare property.

[7.2] *Who may serve as escrow agent*

Under the Timesharing Act, chapter 721, Florida Statutes, the developer must establish an escrow account with an escrow agent pursuant to a written escrow agreement before the filing of a public offering statement with the division of Florida Condominiums, Timeshares and Mobile Homes. Those who may serve as escrow agent include an attorney, a licensed title agent or agency, a title insurer, a real estate broker, or a bank or other financial institution located within the state with a net worth of more than $5 million.

Sec. 721.05(14), F.S.

[7.3] *Timeshare deposits must be held in escrow*

All funds collected by the timeshare developer from purchasers, including reservation deposits, must be paid into the escrow account, which may be invested in securities of the U.S. government or any agency thereof, or in a savings or time deposit account in an institution insured by an agency of the U.S. government.

Sec. 721.08(6), F.S.

[7.4] *Timeshare escrow agent as fiduciary*

The escrow agent owes a fiduciary duty to each purchaser to maintain the accounts in accordance with good accounting practices, and is charged with ensuring that the escrow account is maintained under his direct control and supervision.

Sec. 721.08(1), F.S.

[7.5] *Criminal liability may be imposed*

The Timesharing Act provides steep criminal penalties for an escrow agent's violations of the duties imposed on him and is actually one of the statutes, if

violated, upon which a RICO Act claim can be predicated.

Sec. 895.02(8)(a)(21), F.S.

[7.6] *Independence of escrow agent*

The Timesharing Act requires that every escrow agent must be "independent." This requires that:

1. The escrow agent is not a relative or employee of the developer, seller, managing entity, or any officer, director, affiliate or subsidiary thereof;
2. No financial relationship exists between the escrow agent and those above-enumerated (excluding payment of fees for escrow services), and
3. Unless the developer is entitled to collect the funds in the escrow amount (think buyer default), the escrow funds may not be used to pay compensation to the escrow agent.

Sec. 721.03(7), F.S.

However, a proposed escrow agent will not be disqualified because:

1. A nonemployee, attorney-client relationship exists between the developer and escrow agent;
2. The escrow agent provides brokerage services;
3. The escrow agent provides routine banking services, not including construction financing, and
4. The escrow agent performs closings for the developer and issues title policies in connection therewith.

Sec. 721.05(20), F.S.

[7.7] *Escrow agents and tax collection*

A unique feature of the timeshare paradigm pertains to how real estate taxes are assessed, collected and paid. Specifically, the timeshare real property is listed on the tax assessment rolls as a single entry for each timeshare development. The

managing entity of the timeshare is responsible for collecting the taxes from the timeshare owners and must hold same in escrow. In a post-developer turnover, the condominium association is considered the taxpayer and is deemed the agent of all the timeshare owners for purposes of collecting and paying ad valorem assessments, taxation and special assessments. Pre-turnover, however, it is the developer that collects the taxes and it must hire an independent escrow agent to hold same.

Funds collected for payment of taxes may be held by the escrow agent in an interest bearing account. The principal will be used to pay the tax bill and the interest accrual must be paid by the managing entity or association for the benefit of the owners.

Sec. 192.037(6)(d), F.S.

[7.8] *Release of escrowed funds by escrow agents*

The timeshare escrow agreement must provide that the escrowed funds will be released only when one of the following events occur: (i) the purchaser cancels the contract, (ii) the purchaser defaults on the contract, or (iii) the purchaser has complied with the contract obligations and the developer has satisfied very specific affidavit and clear title requirements at closing. The Timesharing Act provides that among the escrow agent's fiduciary duties is to release the escrowed funds only in accordance with the terms of the Act. The conditions precedents to releasing the escrow are spelled out in minute detail in Sec. 721.08, F.S.

[8] **Escrow agency in various contexts –condominiums**

In chapter 718, the condominium statute, the laws affecting escrow agents are set forth in Sec. 718.202, F.S.

[8.1] *Who may serve as escrow agent*

Condominium escrow accounts must be established with a bank, savings and loan association, or any financial lending institution having a net worth in excess of $5 million, a Florida Bar attorney, a real estate broker registered under chapter 475,

a title insurer authorized to do business in the state, acting through its employees or a title insurance agent licensed under chapter 626, F.S.

Sec. 718.202(8), F.S.

[8.2] *Reservation deposits and escrow agents*

A condominium developer desirous of taking reservation agreements must establish an escrow account and all reservation deposits must be payable to the escrow agent. The reservation deposit may be placed into an interest bearing escrow account, with the interest due the purchaser, and the deposit must always be available for either refund to the buyer, or, upon a contract being entered into, converted into a purchase deposit.

Sec. 718.202(6), F.S.

[8.3] *Initial ten percent deposit to be escrowed*

Where the construction, furnishing and landscaping of the property submitted to condominium ownership has not been substantially completed per the plans and specifications, the developer shall pay into the escrow account all payments received from the buyer up to 10% of the sale price.

Sec. 718.202(1), F.S.

[8.4] *Payments received in excess of ten percent*

All payments received in excess of 10% of the purchase price are to be held by the escrow agent in a special account.

Sec. 718.202(2), F.S.

In response to confusion in the case law as to whether the special account need be a separate account from Sec. 718.202(1) designated account, a 2010 amendment to the statute clarified that there need not be separate accounts. However, if one account is maintained, the escrow agent must maintain separate

accounting records (i.e. sub-accounts) for each purchaser for amounts separately covered under sub-sections (1) and (2).

Sec. 718.2102 (11), F.S.
North Carillon, LLC v CRC 603, LLC, 135 So.3d 274 (Fla. 2014)

[8.5] *Release of funds from escrow*

The escrow may only be released as follows:

1. If the buyer properly terminates, the deposit and any interest is to be returned to the buyer;
2. If the buyer defaults, the deposit and any interest shall be paid to the developer;
3. Upon closing, to the developer with interest (provided that the contract is silent about the interest), unless prior to disbursement the escrow agent receives written notice from the buyer of a dispute between the buyer and developer.

Sec. 718.202(1), F.S.

[8.6] *Withdrawal from special account escrow*

If the contract so provides, the developer can withdraw escrowed funds from the special account once construction begins. The funds must be used for hard, not soft, costs. Any contract allowing for advance use of payments in this fashion must contain a conspicuous boldfaced legend to this effect on the first page of the contract as well as above the buyer's signature.

Sec. 718.202(3), F.S.

[8.7] *Independence of escrow agent*

A condominium's escrow agent must be independent of the developer. The statute provides only that no developer or any officer, director, affiliate,

subsidiary or employee of the developer may serve as escrow agent.

Sec. 718.202(8), F.S.

Focus is paid on familial relationships and common financial interests between the developer and the escrow agent which reasonably relate to the developer's ability to directly or indirectly control or influence the escrow agent in the performance of the escrow agent's duties. A statement may be taken of the escrow agent affirming his independence.

A non-employee attorney who represents the condominium developer can also serve as escrow agent so long as it will not result in a conflict of interest or require a violation of the respective legal duties attendant to both positions.

Rule 61B-20.003, F.A.C.

[8.8] *Obligation of escrow agent to make inquiry into use of funds*

An escrow agent does not have an obligation or duty to the purchaser to confirm that the developer is properly utilizing the "special account" funds for hard costs. In *Vallina v. Mansiana Ocean Residences, LLC.*, 20 WL 11674441 (S.D. Fla. 2011), the purchasers sued the escrow agent, Fidelity, asserting, *inter alia*, that Fidelity failed to confirm that the special account funds it released were used for their lawful purpose, thus demonstrating the requisite lack of independence. Citing to the language of the escrow agreement, which specifically said that Fidelity had no duty to investigate, the U.S. District Court rejected the purchaser's argument.

[9] **Escrow agency in various contexts –new construction closings**

Here we are speaking of Sec. 501.1375, F.S., and specifically, the statutory requirements relating to deposits received in connection with the purchase of one-family or two-family residential dwelling units.

[9.1] *Escrow of ten percent of purchase price*

The statute provides that when a building contractor or developer – defined as those who construct and sell more than 10 residences a year statewide – enters

into a contract, a notice must be included in the contract, in conspicuous type, alerting the purchaser that up to 10% of the purchase price will be held in escrow unless the buyer elects in writing to waive escrow. The statute provides for criminal and civil penalties for the developer's failure to comply with its provisions

[9.2] *Applications and exemptions*

The statute exempts and does not apply to deposits placed in an escrow account as required by the FHA or VA, and to deposits delivered to licensed real estate brokers as escrow agent. The statute has been construed to only apply to building contractors and developers who build and sell the underlying land, not general contractors who simply build on lots or lands already owned by the customer. *JPG Enterprises v. McLellan*, 31 So.3d 821 (Fla. 4th DCA 2010)

The statute otherwise applies to all other escrow agents, which are defined to include banks, savings and loan associations, trust companies, attorneys, or a title insurance company authorized to insure title in Florida.

[9.3] *Interest on escrowed deposits*

The statute was amended some years ago to allow for the escrow deposit to be held in a non-interest bearing account. In recent years, with the paltry rate of interest paid on deposits, few cared whether interest was paid, if the decision was made to escrow. In any event, if the escrow is placed in an interest bearing account, the interest is paid at closing to the builder.

If the buyer does not waive escrow and the funds are in fact escrowed, the deposit cannot be withdrawn without the buyer's and builder's signatures, subject to these exceptions:

If the builder desires to utilize the deposit, for construction purposes only, the builder may, after notification to the buyer, obtain a surety bond payable to the buyer in the amount of the escrowed deposit, whereupon the escrow agent can release the deposit to the builder. If no surety bond is available in the marketplace, then the builder can borrow an amount equal to the escrow, for up to one year, and charge the buyer at closing with the interest paid by the builder on the loan amount; in this instance, the buyer will be credited the interest

accrual on the deposit but will have to pay the difference between the interest paid on the loan by the builder and the interest earned on the deposit, which in recent years might be relatively substantial.

Another alternative allows the builder to obtain a master surety bond covering the total of all deposits withdrawn, with each buyer paying a prorata share of the bond cost at his or her respective closing.

Note that the statute exonerates an escrow agent from confirming that the deposit released to the builder is being put to its proper use for construction purposes.

Sec. 501.1375(4), F.S.

[9.4] *Buyer's default and release of escrow*

Subsection (7)(d) of the statute addresses the buyer's default and the release of the deposit to the builder. It states that upon the buyer's default, the builder may, so long as the builder is not also in default, withdraw the escrowed funds. In doing so, the builder must send written notice by certified mail to the buyer of its intention to make the withdrawals at least 72 hours prior to the intended time of withdrawal. After the 72 hour waiting period, the builder need present the escrow agent with a deposit withdrawal slip and an affidavit certifying that the buyer is in default and that the builder is not in default, whereupon the escrow agent shall release the funds to the builder with no liability on the escrow agent in doing so.

But, see *Edelberg v. Monogram Building & Design*, 630 So.2d 1227 (Fla. 4th DCA 1994), wherein the court held that the buyer's deposit will not be subject to forfeiture and release to the builder absent due process, *i.e.* a finding that the buyer was in default following a meaningful hearing.

[10] **Escrow disputes and resolution techniques**

In the event of an escrow dispute, the real estate contract will be determinative of the recourses available. In the first instance, it need be ascertained whether a

real estate broker is serving as escrow agent, as brokers have unique rules affecting them.

[10.1] *Broker as escrow agent – no conflicting claims or doubts presented*

A real estate broker acting as escrow agent may disburse the escrowed funds to the appropriate party if the broker feels that the case is clear. Thus, in the absence of *conflicting demands* or *good faith doubt*, a broker can disburse without fear of disciplinary action from FREC. The broker should try to contact the non-demanding party to see if that party will be asserting a claim to the escrow, and then may send a certified letter to the non-responding party with negative notice. If no response is forthcoming, the broker can disburse to the demanding party free of any concerns of a FREC action. However, that will not preclude the broker from civil liability.

Thus, for example, a contract clause grants the buyer the unilateral right to cancel the transaction if the property fails to appraise. The property fails to appraise and the buyer demands refund of the escrow. The broker attempts to contact the seller, to no avail. Upon the proper notice, the broker may return the escrow to the buyer free of fear of a FREC action, but without prejudice to the seller to later sue.

[10.2] *Broker as escrow agent – conflicting demands or doubts presented*

If the broker faces conflicting demands or has a good faith doubt to whom the escrow should be paid, the broker has four "escape" options:

1) Seek an 'Escrow Disbursement Order' from FREC directing how to distribute the funds;
2) With the consent of all parties, submit the dispute to arbitration;
3) With the consent of all parties, submit the dispute to mediation, which must be completed within 90 days, or
4) Seek adjudication by the court.

Sec. 475.25(1)(d), F.S.

Upon receiving conflicting demands for the escrow, the broker must provide written notice to FREC within 15 business days from the day of the last demand, and must institute one of the escape options within 30 days of the last demand.

61J2-10.032, F.A.C.

None of the escape options precludes a buyer or seller from instituting a civil action to recover the escrow.

The request for Escrow Disbursement Order is not available in a contract utilized by HUD in the sale of HUD property.

[10.3] *Attorney as escrow agent*

As previously discussed, an attorney may not release an escrow to a given party without taking into account a fiduciary duty that may be owing to a third party, as formed by the escrow agreement, particularly, or by the escrow agency, generally.

Under the rules regulating trust accounts, the attorney representing a seller and acting as escrow agent must determine whether the attorney has a legal duty to the buyer under the escrow agreement. If the attorney has no legal duty to the third party, or if the attorney's legal duty under the escrow agreement is to release the funds to the seller-client, then he must do so as soon as possible, as per Florida Bar Rule 5-1.1.

Expediency may suggest that the attorney draft an escrow agreement in every case that affords the escrow agent the absolute and unfettered right to release the escrow under certain prescribed conditions, *e.g.* the property not appraising or the buyer timely cancelling under an As Is Contract. But experience shows that while detailed escrow agreements are common in commercial transactions, they are typically not seen in the residential arena.

[10.4] *Attorney disbursing disputed escrow on condition of indemnity*

May an attorney-escrow agent condition the release of the escrow to his client on the client's agreement to indemnify and hold the attorney harmless? No, he may not.

Florida Bar Ethics Opinion 02-6 (March 7, 2003)

[10.5] *Attorney as escrow agent – conflicting demands*

When conflicting demands are made on the deposit, or the escrow agent has a good faith doubt as to entitlement, the agent has the discretion to hold the escrow until the parties agree to its distribution or until final judgment is entered by a court of competent jurisdiction. Alternatively, the escrow agent can interplead the funds. An escrow agent who is also attorney for one of the parties can represent the client in the interpleader action.

Under the commonly used FR/BAR sale and purchase agreement, when an escrow dispute arises, seller and buyer are afforded a 10-day "cool down" period to resolve the dispute, failing which the dispute is submitted to mediation. In most cases, if the cool down or mediation does not resolve the dispute, the escrow agent will proceed to file an interpleader action and deposit the escrow into the court registry.

[10.6] *Use of interpleader actions*

In any proceeding where the escrow agent interpleads the escrow, the escrow agent may recover legal fees and court costs from out of the escrowed funds. The non-prevailing party to the dispute, be it the seller or buyer, may be required to reimburse the prevailing party the legal fees and costs awarded to the escrow agent. Additionally, the clerk of court will take a fee for its services, typically 4% of the amount deposited into the court registry, from the escrow. If explained to them, the collective cost of mediation, the clerk's fee, and the award of fees and costs to the escrow agent might well persuade the litigants to resolve their dispute promptly.

[10.7] *Elements of interpleader actions*

An interpleader suit derives from common law and is now codified by Rule 1.240, Fl. R. Civ. P. The rule provides that a stakeholder possessing a single fund claimed by more than one party can require all claimants to pursue their claims to that fund at the same time and in the same action. This protects the stakeholder from being compelled at his own risk from deciding which claimant has the better claim, and from the expense of multiple lawsuits.

Interpleader requires a two-step procedure:

1) Does the stakeholder have a bona fide fear of exposure to multiple liabilities?
2) Determination of the underlying merits.

N & C Prop. V. Vanguard Bank & Trust Co., 519 So.2d 1048 (Fla. 1st DCA 1988)

No evidentiary hearing is required at the first stage – once the Court determines that interpleader is appropriate, the Court may order that the funds be deposited into the court registry, and the seller and buyer will typically assert crossclaims to the funds.

An escrow agent filing an interpleader suit will only be entitled to the award of fees if she shows that she is a disinterested, innocent stakeholder and that she was not responsible for creating the conflicting claims to the fund. In addition, the suit must be filed in a reasonable time.

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CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the NALA online portal. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at https://www.nala.org/certification/certtest2view. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Length In Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0	Serving as Escrow Agent - Beyond the Closing / Michael	Michael Rothman
	Rothman	

Name of CP (Please Print)				NALA Account Number (On Mailing Label)
				149113
Signature of CP				Name of Seminar/Program Sponsor
				Serving as Escrow Agent - Beyond the Closing / ATFS, LLC
Address				Authorized Signature of Sponsor Representative
				Michael Rothman
				Date of Educational Event:
City:		State (XX):		
Preferred e-mail address				Location:
				Recorded Webinar

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Ethics	

FL BAR Reference Number: 2412186N

Title: Serving as Escrow Agent – Beyond the Contract

Level: Intermediate

Approval Period: 02/01/2025 - 08/31/2026

CLE Credits

General	1.0
Ethics	0.5

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Real Estate	1.0