

## NYSBA Ethics Opinion On Escrow Fund

Summary of Opinion 710 – 11/6/98 (35-98). A lawyer has been holding an escrow fund after a real estate closing, to secure buyers against loss under a possible sidewalk violation assessment by the local municipality. The municipality advises that no assessment will be made, but the buyers refuse to authorize the lawyer to release the fund. The written escrow agreement provides no mechanism for releasing the fund for any other purpose than the assessment.

May the attorney release the fund to his client, the seller, after executing an affidavit-certifying as to—the municipality decision not to assess.

No. The attorney is bound by the escrow agreement and may not release the fund without the informed consent of all the parties. Lawyer’s obligations are controlled by the law of contracts and agency. In the absence of language of instructions in the escrow agreement, it’s inappropriate for lawyer to assume the power to disburse.

Lawyer may resign as escrow agent, but he must take steps (DR 9-102) to protect the fund and to resolve the dispute. One possible way: lawyer may bring a stakeholder action and deposit the fund with the court.

Lawyers should be careful to provide a mechanism for dispute resolution in all escrow agreements. They should avoid the risk of overlooking possible impediments to the release of funds in the press of a real estate closing.