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October 12, 2006

Dear Leslie:

You have asked the Committee on Pro Bono and Public Interest to comment on the report of the Real Property Law Section Task Force (“Report”) concerning attorney escrow accounts. This letter represents our Committee’s comments and recommendation.

(i) The Basis of the Report

The Real Property Law Section was charged with considering alternatives to the current practice whereby attorneys hold deposits for residential transactions in attorney escrow accounts. The charge to the Real Property Law Section was premised on the belief that escrow funds were subject to theft by lawyers.

The Report recommends, as the primary alternative to attorney escrow accounts, that banks be used as escrowees in residential real estate transactions. Along with this recommendation, the Task Force prepared a model form of escrow agreement, which it calls a Bank Escrow Deposit Agreement (“BEDA”).

(ii) Our Committee Opposes Creation of BEDAs

Our Committee recommends that the Commercial and Federal Litigation Section oppose the Report principally for three reasons: (1) the problem the Task Force was asked to address does not exist to any measurable degree; (2) less disruptive changes to the current system, as mentioned in the Report, can better address any problems that may exist; (3) use of BEDA accounts has the potential for significantly reducing the amount of funds that the Interest on Lawyer Account Fund (“IOLA”) makes available each year to legal aid and legal services organizations.

(iii) There Is No Need for A Change

The Report itself makes the case for no change. It states, “In the overwhelming majority of cases, the current practice of attorney escrow of contract deposits works well.” Report at 5. It goes on to state, “The instances of attorney escrow theft are miniscule.” *Id.* at 6. However, it appears that the Task Force felt compelled to recommend an alternative to attorney escrow accounts because the mandate given the Real Property Law Section was to come up with an alternative. Nonetheless, the data presented in the Report show that the problems are minimal.

Moreover, any problems that do exist can be addressed by less drastic means including, among other things, requiring dual signatures on escrow accounts.

(iv) BEDAs Could Undermine the Bar's Commitment to Equal Justice

Even more compelling, our Committee believes that the introduction and use of BEDA accounts would create the potential of significantly reducing the amount of IOLA funds that are made available annually to legal aid and legal services organizations. IOLA was created by the State Legislature in 1983, in part due to the efforts of the New York State Bar Association, to increase the funding for legal aid and legal services organizations in the face of diminished funding from the federal government. The IOLA Fund, in a September 7, 2006 letter to the Task Force opposing the BEDAs, stated that in 2006 IOLA provided \$10 million in grants to legal aid and legal services organizations and, since its inception, it has awarded more than \$200 million. These grants would be significantly compromised if BEDA accounts were adopted.

The Task Force proposes that BEDA accounts be used for escrow deposits that are in excess of \$25,000. The theory, apparently, is that IOLA funding would be preserved because escrow accounts of less than \$25,000 would still be required to transmit interest to IOLA. In reality, and especially in downstate areas where the cost of housing is significant, few deposits would be less than \$25,000. The result would be that significantly fewer accounts that fund IOLA would be created. This, in turn, would substantially reduce the amount of money available to IOLA to fund legal aid and legal services organizations.

The New York State Bar Association consistently has been in the forefront of activities to insure increased funding of legal aid and legal services programs that serve the poor. Support of BEDA accounts would be an unfortunate step backwards and would have the effect of reducing the much needed funding that legal aid and legal services organizations currently receive from IOLA.

(v) Conclusion

For the reasons discussed above, the Committee on Pro Bono and Public Interest recommends that the Section strongly oppose the recommendation of the Real Property Law Section Task Force Report to create BEDA accounts.

Very truly yours,

Michael Sant'Ambrogio
Robert L. Becker
Co-Chairs