

COMMISSION CORNER

News from the Maine Real Estate Commission

Earnest Money Deposits

One of the most common complaints filed with the Commission involves issues raised about the disposition of the earnest money deposit when a transaction fails. Often these conflicts arise due to emotional, stubborn or even irrational individuals who believe that they are in the right. However, issues also occur when the licensees involved in the transaction have not adequately explained to their clients what an earnest money deposit is, the circumstances under which it may be forfeited by the buyer or returned to the buyer and the procedures that must be followed in the event of an earnest money dispute.

A typical dispute arises when a buyer, having made the purchase and sale agreement subject to a financing contingency, learns well into the transaction that their financing has been denied and they will not be able to purchase the property. Through their agent they notify the seller that they are cancelling the contract based on the financing contingency and demand in writing that their earnest money be returned. The seller, having been told that the buyer was pre-approved for financing, is upset because their property has been off the market for weeks and believes that they are entitled to the earnest money as compensation. The seller also demands in writing that the earnest money be released to them. Without getting into the merits of either argument, the earnest money deposit is in dispute. The designated broker in this dispute scenario is acting as a trustee of the deposit and is required to comply with the Real Estate Commission's rules regarding its disbursement.

The Commission does not have the authority to mediate the dispute or determine which party shall receive the deposit. However, if either party files a complaint, the Commission does have the authority to investigate the actions of the licensees involved in the transaction to determine whether they followed proper procedures when handling the earnest money deposit. Chapter 400, Section 2 (10) of the Commission's rules establishes the procedure the designated broker must follow when an earnest money deposit is disputed, and both parties are making a claim on the deposit. Failure to correctly follow the guidelines outlined below may result in disciplinary action.

Once the earnest money is in dispute, the designated broker **shall** (1) notify each party, **in writing**, of the demand of the other party; and (2) keep all parties to the transaction informed of any actions by the designated broker regarding the disputed earnest money deposit, including retention of the earnest money deposit by the designated broker until receipt of a

written release from both parties agreeing to the disposition of the earnest money deposit or agreeing that the dispute has been properly resolved.

After notice of the dispute has been provided in (1) above, the designated broker **may** reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine the disposition of the disputed earnest money deposit and **may**, at the designated broker's own discretion, make such disbursement no sooner than **5 business days** after notifying both parties, **in writing**, of the designated broker's proposed disbursement of the earnest money deposit. This discretionary disbursement by the designated broker is not a violation of license law but may not relieve the designated broker of civil liability.

The designated broker may hold the earnest money deposit until ordered by a court of proper jurisdiction or agreement of the parties to make a disbursement. The designated broker shall give all parties **written** notice of any decision to hold the earnest money deposit pending a court judgment or agreement of the parties for disbursement.

Small claims court and mediation services are available to the parties to resolve an earnest money dispute.

Licensees are reminded that effective and regular communication with their clients, throughout the entire transaction, can be a key to avoiding conflict and reducing the potential for a complaint. In any case, careful adherence to the guidance in Chapter 400, Section 2 (9) and (10) of the Commission rules are important to a successful outcome.