

EARNEST MONEY DEPOSITS

1. Neither the law nor the Code of Ethics dictates whether the listing office or the selling office holds the earnest money deposit (“EMD”).

A. Regardless of which office holds the EMD, the role of the escrow agent is a neutral role. Even if it is a buyer’s agent that acts as the escrow agent, he would have a duty to disclose to the seller if the EMD check bounced or if there was another problem with the EMD funds.

2. A seller and buyer can agree that any third party will hold the EMD. If a third party (*i.e.*, a non-real estate licensee) holds the EMD, the third party is not subject to the Occupational Code/rules on handling EMDs. If a third party is to hold the EMD, a REALTOR’s® responsibility is to deliver the check to the named escrow agent within 2 banking days of receiving notice of acceptance by all parties. MCL 339.2512(i)(vi).

3. If a REALTOR® holds the EMD, then the REALTOR® must comply with Occupational Code/rules governing EMDs.

A. A salesperson cannot hold the EMD until there is a binding contract, but instead must turn over the EMD check to his broker “upon receipt.” MCL 339.2512(i)(ii).

B. The broker, on the other hand, is not required to deposit the check into its trust account immediately, but may hold the check until the purchase agreement is accepted.

C. A broker must deposit the EMD in its trust account within 2 banking days after the broker has received notice that there is a binding purchase agreement. MCL 339.2512(i)(iv).

- 1) A seller/buyer cannot agree, for example, that the EMD check will not be cashed until the inspection contingency is waived or until the short sale lender signs off. (In this situation, someone other than a real estate license holder would need to hold the EMD.)

D. Trust account must be a non-interest bearing demand account. Checks must be signed by a broker or associate broker. R 339.22313(1).

E. Broker may not commingle its own funds in the trust account (except for up to \$500 to avoid service charges). R 339.22313(3).

F. Broker must maintain duplicate records for its trust account: (i) a chronological record of all receipts/distributions from that account; and (ii) a transaction specific record. R 339.22313(4).

4. If funds are in a real estate licensee's trust account and if there is a dispute over the EMD, the EMD must remain in the trust account until buyer and seller have agreed in writing or there is a court order directing the disbursement of the EMD. The real estate licensee can also interplead the funds with the court. R 339.22313(6).

A. This rule only applies where there is a dispute over the EMD.

B. A REALTOR® cannot condition the release of an EMD on the sellers/buyers releasing the REALTOR® from any liability in connection with the transaction.

- 1) While it is a good practice to ask for a release, the rule does not authorize a REALTOR® to refuse to release the EMD because the parties will not release each other, let alone the REALTOR®. A written release is only required by the Rule if there has been a dispute.
- 2) If one party has made a demand for the EMD and the other party will not sign a release or otherwise respond, it is recommended that a letter be sent indicating that the EMD will be released to the party making the demand unless an objection is received within a specified timeframe.

C. A purchase agreement may be considered terminated even if there is still a dispute over the EMD. The fact that there is a dispute over the EMD does not prevent the sellers from re-listing or the buyers from looking for a new home.

D. REALTORS® are not entitled to keep abandoned EMDs; rather, the funds escheat to the State of Michigan.

5. It is not always the case that a purchaser can walk away from a transaction with no adverse consequences other than the forfeiture of the EMD. Many purchase agreements provide that in the event of the buyer's default, the sellers can keep the EMD and sue the buyer for damages.