

RELEASES & SECURITY DEPOSITS

By Gregory McClelland, MAR Legal Counsel, McClelland & Anderson

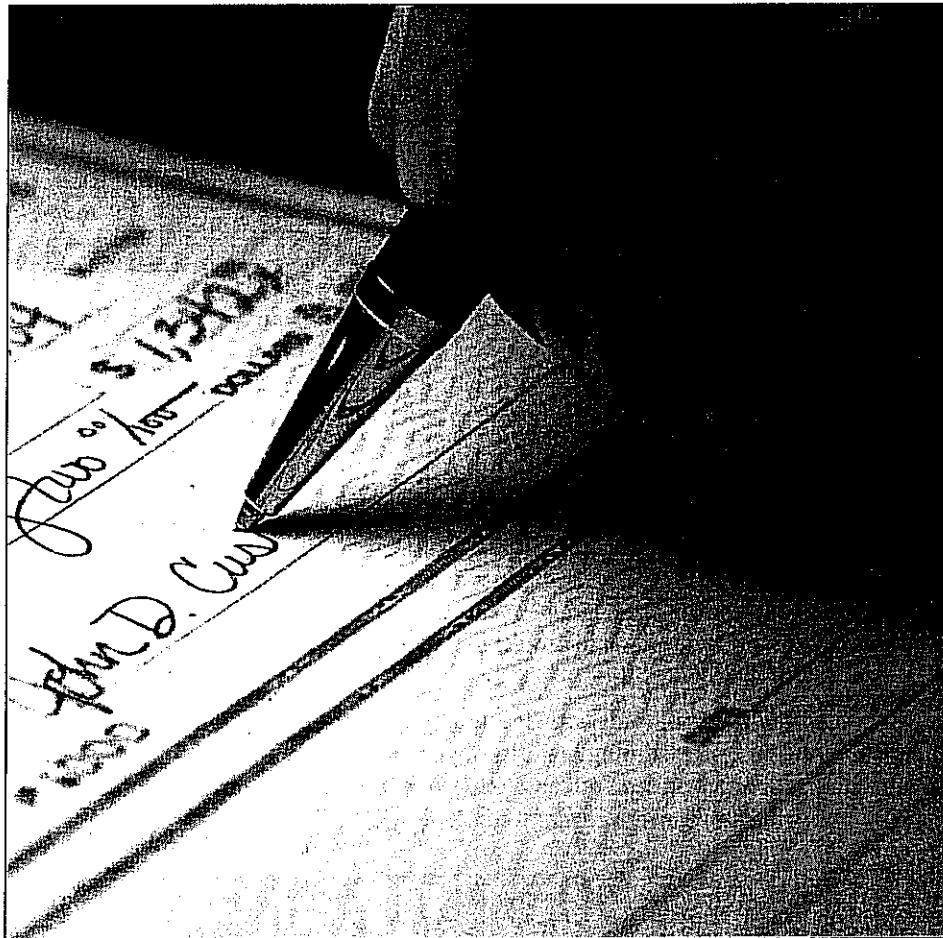
As most REALTORS® are aware, effective in the fall of 2002, the rule regarding the handling of earnest money deposits was amended. The rule now provides:

Any [earnest money] deposit in the trust account of the broker for which the buyer and seller have made claim shall remain in the broker's trust account until a civil action has determined to whom the deposit must be paid, or until the buyer and seller have agreed, in writing, to the disposition of the deposit. The broker may also commence a civil action and interplead the deposit with the proper court (the "Rule").

In a typical situation, a buyer seeks to terminate a transaction based on their claim that they cannot obtain financing for the purchase of the sellers' home. The sellers do not believe that the buyers have made a good faith attempt to obtain a loan or, alternatively, simply have not provided all the documentation necessary for a lender to decide to provide them with a loan. When the buyer terminates the transaction, both the sellers and the buyer contact the REALTOR® holding the earnest money deposit (EMD) and demand that the REALTOR® deliver it to them. The REALTOR® is in a difficult position, in as much as at least one of the parties is the client of the REALTOR®.

The application of the rule is quite simple in this situation. The REALTOR® cannot release the EMD to either the sellers or the buyers until the sellers and buyers reach a written agreement on releasing the EMD; or the REALTOR® receives a copy of an order from a court directing the disbursement of the EMD; or the REALTOR® interpleads the EMD with a court.

Unfortunately, some REALTORS® have interpreted the rule as requiring that in each and every case where a transaction terminates without closing, the EMD cannot be released until the sellers and buyers mutually agree in writing to the disposition of the EMD. The typical situation arises where the purchase agreement contains an inspection contingency, and the buyers



reject the results of the inspection pursuant to the terms of the purchase agreement. The REALTOR®, who is acting as the agent for the buyers, wishes to return the EMD to the buyers so they may proceed forward in search of another home. However, for whatever reason, the REALTOR® cannot obtain the seller's signature on a mutual release. Must the REALTOR® continue to hold the funds until they obtain the seller's signature? The answer to this question is "absolutely not." The rule only applies when there is a dispute. There is no dispute in this case, thus no written agreement providing for the release of the EMD to the buyer is necessary.

A similar situation arises where a buyer has lawfully terminated a purchase agreement based on a contingency, but either the buyer or the seller will not sign the mutual release tendered by the REALTOR®. In turn, the REALTOR® refuses to release

the EMD to the buyer until the parties sign the mutual release. The mutual release demanded by the REALTOR® not only contains a release of one of the parties' claims to the EMD, but also contains a release of the REALTOR® from the seller and buyer for any liability or claims arising from the failed transaction. Any REALTOR® who holds an EMD under these circumstances is surely risking a complaint being filed with the Department of Labor & Economic Growth. Neither the rule nor any other law permits a REALTOR® to hold the EMD as leverage for a release of liability from either sellers or buyers.

Is it a good business practice to attempt to obtain a written release of the EMD from sellers and buyers when there is no dispute? Absolutely. However, in the absence of a dispute, REALTORS® should not and cannot hold an EMD. •