

# focus on: Legal Affairs

By: Kelly Shonborn, IAR Senior Staff Counsel

## EARNEST MONEY Q & A

One of the more common topics about which the Legal Hotline receives questions is earnest money. Here are some of the questions we have recently received concerning earnest money. Please remember that the Legal Hotline is available to assist managing brokers and their designated agents between the hours of 9am and 5 pm, Monday through Friday.



**Q:** My buyer submitted a Purchase Agreement and it was accepted. The same day the contract was accepted, the listing broker called me and asked for the earnest money. Doesn't the buyer have two days to deliver earnest money to the listing broker?

**A:** No. According to the pre-printed language of the IAR Purchase Agreement, which says, "Buyer submits \$\_\_\_\_\_ as earnest money . . .," the earnest money is supposed to be presented with the Purchase Agreement. However, the Purchase Agreement does allow for the parties to negotiate an alternative date for the submission of the earnest money. Further, according to the Purchase Agreement, if the buyer fails to deliver the earnest money within the agreed upon time, the seller may terminate the agreement. After the offer is accepted, the listing broker has two banking days to deposit the earnest money received to whoever is indicated in the purchase agreement to receive the deposit.

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**Q:** Since Purchase Agreements are more commonly delivered to brokers via e-mail it is impossible to submit an earnest money check with the Purchase Agreement. However, the Purchase Agreement says the contract may be terminated by the Seller if they don't receive the earnest money "timely". What are we supposed to do to keep that from happening?

**A:** As a broker you owe a fiduciary duty to your client to perform duties which are in the client's best interests. Such duties may include things that may not be the most convenient for you. This may be the case with the delivery of the earnest money. You need to do whatever you have to do (i.e. drive to the listing broker's office and deliver the earnest money) to ensure timely delivery of the earnest money. If you know that it would be impossible to deliver the earnest money with the purchase agreement then you may consider addressing a different delivery time in the Purchase Agreement. As long as the parties are in agreement in the Purchase Agreement, the earnest money delivery time may be changed.

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**Q:** The Buyer's broker is insisting that he wants to deposit the earnest money into his trust account. May he do this?

**A:** Indiana law (876 IAC 8-2-2) says the earnest money should be held by any party designated in the purchase agreement to hold the earnest money. Accordingly, the Real Estate Commission will hold any broker with whom the money is deposited responsible for the money.

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**Q:** My buyer has an accepted Purchase Agreement on an REO property. The bank seller says that the earnest money needs to be submitted to a title company. Is that OK?

**A:** Since the change to the license law, it is no longer a requirement that a broker must hold the earnest money. Instead, 876 IAC 8-2-2 says the earnest money should be held by any party designated in the purchase agreement to hold the earnest money. Therefore, the buyer and seller may agree in the purchase agreement to allow the earnest money to be held by a title company. However, it is important to note that the real estate commission has no authority over title companies. If the transaction does not close and there is a dispute over which party should get the earnest money the only options for the parties would be to sign a mutual release in which they agree who should get the earnest money or file in small claims court (or follow the Alternative Dispute Resolution Agreement if there was one entered into at the time of the Purchase Agreement).



**Q:** I was the listing broker in a transaction that failed to close. The earnest money check that I was given at the beginning of the transaction was written by the buyer's mother. Now that earnest money is going to be returned, do I write the check to the buyer or the buyer's mother?

**A:** When a broker is releasing earnest money, it should be released only to the buyer or the seller in the transaction. If the buyer has made arrangements with a third party, like his or her mother, to submit the earnest money on his or her behalf, that is an issue between the buyer and that third party.

Please contact the IAR Legal Hotline if you have any questions or concerns regarding the above. The IAR legal Hotline is available to managing brokers and designated agents from 9am-5pm, Monday-Friday at 1-800-444-5472.