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**MEMORANDUM**

FROM: David W. Johnson  
TO: Executive Committee - Utah Association of REALTORS®  
SUBJECT: Legal Update  
DATE: September 19, 1997

**OVERVIEW.** Early in 1997, the UAR asked the Utah Real Estate Commission to consider two much needed changes to the Administrative Rules relating to Earnest Money Deposits. The first requested change was the elimination of the requirement to file interpleader lawsuits in failed real estate transactions. The second requested change was the elimination of the requirement to obtain separate written authorization "from the party not receiving the funds" prior to releasing any Earnest Money Deposits. In its August 13, 1997 meeting, the Utah Real Estate Commission addressed both of these issues, and approved two important rule changes.

**CHANGES IN INTERPLEADER REQUIREMENTS.** Prior to this new rule change, if a transaction failed and a dispute arose over release of the Earnest Money Deposit, the Principal Broker was obligated to notify both the Buyer and Seller of the dispute. If the dispute was not resolved within 45 days, the Principal Broker was required to interplead the Earnest Money into court. This meant that the Principal Broker literally needed to file suit against the Buyer and Seller - asking the court to decide who was entitled to the deposit. The unfortunate result was that the Buyer and Seller, having been sued by the Principal Broker, would, in turn, frequently decide to sue each other and the Principal Broker, the listing agent and the selling agent, etc.

In August, the Real Estate Commission changed this Administrative Rule regarding interpleader. *Effective October 2, 1997*, the Principal Broker is no longer obligated to interplead the funds into court. After a good-faith effort on the part of the Principal Broker to resolve the dispute, if the parties are still unable to agree, the deposit must be placed in a *separate trust account*. *If the parties don't resolve the dispute on their own, or through court within five years, the Earnest Money will then be transferred to the State of Utah as unclaimed funds.*

**RELEASE OF EARNEST MONEY DEPOSITS.** Another very important administrative rule change adopted by the Utah Real Estate Commission in their August 13, 1997 meeting, was a change related to the release of Earnest Money Deposits. Historically, the Principal Broker could release the deposit to the Buyer or Seller, *only if the party not receiving the funds signed a separate release form*. That rule was frequently in conflict with the clear language of the REPC which, for example, stated that if the

Buyer cancels the REPC under Section 8, the deposit shall be released to the Buyer. When the Buyer asked the Principal Broker to release the Earnest Money Deposit, the Principal Broker had to tell the Buyer that the funds could be released only after the Seller signed a separate release form. Unfortunately, the Seller was frequently unwilling to sign such a release; and the Buyer was extremely upset to discover this separate and undisclosed requirement regarding release of the Earnest Money Deposit.

Based on the conflict between the wording of the Administrative Rule and the REPC, the Utah Real Estate Commission agreed to modify the Administrative Rule. *Effective October 2, 1997*, the Principal Broker is entitled to release the Earnest Money Deposit *in accordance with the requirements of the REPC, and without the requirement of obtaining a signature on a separate release form.* Although this rule change simplifies the process for releasing Earnest Money Deposits, the Principal Broker needs to exercise caution. The Principal Broker should carefully review the REPC and all related notices of cancellation, etc., in order to make a reasonable and prudent determination that the release of the Earnest Money Deposit complies with the terms of the REPC. Furthermore, if a dispute arises over the release of the Earnest Money Deposit, the deposit should be held and only released based upon written consent of the parties, court order, or to the State of Utah, in accordance with the other Administrative Rule change discussed above.

construction purposes unless specifically provided in the document or by separate written consent of the purchaser.

4.2.4. Interest Bearing Account. If an earnest money deposit is received and the parties believe that it would be uneconomical to place the money on demand in the "Real Estate Trust Account," the principal broker may, upon the written request of the parties, place the money in a separate, interest bearing trust account. The written request must designate to whom the interest will be paid upon completion or failure of the sale.

4.2.5. Liability for Receipt. All consideration represented as received by a licensee on a Real Estate Purchase Contract or other document must have, in fact, been received by the licensee. A licensee must not rely on a buyer's or a lessee's promise to deliver the consideration at a future date.

4.2.6. Property Management Trust Account. Each principal broker engaged in property management shall establish a separate "Property Management Trust Account." A principal broker who collects rents for others only occasionally or who does so as a convenience for his clients, and manages no more than six accounts, may use the "Real Estate Trust Account" for this purpose and need not maintain a "Property Management Trust Account."

4.2.7. Disbursements. All cash and like payments in lieu of cash received by a principal broker in a real estate transaction are to be disbursed only in accordance with the terms of the Real Estate Purchase Contract which authorizes such disbursement, other proper written authorization of the parties having an interest in the payments, or by court order.

4.2.7.1. The withdrawal of any portion of the principal broker's sales commission must not take place without written authorization from the seller and buyer or until the closing statements have been delivered to the buyer and seller and the buyer or seller has been paid for the amount due as determined by the closing statement.

4.2.7.2. Commissions due the principal broker, other licensees associated with the principal broker, or other principal brokers may be paid directly from the trust account only after the transaction is closed or otherwise terminated. If commissions are so disbursed, a record of each disbursement is to be recorded on the trust account ledger sheet for the transaction.

4.2.7.3. When it becomes apparent to the principal broker that a transaction has failed, or if a party to the failed transaction requests disbursement of the earnest money or other trust funds, those funds may only be disbursed by the principal broker as provided in R162-4.2.7 above.

4.2.7.4. In the event a dispute arises over the return or

forfeiture of the earnest money or other trust funds, and no party has filed a civil suit arising out of the transaction, the principal broker shall, within 15 days of notice of the dispute, provide the parties written notice of the dispute and request them to meet to mediate the matter. If the parties have contractually agreed to submit disputes arising out of their contract to mediation, the principal broker shall notify the parties of their obligation to submit the dispute over funds to an independent mediator agreed upon by the parties. If the parties have not contractually agreed to independent mediation, the principal broker holding the earnest money or trust funds shall use good faith best efforts to mediate.

4.2.7.4.1. In the event the dispute is not resolved in either a broker or independent mediation attempt, the principal broker shall maintain the disputed funds in a non-interest bearing real estate trust account. If the parties authorize, or if they previously authorized, deposit into a separate interest bearing trust account as provided in R162-4.2.4, the disputed funds may be maintained in a separate interest bearing trust account for disputed funds. The funds shall only be disbursed by the principal broker: (1) upon written authorization of the parties who will not receive the funds; (2) pursuant to the order of a court of competent jurisdiction; or (3) as provided in Section 4.2.7.4.2.

4.2.7.4.2. If the principal broker has not received written notice of a claim to the funds, including interest if any, within five years after the failure of the transaction, the principal broker may remit the funds to the State Treasurer's Office as "abandoned" property according to the provisions of Utah Code Section 67-4a-101, et seq.

4.2.8. Records. A principal broker must maintain at his principal business location a complete record of all consideration received or escrowed for real estate transactions in the following manner:

4.2.8.1. A duplicate deposit slip must show the amount of money received, the transaction number, and the date and place of deposit.

4.2.8.2. A set of checks and deposit slips must be used denoting the principal broker's business name and address, stating "Real Estate Trust Account," with the checks numbered consecutively. Checks drawn on this account are to be identified to the specific transaction. Deposits to this account are to be identified to the specific transaction. Voided trust checks are to be marked "Void" and the original check retained in the principal broker's file. A principal broker may establish as many bank trust accounts as desired. However, each trust account must be