Chapter 6
Trust Accounts and Trust Funds

INTRODUCTION

In fulfilling their responsibilities to clients, real estate brokers often serve as trustees in collecting and holding the funds of others in real estate transactions. The real estate license law and the rules of the Commission contain several provisions that govern the activities of brokers acting in their capacity as trustees. The law requires brokers to deposit trust funds into a trust or escrow account, to maintain records for that account, to account to persons for whom the broker holds such funds, and to disburse those funds properly.

Just as the public relies on the brokerage services of real estate professionals, brokers consult professional accountants and lawyers for advice on proper maintenance of trust accounts. The purpose of this Chapter is to acquaint brokers with laws for the establishment and maintenance of trust accounts. The methods and forms included here are suggestions, not required methods or forms, for brokers to review. At the same time they are not substitutes for the advice of professional accountants and lawyers. Small firms with only a few transactions may find these suggestions useful as guidelines for maintaining their accounts. Larger firms need customized accounting systems that meet the law's requirements and the needs of the individual business.

THE PURPOSES OF A TRUST ACCOUNT

A broker's trust account is a bank account separate and apart from other bank accounts that a broker may have. Its purpose is to hold funds which the broker and the broker’s affiliated licensees have collected on behalf of buyers and sellers and tenants and landlords separate from the broker's own funds. Typically, a broker will have a business account for operating the broker's firm and a trust account for holding trust funds.

Four major reasons exist for requiring brokers to keep trust funds in a special account away from personal funds.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>If a broker dies, funds held in a properly maintained trust account do not become part of the broker's estate to be divided among the heirs as the broker's personal assets are.</td>
</tr>
<tr>
<td>(b)</td>
<td>If the broker becomes involved in a lawsuit that results in a judgment against the broker, funds in a properly maintained trust account are not subject to any attachment or garnishment from the lawsuit.</td>
</tr>
<tr>
<td>(c)</td>
<td>In the event a broker files bankruptcy, the trust account does not become part of the broker's personal estate to be divided among the creditors by the bankruptcy trustee.</td>
</tr>
<tr>
<td>(d)</td>
<td>By placing trust funds in a trust account, the public's funds are not</td>
</tr>
</tbody>
</table>
easily available to cover, accidentally, any shortage in the firm's operating accounts.

In all of these situations a trust account protects the public's money without regard to the financial condition of the broker personally or the broker's estate. Yet, for full protection, trust accounts require special care and attention from the broker.

**TRUST FUNDS**

Trust funds consist of money or other things of value not belonging to the broker but received by the broker's firm on behalf of others. Things of value entrusted to a broker are usually money, but may take other forms.

**TYPES OF TRUST FUNDS**

There are two types of things of value that a broker may encounter:

| (a) | things which can be deposited - cash, check, cashier's check, money order, bank draft, and postdated check (on the date specified); and |
| (b) | things which cannot be deposited - promissory note, personal property (such as rare coins, jewelry, or stamps) and services (such as repair work to be done on the property in lieu of paying earnest money, rent, or a security deposit). |

Both types of funds require careful handling by the broker. The broker must establish written procedures for sales associates to follow in handling both items for deposit and items not for deposit. It is also essential that the broker train sales associates to write contracts properly to describe accurately the nature of the trust funds and any special instructions. For example, if a salesperson takes an offer on which he or she collects a promissory note, the offer must clearly reflect that fact for the seller to consider. The salesperson must give the promissory note to the broker for safekeeping. Brokers have a responsibility to cover these procedures in training sessions, sales meetings, and in the company's policies and procedures manual.

When earnest money, security deposits, or rents are in some form other than tangible property, the contract needs careful wording. For example, if a tenant is renting property that he or she wishes to purchase, he or she may agree to do some repair work on the property instead of paying earnest money.

The contract should include a stipulation such as the following:

| The parties agree that the buyer shall perform the following: (list the services or things to be done by the buyer) and such work shall be considered earnest money in the transaction at a value of ___. |

The wording of this and any other contract provision included in this manual is a suggestion only. Different transactions demand different language. Sales associates
must seek the approval of their broker before using a stipulation from this manual in an actual contract.

**SOURCES OF TRUST FUNDS**

Trust funds from real estate transactions come to a broker from many different sources. Listed below are a few of the more common sources in real estate transactions.

| (a) | EARNEST MONEY - The initial commitment of something of value entrusted to the broker to indicate that a buyer wants to buy property according to the terms of an offer being made. |
| (b) | DOWNPAYMENT - Funds entrusted to the broker toward the purchase price of the property. |
| (c) | RENTS - Monies collected from tenants of property not owned individually by the broker. A broker who manages rental property for an owner collects rent from tenants. Those rents are a source of trust funds to be held for the owner. Often, the owner authorizes the broker to pay expenses of the property from the rent collected and then either to remit the balance of the funds to the owner or to maintain the funds in reserve for future expenses. Sometimes under the provisions of a sales contract, a buyer moves into a property before closing or a seller remains in a property after closing and the broker collects the rent on behalf of the other party. In all these situations, the broker must handle the funds through a trust account. |
| (d) | SECURITY DEPOSITS - Funds collected from tenants of properties owned individually by the broker or by other owners for purposes such as security deposits, damage deposits, cleaning deposits, key deposits, and last month's rent. The broker must hold these funds in a trust account because they belong to the tenant. |
| (e) | FUNDS COLLECTED ON LAND CONTRACTS OR WRAPAROUND MORTGAGES - Payments collected on the sale of a property owned by a licensee and sold under a land contract (installment contract) or a wraparound mortgage. When a licensee collects these payments from the buyer and also owes obligations against the property (for example, mortgages, taxes, and insurance), the licensee must deposit the payments into a trust account until he or she has met such obligations and properly accounted for the funds to the parties. |
| (f) | ANY FUNDS ADVANCED BY A PARTY FOR ANY EXPENSES CONNECTED WITH A REAL ESTATE CLOSING OR PROPERTY MANAGEMENT - A party may pay a broker in advance for an appraisal, a credit report, or for some repair work to be done on a property. The broker must then hold the funds in a trust account until the broker pays the proper person. When a broker conducts the closing of a transaction, he or she may collect funds such as the down payment from the buyer, the loan proceeds, and payment from the seller for the termite inspection and then disburse those funds to the appropriate parties. These, too, are trust funds. |

**THE REQUIRED ACCOUNT**
In order to obtain a license, every broker must have a separate, federally insured, bank checking account that the bank designates as a trust or escrow account. At the time of making application for a broker's license, the applicant must register the bank trust account with the Commission. This required account may be either an interest-bearing or a non-interest-bearing checking account, and the broker must have signatory power on the trust account.

Under some circumstances the courts may properly seize or attach a bank account that the broker and the bank may believe is a trust account. Consider these four examples. In two instances the Internal Revenue Service seized real estate trust accounts to satisfy the broker's personal tax liability. In addition, a judge in a divorce case awarded a real estate trust account to the broker's ex-wife. In another case, a bank attached the trust account of a broker who fell behind on his loan payments. The common thread among these four cases was that the broker had established the trust account under the broker's Social Security Number. To help prevent seizure of a brokerage trust account, the broker must establish all trust accounts under an Employer Identification Number. The Internal Revenue Service will provide information on filing I.R.S. Form SS4 to obtain an Employer Identification Number.

DESIGNATION AS A TRUST ACCOUNT

The bank must designate the account as a trust or escrow account. The bank may require the broker to complete special forms to designate the account properly as a trust account. This designation assures protection for the trust funds in the account so long as the broker and the bank recognize and treat the account as a trust account.

NOTIFYING THE REAL ESTATE COMMISSION

Brokers must notify the Commission in writing of the name of the bank in which the account is maintained and the account name or number. If a broker changes banks or if the broker's bank changes the account number, the broker must notify the Commission in writing of the change. This written notification must be made on forms available from the Commission. A letter from the broker to the Commission satisfies this requirement.

ADDITIONAL TRUST ACCOUNTS

Brokers must have at least one trust account but may have more than one account, provided they have signatory power on each account and provided that they register each trust account with the Commission. For example, many brokers who have diversified operations often have one trust account for earnest money, one trust account for rental collections, and one trust account for security deposits. The bank must designate each account as a trust account, and the broker must register each account with the Commission. This written notification must be made on forms available from the Commission.

INSURED ACCOUNTS
Brokers must maintain their trust accounts in federally insured bank accounts for the protection afforded by the Federal Deposit Insurance Corporation (FDIC). While the Federal Deposit Insurance Company’s rules of coverage are complex and widely misunderstood, on the simplest level the FDIC insures up to $250,000.00 of deposits for each account owner in each member bank. Therefore, if a broker has accounts in a bank in which the aggregate balance exceeds $250,000.00, he or she might consider opening an additional account or accounts in other banks in order to be fully insured. Another option would be to purchase adequate excess FDIC deposit insurance coverage from a private insurance carrier. Properly structured such excess coverage can protect against the risk of bank failure and avoid the administrative burdens and expenses of keeping accounts in more than one bank.

For fiduciary accounts such as trust accounts, the FDIC offers "pass-through" deposit insurance. Pass-through coverage means that each buyer, seller, or tenant who has given the broker funds for deposit in the trust account is treated for insurance purposes as a separate account owner. Thus, if the buyer, seller, or tenant has no more than a total of $250,000.00 on deposit in the broker's trust account and in any other accounts in the same bank, those funds are fully insured.

In order for the broker's trust account to qualify for the "pass-through" FDIC coverage, the broker must meet the following record keeping requirements:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>disclose properly in the account records at the bank that he or she owns the account in a fiduciary capacity and</td>
</tr>
<tr>
<td>(b)</td>
<td>maintain records in good faith and in the regular course of business that show the names and interests of each owner of the funds in the account.</td>
</tr>
</tbody>
</table>

If the broker meets both requirements, the FDIC insures the funds of each owner separately. However, there is an important limitation to this insurance. Brokers should notify customers and clients, for purposes of determining deposit insurance coverage, that the FDIC will add the customer’s or client's funds on deposit in the broker's designated trust account to any other funds the customer or client has on deposit in the same bank. The FDIC will insure only a total of $250,000 of the customer's or client's funds in the same banking institution.

If FDIC insurance will not cover a customer's or client's deposits, the broker holding some of those funds may be liable for them. For example, a customer or client has deposits in XYZ Bank totaling $250,000. From other funds he gives a broker a $10,000 earnest money deposit. The broker deposits the $10,000 into her trust account which is also with XYZ Bank. Thus, the customer has a total of $260,000 on deposit in XYZ Bank. If the bank fails, FDIC insurance would cover only $250,000. In such a circumstance, the broker may be liable to the customer or client for $10,000 if the broker failed to notify the customer or client of the name of the bank in which she deposits trust funds and/or of this FDIC insurance limitation.

**AUTHORIZATION TO EXAMINE TRUST ACCOUNTS**

The Commission has the authority to examine a broker's trust account upon reasonable request. The Commission's staff routinely conducts examinations of trust accounts.
The Commission may accept a certified report from a certified public accountant instead of examining a broker's account. This report must certify that the account is in compliance with the license law and the Commission's Rules. For example, a broker who hires a certified public accountant (CPA) to audit the broker's books may have the CPA review the trust account. The CPA then completes a certification letter for the broker to keep on file. If the Commission's staff contacts the broker about reviewing the trust account records, the broker may request to submit the CPA report in lieu of the examination. The Commission, at its discretion, may accept the report. The report must take the following form:

\[
\begin{array}{l}
\text{______________} \quad \text{(Date)} \\
\text{I, __________________________, a Certified Public Accountant, have this date} \\
\text{examined the real estate brokerage trust accounts of ______________ for the time} \\
\text{period of _______ to _______ and find the handling of funds in these accounts to} \\
\text{be in compliance with O.C.G.A. §§ 43-40-20 and 43-40-25 (3), (4), (5), and (23)} \\
\text{and Rules 520-1-.26, 520-1-.30, and 520-1-.34 of the Georgia Real Estate} \\
\text{Commission. (Attach a statement explaining items, if any, which do not appear to} \\
\text{be in compliance.) Said firm maintains the following real estate brokerage trust} \\
\text{accounts:} \\
\end{array}
\]

\[
\begin{array}{|c|c|}
\hline
\text{Certificate Number} & \text{Signature of Certified Public Accountant} \\
\hline
\text{__________________________} & \text{__________________________________} \\
\hline
\text{Affirmed by Broker} & \\
\hline
\end{array}
\]

**NONRESIDENT BROKERS**

A nonresident broker may maintain a trust account in a bank in the nonresident's state of residence provided the broker authorizes the Commission to examine the trust account at such times as the Commission may elect. The broker must meet all of the other requirements for trust accounts discussed above.

**INTEREST-BEARING ACCOUNTS**

Brokers may want to use interest bearing accounts for their designated trust accounts. While a broker may use such an interest-bearing account, the broker must meet three conditions before so doing:

\[
\begin{array}{|l|}
\hline
(a) & \text{Any contract that requires the broker to hold money in trust must} \\
& \text{include language showing that the parties have agreed to have the} \\
& \text{money placed in an interest-bearing account. The contract must} \\
& \text{provide to whom the broker will pay any interest earned. Each broker} \\
& \text{should consult an attorney on what type of language in the contract} \\
& \text{best accomplishes this requirement.} \\
\hline
(b) & \text{The bank holding the account must designate the account as a trust} \\
& \text{account.} \\
\hline
(c) & \text{The broker must give written notice to the Commission of the} \\
& \text{account's name or number and the name of the bank in which it is} \\
& \text{opened. The written notice must include a statement that the broker} \\
\hline
\end{array}
\]
has notified the bank to allow a representative of the Commission to examine the account.

The option of having an interest-bearing trust account may not be available to a real estate corporation since certain federal bank regulatory agency rules may restrict banks from paying interest on demand accounts to corporations.

**MONEY MARKET FUNDS**

Brokers may not maintain their required trust account in money market funds. The license law dictates that this required account must be a federally insured checking account in a bank. However, the parties to a real estate transaction may agree in writing to direct the broker to deposit trust funds into a money market account. Thus, a broker may have an additional trust account in a money market fund if contractual obligations require it; in which case, the broker must see that the account is properly designated and registered with the Commission.

**RENTAL TRUST ACCOUNTS**

Brokers who manage rental properties for owners must deposit all trust funds received on behalf of the owners and tenants in a trust account. Such funds include security deposits, damage deposits, key deposits, and rents collected from tenants. While the broker may deposit these funds into the one required trust account, many brokers use a separate trust account for rental funds. If the broker uses a separate trust account for rental properties, it must also be registered with the Commission. Some brokers maintain a trust account for earnest money, a trust account for security deposits, and a trust account for rent proceeds and expenses.

**WHEN A LICENSEE ACTS AS PRINCIPAL**

When an individual becomes a licensee, certain laws designed to protect the public regulate that individual’s activity as a principal in real estate transactions. For example:

| (a) | sales associates must notify their broker in writing whenever they buy, sell, or lease real estate; |
| (b) | licensees acting as principals in sales or lease transactions must disclose their licensed status in writing in sales contracts and leases; and |
| (c) | licensees must deposit trust funds received by them when acting as principals in real estate transactions into designated trust accounts. |

A licensee acting as a principal who rents his or her own property may deposit rents collected into accounts other than a designated trust account. However, the same does not hold true for earnest money or security deposits collected on property in which a licensee has an ownership interest. The Attorney General has issued an opinion stating that the law requires a broker managing his or her own rental property to maintain security deposits in a trust account and the license law makes it clear that the same requirement applies to salespersons and associate brokers. [See O.C.G.A. § 43-40-20 (f) & (h)] This requirement can not be avoided by an agreement between a licensee and tenant. Thus, while a lease agreement in which a
licensee acts as a principal might give written authority for the licensee not to deposit rent payments in a broker’s trust account, the licensee must nevertheless place security deposits and earnest money deposits in a designated trust account approved by the broker and registered with the Commission.

In addition, when a licensee acts as a principal in the sale of property that he or she owns and receives installment payments from a buyer under the terms of a sales contract, the licensee may have to deposit those payments into a designated trust account. If after the buyer begins to make the payments to the licensee, the licensee remains responsible for taxes, insurance, existing mortgages or other encumbrances on the property, then the licensee must deposit into a trust account those parts of the buyer's payments necessary to pay the insurance premium or taxes, the mortgage payment, or other encumbrances. The licensee may remove proceeds above those required to satisfy the obligations, but must maintain a proper accounting of such deposits and disbursements.

Whenever a licensee is in doubt whether his or her acting as a principal requires the deposit of funds received by the licensee into a broker's trust account, the safest course of action is to account for those funds through such an account unless the licensee has competent legal advice to act otherwise. Other sections of the real estate licensing laws regarding dual capacity disclosure and advertising may apply in such transactions.

These three situations reflect proper handling of trust funds.

(a) The broker of ABC Realty Company, a sole proprietorship, owns rental property that ABC Realty manages. The broker places security deposits collected by ABC Realty into the company's trust account. The monthly rent collected by ABC Realty goes directly to the broker as personal funds.

(b) The broker of ABC Realty Company and a partner own rental property jointly that ABC Realty Company manages. The broker places both security deposits and rent payments received by ABC Realty Company into the Company's trust account since the company received them in trust for the partnership. The firm then disburses from its trust account proceeds from the monthly rents to the partnership according to the terms of the management agreement.

(c) The qualifying broker of ABC Realty Company, Inc., a corporation, owns rental property that the company manages. The broker places both security deposits and rent payments received by ABC Realty Company, Inc. into the company's trust account since the corporation received them in trust for the broker. The firm then disburses from its trust account proceeds from the monthly rents to the broker according to the terms of the management agreement.

**RECEIVING TRUST FUNDS**

The Commission insists that the public have maximum protection when brokers handle the public's funds. The following material will help brokers understand the law's provisions on handling trust funds collected on sales contracts, lease agreements, and other agreements establishing the broker as a trustee.
### BROKER'S RESPONSIBILITY

<table>
<thead>
<tr>
<th></th>
<th>ACCOUNT FOR AND REMIT - A broker must account for trust funds collected from the public by the broker's firm. The accounting process begins when the sales associate drafts an offer or lease agreement and continues when the funds are placed in the custody of the broker. The broker must then deposit the funds according to the terms of the written agreement. The agreement may provide for immediate deposit or a deposit in the future, such as upon acceptance of an offer to purchase or lease. The written agreement may provide for special handling of items that cannot be deposited such as a promissory note or some personal property.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>DISBURSE - When a sale closes, the closing documents direct the manner of disbursing the earnest money from the trust account. If a sale fails to close, the broker will attempt to obtain a written agreement separate from the contract telling the broker how to disburse the earnest money. Similarly, written lease agreements and management agreements dictate how the broker must remit security deposits and rent proceeds to the parties. The various written documents begin the accounting process. The broker's trust account records (journal, canceled checks, deposit tickets) must then reflect the instructions of the written agreements.</td>
</tr>
<tr>
<td></td>
<td>COMINGLING TRUST FUNDS - Brokers must use their trust accounts exclusively for the deposit of trust funds collected by them and their sales associates in real estate transactions. Consider a situation in which a broker allowed earnest money deposits to remain in a trust account and to accumulate after sales had closed. The closing statement directed that the earnest money be applied toward paying the commission on the sales. The earnest money deposits retained, therefore, became the broker's funds. The broker then used those accumulated funds to pay operating expenses. The broker wrote checks from the trust account to pay such expenses as utilities, salaries, and office supplies. In this situation the broker violated the law by commingling the funds of others with the broker's funds. The danger here is that as a result of commingling, a bankruptcy trustee, a creditor, or an administrator of the broker's estate could take both the broker's and the other persons' funds in the event of bankruptcy, lawsuit, or death of the broker. Because the account contained the broker's personal funds, it had the appearance of a regular operating account.</td>
</tr>
<tr>
<td></td>
<td>PROMPTLY DEPOSIT - The law requires a broker to deposit all trust funds promptly into a non-interest-bearing checking account. To do otherwise, the broker must have written authority from all parties. For example, if a buyer requests that the broker deposit earnest money upon acceptance of an offer rather than immediately upon receipt by the broker, the buyer must give the broker written authority to hold the money until that time. Other special instructions may include placing trust funds in an interest-bearing account or giving a postdated check or personal property instead of earnest money or security deposit. The broker must act on clear, written authority agreed to by</td>
</tr>
</tbody>
</table>
all parties in these situations. Once the broker deposits the funds into a trust account, they must be maintained there until the parties terminate or consummate the transaction.

**DUTY OF SALES ASSOCIATES**

Every broker must establish in writing reasonable policies for receiving trust funds from sales associates. The firm’s policies and procedures manual, affiliation agreements, and training materials should include these policies. Once the broker has informed the sales associates of the procedures they must follow, the broker must see that they adhere strictly to them. The law does not allow sales associates to receive written instructions from the parties to a contract that would override their duty to deliver the funds to the broker as soon as practicably possible.

<table>
<thead>
<tr>
<th></th>
<th>ACCOUNT FOR AND REMIT - It is unlawful for a sales associate to collect trust funds from a member of the public and fail to account for these funds or to remit these funds as provided for in the written agreement creating the trust. When a sales associate writes an offer to purchase property and collects earnest money from the buyer, the sales associate begins the accounting process. The written offer must accurately reflect the intentions of the parties. It should clearly state the date of the offer, the date of payment of the earnest money, and any instructions regarding the handling of the earnest money. For example, if a sales associate writes an offer and collects an earnest money check and the buyer instructs the broker not to deposit the check until the seller accepts the offer, the written offer must include a special stipulation or other written instructions to that effect. If the seller accepts the offer, the sales associate must be certain that the acceptance date appears in the written agreement to account for the date the broker is to deposit the money into the trust account. Sales associates must remit trust funds to their broker for deposit. The broker then deposits the funds according to the instructions in the written agreement. These same principles of accounting for and remitting trust funds apply to lease agreements and other contracts creating a trust. The lease contract and management agreement must state the instructions for handling security deposits and rental collections</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SALES ASSOCIATES MUST TURN OVER FUNDS TO BROKER - Sales associates are responsible for turning over funds to the broker as soon after receipt as is practicably possible. Any special instructions about the handling of trust funds that appear in a sales contract or lease agreement are for the broker. The sales associate must place the collected trust funds in the custody of the broker in the same form as the sales associate receives them.</td>
</tr>
</tbody>
</table>
|   | COMLINGLING TRUST FUNDS - It is unlawful for a sales associate to commingle collected trust funds with his or her own funds. Consider the following example. A salesperson received $200 cash as earnest money with an offer to purchase property. The salesperson deposited the cash into a personal checking account, then wrote a personal check from that account to the broker. Despite the motive, the salesperson violated the law by commingling the funds of others with the
HOLDING EARNEST MONEY

Improper handling of earnest money often results from the belief that a sales associate may keep the earnest money in his or her possession if the buyer does not want it immediately deposited by the broker. The sales associate may not do so. He or she must immediately turn over any earnest money to the broker in the same form in which he or she collected it.

If the buyer does not want the earnest money deposited immediately, the broker must have written authority to delay deposit until the time specified in the offer. When such authority exists in the offer, the broker, not the sales associate, must provide reasonable procedures for the safekeeping of the earnest money (whether check or cash) until the time for deposit.

A stipulation authorizing the broker to deposit the earnest money only after acceptance of the offer by all parties eliminates the problem of having to write an immediate refund of the earnest money to the buyer if the seller does not accept the offer. This procedure can also avoid such problems as waiting for the buyer's check to clear the bank before making the needed refund.

POSTDATED CHECKS

Buyers often request that a broker accept a postdated check for earnest money. If a sales associate collects a postdated check, it must be turned over to the broker immediately as would any other earnest money. The written offer must clearly disclose to the seller that the broker received a postdated check and when the broker is to deposit it. An alternative to accepting postdated checks is to accept a small amount of earnest money initially and stipulate in the offer that the buyer will pay additional earnest money on a specified date. It is important that the seller understand this arrangement.

EARNEST MONEY AND COOPERATING BROKERS

Before showing property listed with another company, the sales associate should call the listing company to clarify the agency status of the sales associate's broker. If the sales associate's broker is acting as a subagent, he or she should get an understanding of how to handle the earnest money in the event an offer is obtained. The listing company will hold the earnest money unless the parties agree otherwise in writing. The selling company must turn it over to the listing company for deposit if the terms of the contract so specify. If, for some reason, the selling company is to hold the earnest money, a special stipulation authorizing the selling company to hold the earnest money must appear in the contract.

If the buyer makes an earnest money check payable to the wrong company, the sales associates involved must either: (1) return the check to the buyer and have a check made out to the company which will hold the funds and inform the seller of the situation, or (2) have the seller make a counter offer indicating that the listing company is holding the earnest money.

EARNEST MONEY AND BUYER'S AGENTS
A licensee acting as a buyer's agent should call the listing company, notify them that he or she is acting as a buyer's agent and get an understanding of how to handle the earnest money in the event an offer is obtained. Again, the listing company will hold the earnest money unless the parties agree otherwise in writing.

**BROKER’S FUNDS IN THE ACCOUNT**

The primary purpose of a designated trust account is to maintain trust funds. A broker may have personal funds in the account only for the following three purposes:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td><strong>MINIMUM BALANCE</strong> - If the bank in which the broker maintains the trust account requires a minimum balance in the account, the broker may maintain that amount in the account designated as personal funds. The broker must clearly identify these personal funds in the trust account journal.</td>
</tr>
<tr>
<td>(b)</td>
<td><strong>BANK SERVICE CHARGES</strong> - If the bank in which the broker maintains the trust account charges a fee for the account, a broker must either arrange with the bank to deduct those charges from personal funds that the broker maintains in another account in the bank or keep a reasonable amount of personal funds in the trust account to cover the charge. The broker must clearly identify these funds in the trust account journal.</td>
</tr>
<tr>
<td>(c)</td>
<td><strong>ACCUMULATED COMMISSIONS</strong> - Sometimes all or portions of earnest money or rents in a trust account may become earned commissions. A broker may allow these funds to remain in the account as long as they are identified in a journal as the broker's funds and accounted for and removed on at least a monthly basis. For example, a broker has several closings in one month. In each transaction, the closing documents provide that the earnest money deposits held by the broker are to be applied toward the broker's commissions on the sales. As each transaction closes, the earnest money becomes the broker’s money. The broker elects to allow the deposits to remain in the account even after they become personal funds in order to disburse them by writing only one check at the end of the month. The broker may do so as long as these accumulated funds are identified as the broker’s in the journal and accounted for and removed on at least a monthly basis. When the broker disburses the accumulated funds, the broker must disburse them by a check made payable to the broker. For example, it would be improper for a broker to write a series of checks paying personal and operating expenses out of the accumulated funds in the trust account. To do that would result in the commingling of funds, and the account could then lose its trust status. Similarly, a broker may not transfer part of these funds to a landlord's account in the trust account to cover the landlord's expenses. The broker must remove the broker’s accumulated funds from the account each month only by writing a check made payable to the broker.</td>
</tr>
</tbody>
</table>
Brokers who manage rental property must place rents received into a trust account. The broker may pay any authorized expenses for the property from the trust account only in amounts not exceeding rent deposits credited to the landlord. If rent receipts do not cover the expense, the broker must transfer sufficient funds into the account before paying the expense. For example, a broker who manages property for owners Able and Baker must see that each owner has enough funds credited to his or her respective properties before paying any expenses for them. If Able's property produced $500 in rent and the broker paid $300 in expenses, the $200 balance belongs to owner Able. The broker can only use the $200 to pay Able's expenses or disburse it to Able. If Baker's property produced only $200 in rent and expenses of $400 are due, the broker can only pay out $200 from the trust account for the expenses. The broker must arrange with Baker to pay the balance of the expense in another manner. The broker cannot use any of Able's funds for Baker's expenses. Because the collection of rents and paying expenses on behalf of property owners involves so many bookkeeping entries, most brokers have a separate trust account just for handling the rental collections and expenditures.

**JOURNAL REQUIRED**

The law requires that every broker maintain a trust account journal to record every transaction that affects the trust account. The journal may consist of electronic records or paper records. Although the Commission does not require that the journal be in a particular form, the journal must include the following information about each deposit or disbursement:

| (a) | the names of buyer and seller or tenant and landlord or broker; |
| (b) | the amount and date of the deposit; |
| (c) | identification of the property involved; and |
| (d) | the amount, payee, and date of each check drawn on the account. |

Every broker should establish a bookkeeping system for the trust account or accounts that best serves the type of brokerage firm and its volume of transactions. The four items cited in the paragraph above represent the minimum information the journal must include whatever the form it takes.

**SUGGESTIONS FOR MAINTAINING TRUST ACCOUNT RECORDS**

| (a) | JOURNAL - Enter all trust account transactions in the journal. Make entries in the journal chronologically as each transaction occurs. Indicate deposit ticket and check numbers in the journal. Explanatory notes are often helpful. |
| (b) | ITEMS TO RECORD IN THE JOURNAL |
| (1) | Items that INCREASE the balance in the account such as deposits and re-deposits of bad checks; and |
| (2) | Items that DECREASE the balance in the account such as checks drawn on the account, bank service charges, check printing charges, and debit memos from the bank (bad check returned unpaid or other subtractions by the bank from the account). Unless the broker has written agreements with the |
parties having interest in collected trust funds that state otherwise, the broker is responsible for such charges as check printing charges, service charges or other charges imposed against the account by the bank.

| (c) | LEDGER - In addition to the trust account journal, maintain a ledger on each property when managing rental properties. |
| (d) | CUSTOMIZE - Adopt a record keeping system that meets the requirements of the License Law and that fits the unique needs of the firm. Seek advice from accountants, attorneys, other brokers, and real estate professional organizations. |

**MONTHLY RECONCILIATION REQUIRED**

Brokers must also reconcile their trust account balances at least once a month. This procedure involves comparing the bank statement balance to the checkbook balance. First, select the date of reconciliation. That can be the date on the bank statement, the date the broker receives the statement, or the date of the reconciliation. Add any deposits or other credits not showing on the bank statement as of the day of reconciliation to the statement balance. Subtract from the statement balance any debits incurred or checks written through the date of reconciliation but not cleared on the bank statement. After deducting any service charges, the resulting balance should equal the balance in the checkbook as of the date of reconciliation. Then compare the reconciled balance to the total amount of trust funds that the journal shows that the broker is holding at the time of the reconciliation.

All of this information must be incorporated into a written statement and the statements must be kept in the broker's files for three years. If there is a discrepancy between the reconciled bank balance and the journal or if the bank statement shows fees for non-sufficient funds checks drawn on the account or if the account shows a negative balance, the reconciliation statement must contain an explanation of the discrepancy or shortage and a description of the broker's actions to correct the problem.

**CASH REPORTING REQUIREMENT**

Real estate brokers must notify the Internal Revenue Service (IRS) when they receive more than $10,000.00 in cash in one transaction, or two or more related transactions in the course of a 12 month period. IRS Form 8300 assists businesses (including real estate brokerages) in reporting these transactions. The broker must complete the Form 8300 and file it with the IRS by the 15th day after the transaction occurs. The broker must maintain a copy of each Form 8300 for five years from the date of filing. In addition, the broker must provide a copy to the person paying the cash to the broker. A broker who fails to report or to supply information, or who files a false or fraudulent report is subject to civil penalty and/or criminal prosecution. For further information concerning these requirements, contact an IRS office.

**DISBURSING TRUST FUNDS**

The Commission’s rules provide that a broker who disburses trust funds from a designated trust account contrary to the terms of a written agreement creating the trust demonstrates incompetency to act as a real estate broker in such a manner as
to safeguard the interest of the public. The rule further provides the circumstances under which a broker may disburse funds from a trust account and fulfill the responsibility to account for and remit trust funds in the broker's possession.

| (a) | UPON REJECTION OF AN OFFER - Upon the rejection of an offer to buy, sell, rent, lease, exchange, or option real estate, the broker should promptly return any trust funds collected to the person who made the offer. |
| (b) | UPON WITHDRAWAL OF AN OFFER BEFORE ACCEPTANCE - When a buyer makes an offer to buy, sell, rent, lease, exchange, or option real estate, or gives the broker earnest money and then withdraws the offer before the seller accepts it, the broker should promptly return the earnest money to the buyer. |
| (c) | AT THE CLOSING OF A TRANSACTION - In a real estate sales transaction, a broker must disburse funds from a designated trust account according to the terms of the closing documents. The closing documents may provide for a refund of the earnest money to the buyer, for crediting it toward closing costs or down payment, or for crediting it toward the broker's commission earned on the sale. If refunded to the buyer, the broker must write a check made payable to the buyer in the amount of the earnest money on deposit. If credited toward the closing costs, the broker must make the check payable as directed by the closing agent. If the earnest money is credited toward the broker's commission, the broker must make the check payable to the broker in the name in which the broker does business and which the broker has registered with the Commission. If a broker operates as a sole proprietorship under a trade name, the check must be made payable to the company's trade name. If the broker does business in his or her own name, then he or she may make the check payable to himself or herself. If the firm is a corporation, limited liability company, or partnership, the check must be made payable to the corporation, limited liability company, or partnership name. The broker must never make payable to "Cash" any check written on the trust account. |
| (d) | BY WRITTEN AGREEMENT - A broker may disburse trust funds upon securing a written disbursement agreement signed by all parties having an interest in the trust funds. The agreement must be separate from the contract that directs the broker to hold the funds. |
| (e) | INTERPLEADER - A broker may file a legal action known as an interpleader in a court of competent jurisdiction, and tender the trust funds in question into the registry of the court. |
| (f) | UPON COURT ORDER - A broker may disburse trust funds upon the order of a court of competent jurisdiction. |
| (g) | REASONABLE INTERPRETATION OF CONTRACT - A broker may disburse trust funds upon a reasonable interpretation of the contract that directed the broker to deposit the funds. After consulting an attorney, the broker may take the following steps: |
| (1) | be certain that the bank has credited the funds to the broker's trust account; |
notify all parties in writing of the disbursement; and

(3) disburse the funds according to the notification.

SPECIAL PROBLEMS IN DISBURSING TRUST FUNDS

Wise brokers are cautious brokers when disbursing trust funds, particularly when the parties to the transaction have a controversy. In such a case, the broker may be representing a party who has a potential claim to the earnest money. The broker may not act to please that party and not pay close attention to the Commission's Rules. Sometimes a broker attempts to avoid controversy and by appeasing all parties, does not disburse the trust funds properly.

The case of *Panfel v. Boyd* illustrates the problem. The broker, who represented the sellers, deposited $10,000 as buyers' earnest money in the trust account. The sales contract provided that "if sale, due to buyer's default, willful or otherwise, is not consummated, then said earnest money shall be refunded." The sale failed to close, despite attempts of both buyers and sellers to extend the closing date. When the buyers demanded return of the earnest money, the broker refused, instead filing an interpleader action with the court. After a trial and appeal, the Georgia Court of Appeals ruled that the buyers were entitled to seek damages from the broker for the broker's failure to return the earnest money. The appellate court reviewed the seven methods for disbursing trust funds under Section 520-1-.34 [currently 520-1-.08(3)] of the Commission's Regulations and noted that the parties specifically contracted for return of the earnest money if the sale was not consummated. That court also stated that "a reasonable interpretation of the contract" required the broker to return the earnest money. If there is any reasonable doubt about the course of action to take in disbursing earnest money, a broker may wish to seek competent legal advice.

A broker may disburse trust funds based upon a reasonable interpretation of the contract that created the trust. First, consult an attorney in determining to whom to disburse the funds, then take the following steps:

(a) be certain that the bank has credited the funds to the broker's trust account;

(b) notify all parties in writing of the disbursement and

(c) disburse the funds according to the notification.

BAD CHECKS

(a) EARNEST MONEY - If a broker immediately deposits an earnest money check as soon as the buyer makes an offer, the broker must be careful. In the event the buyer withdraws the offer or the seller rejects it, the broker must not refund the money before the buyer's check clears the bank. Otherwise, there is danger that the bank may return the check unpaid after the broker has refunded the earnest money. A broker can avoid this situation by establishing such procedures as:

(1) accepting only certified funds from buyers;

(2) including in the contract that any necessary earnest money refund will be made only after the buyer's check has cleared the
bank; or

(3) obtaining written authorization to deposit the check only after acceptance by all parties.

If the bank returns a buyer's check unpaid after all parties have accepted the offer, the broker must immediately advise the buyer and the seller of the fact preferably in writing. If a bank error or a mistake on the buyer's part has occurred, the buyer will have the opportunity to correct it. Otherwise, the broker must ask the seller how to proceed. The seller may wish to void the contract (if proper grounds exist) or proceed in another manner. Before notifying the seller, the broker should determine exactly why the bank returned the check in order to assist the seller. If the broker promptly notifies the seller, the seller is then in a better position to take whatever action the seller deems appropriate or to consult legal counsel for advice on how to proceed.

(b) RENT - When managing rental properties for an owner, a broker can take steps to avoid complications resulting from returned checks. The broker must not pay expenses on a property if the return of a tenant's rent check could result in an imbalance in that owner's account. The broker may need to retain some of the landlord's funds in the trust account to cover such possibilities. Some broker's delay the regular closing out of the owners' accounts for up to a month in order to deal with the possibility of returned checks. The broker's management agreement with the property owner must cover arrangements of this type.

MAINTAINING RECORDS

In addition to maintaining a trust account journal, a broker must keep the following items for a period of three years:

(a) verified bank deposit slips;
(b) bank statements;
(c) receipts;
(d) offers;
(e) sales contracts;
(f) listing contracts;
(g) closing statements;
(h) leases;
(i) management agreements; and
(j) other documents related to real estate transactions.

The broker must make these records available for inspection by the Commission.