

TRUST ACCOUNT AND INTERPLEADER PROCEDURES



PUBLISHED BY
THE OKLAHOMA REAL ESTATE COMMISSION

Trust Account and Interpleader Procedures



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THE OKLAHOMA REAL ESTATE COMMISSION

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GUIDELINES FOR ESTABLISHING AND MAINTAINING A TRUST ACCOUNT AND DISPOSING OF DISPUTED TRUST FUNDS

PREFACE

Due to the nature of real estate (purchase and lease) transactions, large sums of money belonging to others come into the custodial care of brokers. Recognizing the serious implications of this position of trust held by brokers, the Oklahoma State Legislature has included a number of provisions in the Oklahoma Real Estate License Code and Rules which govern the activities of brokers acting as trustees.

This booklet is underwritten by the Oklahoma Real Estate Education and Recovery Fund and is presented for the purpose of assisting brokers in complying with the requirements for establishing and maintaining trust accounts. Since trust accounts and the disposition of funds is a broad subject, no single treatment can possibly answer all questions. Therefore, this booklet is intended as a means of assistance and information for real estate licensees in the management of trust funds. The information supplied herein is intended as a suggestion only and should be considered as supplementary to the accounting procedures every brokerage operation must use.

DEFINITIONS

BROKER'S PERSONAL OPERATING ACCOUNT: This account contains monies of the broker to operate the business and does not contain monies of others.

COMMINGLING: The mixing of funds of others with personal or business funds of the broker.

DISPUTE: Controversy concerning the ownership of trust funds.

EARNEST MONEY DEPOSIT: Money given by the purchaser with an offer to purchase to show good faith.

INTERPLEADER: A court action available to the broker in the case of disputed trust funds. This action requests the court to determine to whom the funds should be awarded.

SECURITY DEPOSIT: Commonly a deposit of money by a tenant to a landlord or property manager to secure performance of a written or oral rental agreement.

TRUST/ESCROW ACCOUNT: An account established in a financial institution wherein deposits are insured by an agency of the federal government, separate and apart and physically segregated from the broker's own funds in which the broker is required by law to deposit all funds or items collected from others.

TRUST FUNDS: Money or items of value of others held by the broker in trust.

PURPOSE OF TRUST ACCOUNT

Trust accounts are not mandatory unless monies or other depositable items belonging to others are accepted by the broker and require the broker to place the monies or items in the broker's trust account.

If funds are made payable to the broker, he must deposit them into a trust account of which he is a signor. If the broker does not desire to establish an escrow account, a third party escrow may be used, providing funds are made payable to the third party and all parties agree in writing.

Brokers are required to keep custodial funds or other items of value in a demand account. The account must be in the name of the broker as it appears on the license or trade name as registered with the Commission. The broker must also be a signor on the account specifically labeled as a trust or escrow account. Three primary reasons for this are: (1) Should the broker die, the funds do not become a part of his/her estate; (2) In the event the broker is the subject of litigation, the trust funds are protected; and (3) Trust funds are insured by the FDIC up to \$100,000 per individual contributor, providing each individual contributor is identified in the broker's trust account ledger and provided commingling has not occurred.

MULTIPLE ACCOUNTS AND RECORDING REQUIREMENTS

Brokers may have as many trust accounts as their business needs require. However, it is mandatory that the Oklahoma Real Estate Commission be notified in writing each time an account is opened, closed or changed. This may be done by completing a form provided by the Commission.

Necessary notification would include bank name, address and account number changes.

LEGAL AUTHORITY

The Commission's legal authority to make requirements concerning trust accounts is found in Title 59, Oklahoma Statutes, 1974, Section 858-312, Subsections 6 and 16, and Oklahoma Real Estate Commission Rules 605:10-13-1, 605:10-13-2, and 605:10-13-3.

INTEREST BEARING ACCOUNTS

Interest bearing accounts are authorized by Commission Rules, however, certain disclosures are required. The broker must disclose to all parties, in writing, that the trust funds will earn interest and who will be receiving the interest. This written disclosure must be performed through a separate agreement. The Commission does not prohibit the broker from receiving the interest; however, a signed separate agreement must be executed by all parties stating that each party is in agreement and identifies the party receiving the earned interest.

Interest earned may be credited to any party, but the broker is cautioned: the IRS Form 1099 may reflect interest income earned by the broker if the account is not properly identified. Should the broker desire to have an interest bearing account with someone else earning the interest, the broker should first consult with his accountant and banker prior to setting up the account. The interest bearing account must be a demand type account; this prohibits the use of certificate of deposit or other types of time deposits as trust/escrow accounts.

EXCESSIVE TRUST/ESCROW ACCOUNT FUNDS

A broker must maintain an accounting system that accurately and quickly identifies excess funds held in a trust account. An accounting of excess funds should be done monthly and a written summary or ledger kept with the bank statements and canceled checks.

Commission Rule 605:10-13-1(b) states that, **“a broker may not keep any personal funds in the trust account, except amounts sufficient to insure the integrity of the account and cover any charges made by the bank for servicing the trust or escrow account.”** Excess funds may not be used to pay personal or operating expenses of the broker, the agency, or for any illegal, illicit or overt purposes.

Excess funds are provided as overdraft protection for a broker's trust account(s) when the broker experiences a high incident of insufficient fund checks from tenants or excessive bank charges for maintenance of the account. Excess funds may not be used to pay purchasers earnest money deposits, closing costs, repair costs, tenant's rent or security deposit, or other contractual requirements unless a prior written agreement has been made.

If funds exist beyond insuring the integrity of the account, the broker should write a check from his trust account to his operating account or electronically transfer the funds to the operating account. However, if the Commission finds that a broker is abusing the account by holding excessive funds that belong to the broker, the Commission could initiate an action against the broker for commingling.

A broker must remove excess funds from his trust account(s) at any time the amount exceeds the limits imposed by the Commission. The broker should write a check from his trust account to his operating account or electronically transfer the funds to the operating account.

The broker may choose to have the monthly charges assessed against his/her operating account in order to prevent having excess funds in the trust account. Some banks offer this service as an option.

RECONCILIATION OF BANK STATEMENT AND TRUST ACCOUNT LEDGER

The monthly statement indicates the amount the bank has credited to the trust account as of a specific date. The broker has the obligation of reviewing the statement and reconciling it on a monthly basis.

The statement balance should be adjusted to deduct any outstanding checks not received by the bank before the statement was published. The statement should be credited with any deposit not shown on the statement. The adjusted balance should be the same as the trust account ledger balance.

When the adjusted bank statement and the trust account ledger do not show the same balance, the broker should:

1. List individually each real estate purchase contract pending in which the earnest money deposit is being held in the trust account and total the list of deposits.

2. List individually the amount of each security deposit and the total of all deposits.
3. List individually all deposits the broker is holding pending the resolution of a dispute.
4. List all deposits the broker is holding that have been advanced for payment of expenses or repairs.
5. List and total all other funds, accounting for their sources and purposes.

If the bank statement is less than the ledger balance, the account is considered “short.” If the bank balance exceeds the ledger balance by more than an amount as determined by the Commission, the account is considered commingled. In either case, the broker should take immediate corrective measures.

POST-DATED AND RETURNED CHECKS

The broker must immediately inform the seller or landlord of a returned or dishonored check. The option of collection procedures should be determined by the parties.

In the case of a security deposit or other property management trust account with a dishonored check, the property management agreement may give the broker the authority to attempt collection.

Real estate purchase contracts normally do not give brokers the authority to attempt to collect dishonored checks.

Brokers may accept post-dated checks for an earnest money deposit. However, the parties must be informed of the risks of post-dated checks. In the event a party elects to accept an offer with a post-dated check, the broker may not deposit the check until the appropriate date and must maintain the security of the check until deposited.

MAINTAINING PROPER TRUST ACCOUNT RECORDS

The Oklahoma Real Estate License Code and Rules require a broker to maintain a bookkeeping system that clearly and accurately discloses full compliance with the law.

While the broker may develop his/her own accounting system, the following must be included:

1. The amount and nature of the deposit.
2. The date of the deposit.
3. The address of the subject property.
4. The date the funds were disbursed.
5. The amount of the disbursement.
6. The number of the disbursement check.
7. A current running balance of all funds held in the trust account.

An efficient accounting system allows other designated persons in the broker's absence to identify trust funds by individual depositor or if circumstances arise to identify depositors for other reasons.

RECORD RETENTION

The broker should maintain ledger sheets, bank statements, canceled checks, deposit slips, copies of listing agreements, contracts, closing statements, lease agreements, management agreements, general correspondence and other items necessary to verify and explain record entries for a minimum of five years after consummation or termination of each transaction. The five years shall begin with the date of disbursal of funds.

Brokers may choose to maintain separate ledgers for real estate sales and property management activity or combine these into one ledger. The Commission's emphasis is on the accuracy of the accounting, not the accounting system used.

RESPONSIBILITY IN HANDLING OF TRUST FUNDS

The broker is responsible for trust funds from the time the broker, an associate, or employee of the firm receives them and until they are properly disbursed. This responsibility exists unbroken even if the funds are embezzled or stolen while in the broker's care. Such potential liability requires strict supervision by the broker. Written policies and procedures that are approved by the broker are invaluable in establishing the standard for associates or employees to follow in handling trust funds. The broker should monitor activity to ensure these policies and procedures are being followed.

IMPROPER HANDLING OF TRUST FUNDS

The License Code and Rules provides that a licensee may be disciplined for improper handling of trust funds. Specific examples of the improper han-

dling of trust funds include but are not limited to: failure to deposit funds before the end of the third banking day following acceptance of an offer, unless otherwise agreed to in writing by all interested parties; releasing of funds without proper authority; use of funds for payment of unauthorized expenses; and failure to establish an accurate accounting system.

Improper accounting of trust funds may subject the broker or associate to civil suits or possible prosecution under criminal charges.

TRANSFER OF FUNDS

If it becomes necessary to transfer trust funds in the event of the death or disability of a broker or the cessation of real estate activities and the responsible broker is unable to retain said funds, refer to Rule 605:10-9-6 and 605:10-13-1(m), respectively.

RECEIPTS, DEPOSITS and DISBURSEMENTS

Unless otherwise agreed to in writing by the purchaser and seller, the License Code and Rules requires trust funds to be deposited by the end of the third banking day after the acceptance of an offer. The broker should absolutely ensure that trust funds are deposited according to the terms of the contract.

In a cooperative brokerage transaction, the selling broker will read the contract and comply with the earnest money deposit instructions. Frequently, purchase contracts require the selling broker to turn earnest money checks over to the listing broker. Irregardless, the terms of the contract regarding the earnest money funds must be followed.

The broker shall maintain such funds in said bank account until the transaction involved is consummated or terminated and proper accounting made.

In the event a transaction does not consummate, the broker shall promptly disburse the earnest money or items to the proper party in accordance with the terms of the contract. In the event a dispute arises prior to disbursement, the broker shall follow Rule 605:10-13-3 or may file an interpleader action with the appropriate court.

DISPUTES ABOUT EARNEST MONEY AND SECURITY DEPOSITS

In the event a dispute arises prior to the disbursement of any monies or other valuables held by the broker in connection with a real estate purchase

contract, the broker shall continue to retain said money or valuables in trust until he/she has a written release from all parties consenting to its disposition, or until a civil action is filed to determine its disposition, at which time the broker may turn it over to the court.

In the absence of pending civil action and upon the passage of thirty (30) days from the date of final termination of the contract, it shall not be considered grounds for disciplinary action by the Commission against a broker for the broker to disburse monies or valuables to either purchaser or seller when the disbursement has been based on a good faith decision by the broker that the opposite party has failed to perform as agreed. Such disbursement to be made only after all parties concerned have been given fifteen (15) days written notice setting forth the broker's proposed action.

Some real estate purchase contract forms permit the broker to pay expenses incurred on behalf of the purchaser when a transaction does not close. Before exercising this option, the broker must obtain written consent from the purchaser and the seller before making any payment of expenses from the trust funds. If the purchaser withholds consent, the broker must proceed as if a dispute had arisen.

Disputed funds should not be allowed to accumulate for a period in excess of one year. The broker is encouraged to avail himself to options regarding disputed funds as soon as possible.

INTERPLEADER

In 1980 the Oklahoma Legislature enacted a law that established a procedure for the resolution of the broker's dilemma concerning the ownership of disputed funds. A broker may file an interpleader action without having to decide how the funds should be disbursed.

The broker may pay the funds directly into the court clerk's office and the court then decides which party, purchaser or seller, landlord or lessee, is entitled to the money.

The broker may also file an interpleader action when the broker claims an interest for part of the funds. For example, if the purchaser wrongfully refuses to close, a contract may permit the earnest money to be divided between the broker and the seller after deductions for expenses. A broker may file the interpleader at any time after he/she has tried to obtain a mutual release of contract and consent to disburse funds.

The broker may file an interpleader action in Small Claims Court if the amount disputed does not exceed \$4,500.00. Amounts over \$4,500.00 may require the services of an attorney in District Court. In this case the broker may or may not be able to recover the costs of filing and reasonable attorney fees.

In 1982, when the Oklahoma Legislature amended the statutes allowing interpleader actions in Small Claims Court, it also established the filing form. This form is included in the back of this booklet. The broker should contact the County Clerk's office regarding any changes to the interpleader process.

FILING AN INTERPLEADER ACTION

When filing the interpleader forms, the broker should deliver a check from his/her trust account to the court clerk for the amount of the disputed earnest money.

The defendants must be served with a copy of the affidavit and the Order advising them the interpleader action has been filed and the court date. At this time either defendant may have the action transferred to District Court from Small Claims Court. Should this occur, the broker is advised to seek the services of an attorney.

There are three ways the affidavit and Order may be served on the defendant(s). First, the court clerk may notify the defendants by certified mail. Second, the affidavit and Order may be served by the sheriff. Third, the broker may obtain the service of a private process server. The cost of each of these methods varies. Certified mail is usually the least expensive, but if the broker feels the defendant(s) may be difficult to locate or may refuse certified mail, the sheriff or process server may be necessary.

The broker should attend the hearing due to the fact that the judge may desire background information. The broker would be well advised to have all documents relating to the transaction ready for the judge to review.

If the broker claims an interest in the disputed earnest money, the judge will likely require specific documentation. For example, if the claim is the purchaser wrongfully refused to close, the broker may be asked to produce a listing agreement showing the terms of the broker's interest.

Once the matter has been decided by the court, it is within the court's authority to order the broker to be reimbursed for the filing fee, cost of service, and attorney fees, if applicable.

There are several advantages to the interpleader action. The broker is relieved of the risk of potential liability for releasing funds to the wrong party. It is quick, inexpensive and provides an efficient resolution of competing claims.

CONSUMMATION OF A TRANSACTION

When the parties to a contract have authorized the closing to be handled by a closing company, a lending institution or an attorney, the broker should deliver a check drawn on the trust account for the amount of earnest money to the closing company. The closing company disburses all funds and gives the broker a check for the earned commission. Any division of the commission is then handled through the broker's personal operating account. This procedure avoids the situation wherein earnest money might become earned commission and remain in the trust account.

In case the broker is to make all disbursements, he/she is acting as a trustee. All funds received in a transaction must be deposited in the trust account and disbursed directly to the parties due the funds. These funds may include the earnest money, additional down payment, and proceeds of a sale. Under no circumstances should the broker deposit these funds into his personal operating account. The only funds the broker is entitled to deposit into his personal operating account are funds which are irrevocably his/hers. These funds would consist of the earned commission as spelled out in the listing contract, or reimbursements of funds expended on behalf of the seller prior to the closing. Upon closing, the broker's commission and any reimbursements must be removed immediately from the trust account and deposited into the broker's personal operating account. Any division of commission will be made from the broker's personal operating account, not the trust account.

WHEN TO WITHDRAW FUNDS

Funds are withdrawn from a trust account when the transaction is consummated or the transaction is terminated, or upon agreement of the parties.

COMMISSION SPLITS

Commission splits shall not be paid from a broker's trust account. For further trust account guidance, refer to Commission Rules 605:10-13-1 through 605:10-13-3.

APPENDIX I

SAMPLE INTERPLEADER FILING FORM

IN THE DISTRICT COURT, COUNTY OF _____, STATE OF
OKLAHOMA

Plaintiff,

Address

Phone

SMALL CLAIMS NO. _____

-VS-

Defendant

Defendant

AFFIDAVIT

STATE OF OKLAHOMA)
COUNTY OF _____) SS:

_____. being duly sworn, deposes and says: THAT,
_____, the defendant resides at
_____. in the above named county, and that the mailing address of
the defendant is _____.
THAT, _____, the defendant resides at
_____, in the above named county, and the mailing address
of the defendant is _____.
THAT the Plaintiff has custody or possession of money in the amount of or value of
\$_____held pursuant to the following:

THAT the defendants claim or may claim to be entitled to such money. THAT the plaintiff deposits herewith into the court \$_____ which equals the amount of such money to be invested in accordance with the order of the court and that the plaintiff will abide with the judgment of the court as to the final disposition thereof.

Plaintiff

(continued)

Interpleader filing form

Subscribed and sworn to before me this _____ day of _____, 20____.

_____, Court Clerk
My Commission Expires:

BY: _____
Deputy, Judge or Notary

ORDER

THE people of the State of Oklahoma , to the within named defendants: YOU are hereby directed to appear and answer the foregoing claim and to have with you all books, papers and witnesses needed by you to establish your claim to such money. THIS matter shall be heard that the _____ **County Courthouse**, _____, _____, **Oklahoma, at the hour of _____ o'clock of the _____ day of _____, 20____**, or at the same time and place seven (7) days after service hereof, whichever is latter. And you are further notified that in case you do not appear Judgment will be given against you as follows: DETERMINING or foreclosing your claim to the above-described money as well as the disposition there, AND in addition for costs of the action, including attorney fees where provided by law and including the costs of service of the order.

DATED this _____ day of _____, 20____.

_____, Court Clerk

JUDGES NAME _____

JUDGES ROOM NUMBER _____

BY: _____
Deputy