



Unit

2

Escrow Accounts and Disciplinary Action

In This Unit

Broker escrow accounts • Timely deposit of escrow funds • Conflicting demands for escrowed funds • Brokers' records • Real Estate Recovery Fund • Violations • Division of Real Estate's responses to law violations

Your Quick Reference
Guide to Changes
in Florida Escrow
Accounts and
Disciplinary Action

Learning Objectives

When you have completed this unit, you will be able to accomplish the following.

- Describe the legal requirements for brokers regarding the handling and accounting for escrow deposits.
- Describe the purpose of the Recovery Fund and the procedures used in disbursements to consumers.
- Describe the procedures for filing a complaint, the types of penalties available to the FREC, and the requirement that licensees notify the FREC for criminal convictions.

BROKER ESCROW ACCOUNTS

A broker's escrow account holds funds that belong to persons other than the broker. The account must be kept in a bank, trust company, title company having trust powers, credit union, or a savings association within the state of Florida. At least one broker in the firm must be authorized to sign checks on the escrow account. Other members of the firm may also be authorized to sign checks [61J2-14.008(1)(c), 61J2-14.010(1)].

While many brokers let title companies hold the deposits, some brokers (especially those engaged in rental property management) still maintain their own escrow accounts. The Florida statutes and the FREC rules regulate a broker's escrow accounting, both for sales and for property management.

Amount of Broker's Funds in Account

A broker may deposit up to \$1,000 of personal or business funds to open a sales escrow account, or \$5,000 to open a property management escrow account, keep it open, and pay for unexpected expenses. The higher amount for the property management escrow account allows the broker more latitude in disbursing to owners without fear that a tenant's dishonored check will lead to a negative balance in the account. A broker can open several property management accounts and legally deposit up to \$5,000 into each account [61J2-14.010(2)].

Interest-Bearing Accounts

Provided a broker has the written permission of all parties to a transaction, the broker may place funds in an interest-bearing escrow account. The permission document must set the time to disburse earned interest and name the person or organization to receive the interest. The escrow account must be insured by the FDIC and held in a depository within the state of Florida (61J2-14.014).

TIMELY DEPOSIT OF ESCROW FUNDS

A sales associate who receives any deposit must deliver it to the broker no later than the business day following receipt. Brokers who maintain an escrow account must deposit the funds no later than the end of the third business day following receipt of the funds from the customer. The time period is not cumulative. A broker is not responsible if the bank dishonors a check unless the broker, by culpable negligence, failed to deposit the check on time, and a party is damaged as a result [61J2-14.008(1)(b)]. Saturdays, Sundays, and legal holidays are not counted as business days (61J2-14.009).

• **Example:** John Sousa signed a purchase agreement and gave sales associate Wendell an earnest money deposit on Thursday afternoon for \$5,000. Wendell must deliver the deposit to his broker, Larry, by the end of the next business day, Friday. Broker Larry must deposit the funds no later than the end of the business day on Tuesday.

IN PRACTICE

You don't need a sales escrow account

Fewer brokers hold escrow deposits today because title insurance companies are now willing to take on that task. Brokers who let a title company hold the deposits save time in accounting and recordkeeping and don't have to worry about DBPR escrow audits and conflicting demands for deposits.

When the Deposit Is Held by a Title Company or an Attorney

When a deposit is placed with a title company or an attorney, the licensee who prepared or presented the sales contract must indicate on that contract the name, address, and telephone number of such title company or attorney. Within 10 business days after each deposit is due under the sales contract, the licensee's broker must make written request to the title company or attorney to provide written verification of receipt of the deposit.

Written verification of deposit. Within 10 business days of the date the licensee's broker made the written request for verification of the deposit, the licensee's broker must provide the seller's broker with either a copy of the written verification, or, if no verification is received by licensee's broker, written notice that licensee's broker did not receive verification of the deposit. If the seller is not represented by a broker, then licensee's broker shall notify the seller directly (61J2-14.008).

When the deposit is held by a title closing agent or attorney, the following sections about conflicting demands do not apply. Closing agents and attorneys may decide whether to disburse the funds, but normally will not release any funds unless they have: (1) the written agreement of both parties or (2) a court order. The licensee is not responsible for the funds in this situation and need not become involved.

Disbursing Funds from a Broker's Escrow Account

The broker is the custodian of escrowed funds but does not legally control the funds. The buyer has legal control of escrowed funds and may demand return of the funds at any time before the seller has accepted a buyer's offer. Upon acceptance, however, both the buyer and the seller legally control the deposit. The broker should not disburse the funds without the written agreement of both the buyer and the seller (61J2-14.011).

CONFLICTING DEMANDS FOR ESCROWED FUNDS

When both seller and buyer demand the release of escrowed funds without agreeing who will receive the funds, it is called *conflicting demands*. If no demand has been made for the escrowed funds, but the broker is uncertain about who is entitled to the funds, the broker is said to have *good-faith doubt*.



Caution

For example, if a contract clause states that the buyer may void the contract if termite damage exceeds \$1,000, and a contractor's estimate to repair the damage is \$1,500, there may be good-faith doubt. If the broker tries to contact the seller repeatedly, and the seller does not respond, the broker may then decide to disburse the escrowed funds to the buyer, arguing that he did not have a good-faith doubt as to the buyer being entitled to the funds. While the broker may be safe from disciplinary action from the FREC, the seller may still sue him and might win the case.

Procedures in Escrow Deposit Disputes

The broker holding the escrow deposit has 15 business days to send written notification to the FREC after receiving the last conflicting demand from the buyer or seller or after having good-faith doubt. Within 30 business days after the last demand, the broker must begin one of the following settlement procedures:

- **EDO**—Request the Commission to issue an escrow disbursement order (EDO) determining who is entitled to the escrowed property. If the amount of the escrow deposit is more than \$50,000, the FREC won't issue an EDO. The broker would have to employ one of the other methods.
- **Mediation**—Submit the dispute for mediation, if all parties agree. The parties must also agree on who will pay the mediator. Payment to the mediator must be agreed to in writing. Mediation does not result in a binding decision, but it is a method to help the parties reach an agreement. If the parties agree, they may reduce their agreement to writing and sign it, making it an enforceable contract. If the parties have not reached agreement within 90 days, the broker must promptly select one of the other measures.
- **Arbitration**—Submit the dispute for arbitration, provided all parties agree. The parties must agree to be legally bound by the decision and to pay the arbitrator.
- **Litigation**—Submit the dispute to litigation by a court, either by interpleader or declaratory decree. If a broker claims no part of the deposit, the court action is called an *interpleader*. If the broker were claiming part of the escrow deposit, the broker would ask the court for a declaratory judgment [475.25(1)(d)1].

Exceptions to the Conflicting Demands Requirements

Brokers who disburse disputed escrowed funds held on a contract without following the conflicting demands procedures may be charged with *failing to account and deliver escrowed property*. There are currently three exceptions. A broker may return the escrowed property without notifying the Commission if:

- the buyer of a residential condominium unit delivers to the licensee written notice of the buyer's intent to cancel the contract during the statutory "cooling off" period (after receiving the required documents, a buyer has 15 days for a new condominium, or three business days for a resale condominium);
- the buyer of real property in good faith fails to satisfy the terms in the financing clause of the contract; or
- the funds concern a HUD contract for HUD-owned property, in which case the broker must follow HUD's Agreement to Abide, Broker Participation Requirements. (61J2-10.032 (4))

Be Careful Using the Financing Clause Contingency Exception



Caution

If you decide to give the deposit back to a buyer because the buyer didn't get the financing, be careful. These exceptions protect you from administrative action from the FREC, but if you are sued and the seller proves the buyer didn't use best efforts to get the loan, you could lose a court case. If in doubt, always get a signed release from both parties before disbursing the funds.

Right to Relist

An escrow dispute, in itself, does not prevent the seller from advertising or selling the property. However, the escrow dispute could turn into a legal dispute about whether the seller has defaulted on the contract. In that case, the buyer may have legal rights, including the right of specific performance. If another buyer contracts for the property, the seller could then be liable to two buyers.

Brokers should be wary about relisting the property into the MLS and should:

1. recommend that the seller contact an attorney before taking steps to resell the property;
2. make full disclosure in the MLS listing about the dispute (some multiple listing services will not allow relisting under these circumstances); and
3. ensure that if an offer is made from a second buyer, a contingency clause is inserted into the contract conditioned on the dispute being settled before closing.

Brokers' Rights to Deposits for Commissions

If the party entitled to escrowed funds disputes the broker's commission claim, the broker may retain the amount of the claim in the escrow account until the dispute is settled by agreement, arbitration, mediation, or a court order (61J2-14.011).

BROKERS' RECORDS

Brokers must maintain accurate records of escrow account transactions. Upon request, the broker must make those records available to the Department of Business and Professional Regulation (DBPR) or its investigator, including deposit receipts, bank statements, and all agreements between the parties to a transaction [61J2-14.012(1)].

Bank Reconciliation

The broker must have a reconciliation prepared at least monthly, comparing the broker's total trust liability with the reconciled bank balances of all escrow accounts. The broker must date and sign each reconciliation. Provided that there is not a shortage in the account, that there is no danger to the public, and it is a first offense, brokers will be given a notice of noncompliance, giving reasonable time to correct escrow account errors.

The minimum information required in the monthly reconciliation includes the following:

- Reconciliation date
- Bank name
- Bank account name
- Bank account number
- Account balance
- Dates and numbers of outstanding checks
- An itemized list of the broker's trust liability (names of parties and the amounts owed to each)
- Other items necessary to reconcile the account
- Broker's checkbook balance
- Other records showing the date of receipt and source of the funds [61J2-14.012(2)]

If the trust (escrow) liability and the bank balances do not agree, the reconciliation must explain the difference. The broker must describe the corrective action taken if there is any shortage or overage in the account.

Keep the Documents

A broker must keep all escrow account records for at least five years from the date of receipt of any funds. The five-year requirement also applies to any listing agreement, offer to purchase, rental property management agreement, rental or lease agreement, or any other written or verbal agreement that engages the services of the broker. In the event that litigation arises as a result of any transaction, the records must be maintained for at least two years after the conclusion of the civil action or the conclusion of any appellate proceeding, whichever is later, but in no case less than five years. Legible copies or electronic versions of the records meet the requirement (475.5015, F.S.).

Brokerage Office Inspections and Audits

The DRE conducts random inspections and routine audits of brokerage offices to ensure compliance with the real estate license law. The Division investigator ordinarily sends the broker a letter first, then phones to arrange a time to visit the office for an audit. The investigator checks for compliance in the following areas:

- **Office requirements.** There must be at least one enclosed room in a stationary building.
- **Office entrance sign.** The sign must be easily observed and read by anyone entering the office. The sign must have the name of the broker, a partnership or corporate name or trade name, if any, and the words "Licensed (or "Lic.") Real Estate Broker."
- **Brokerage relationship disclosures.** Brokers must retain required disclosures on contracts for sale and purchase of residential properties for at least five years.
- **Licenses.** Licenses and registration of the firm and all its members are verified to ensure that all persons involved in providing real estate services have current licenses.

- **Escrow accounts.** A review of each escrow (trust) account includes inspection of all the records and transaction files associated with the account, including:
 - monthly reconciliation statements (for the last 6 to 12 months);
 - bank statements and canceled checks (for the last 6 to 12 months);
 - checkbooks, deposit books, and bank deposit receipts;
 - ledger books or computer records of sale and property management records;
 - pending sale contracts (files);
 - voided contracts and offers with escrow funds presently being held;
 - any earnest money deposit disputes; and
 - property management contracts, agreements, and leases (files).

The investigator may also require that the broker fax an up-to-date interim statement from the bank of all deposits and disbursements from the date of the last bank statement to the close of business the day before the audit. The investigator then completes an Office Inspection & Escrow/Trust Audit Form during the visit.

IN PRACTICE

When notified that a DBPR inspector will be visiting, check everything

Make certain that your sign is in compliance, all required disclosures are in the transaction folders, reconciliations are dated and signed, and all sales associate licenses are in order.

Practice Questions

1. A broker may deposit up to \$5,000 of personal funds into the property management escrow account.
 - a. True
 - b. False
2. When all parties to an escrow dispute select mediation as a settlement procedure, the decision of the mediator is binding on all parties.
 - a. True
 - b. False

REAL ESTATE RECOVERY FUND

The Florida Legislature established the Real Estate Recovery Fund to compensate individuals or entities that lose money due to an offense by a real estate broker or sales associate in a real estate transaction. The fund is replenished by:

- fees paid by licensees at renewal,
- fines imposed by the Commission and collected by the Department, and
- repayments to the fund by licensees who have judgments against them.

If the fund at any time exceeds \$1 million, the DBPR will stop collecting fees until the fund balance drops below \$500,000.

Procedure for Filing a Claim

To be paid from the fund, the consumer must:

- have received a final judgment from a Florida civil court against an individual broker or sales associate (not a corporation or partnership) in any action based on a real estate brokerage transaction. The Commission may waive the need for a final judgment due to the death or bankruptcy of the licensee;

The consumer must have an uncollectible judgment against an active licensee for wrongdoing.

- have provided written notice to the FREC by certified mail at the time civil action was commenced;
- make the claim for recovery within two years of the act or within two years from the time the act was discovered, but in no event later than four years after the act occurred;
- cause a writ of execution to be issued on the judgment, and sign an affidavit that no personal or real property of the debtor can be found or levied upon;
- file a claim with the FREC or the Department of Legal Affairs by certified mail; and
- execute an affidavit showing that the final judgment in his or her case is not on appeal, or, if it were the subject of an appeal, that the appellate process has concluded and the appeal upheld the judgment.

In order for the FREC to pay the claim, it's also necessary that the licensee:

- held a current, valid real estate license,
- was not a buyer, seller, landlord, or tenant in the transaction,
- acted solely as a real estate licensee, and
- violated Chapter 475.25 or 475.42.

Amount to Be Reimbursed

The fund will reimburse compensatory damages, but not punitive damages, up to \$50,000 for judgments in one transaction against a licensee, regardless of the number of claimants. If there are several judgments for more than one transaction, the maximum amount FREC will pay from the fund for one licensee is \$150,000. The fund will not pay treble damages, court costs, attorneys' fees, or interest.

Penalties for Payments from the Fund

Upon payment from the fund in settlement of a claim against a licensee, the license of the broker or sales associate is automatically suspended the same day. A hearing is not necessary. The license shall not be reinstated until the licensee has repaid in full, plus interest, the amount paid from the fund.

Disbursements for Broker's Compliance with an Escrow Disbursement Order

One exception to the penalty just described involves payment from the fund when a broker suffers a financial loss resulting from following an escrow disbursement order (EDO). The Commission will reimburse the broker for the amount of the loss and will not discipline the broker. The FREC will also pay the broker's reasonable attorney's fees and court costs. If the plaintiff prevails in court, the Commission will pay the plaintiff's reasonable attorney's fees and court costs (475.482, F.S., 475.483, F.S., 475.484, F.S.).

No penalty may be brought against the broker for EDO-related disbursements.

Practice Questions

3. If the recovery fund exceeds \$1 million, licensees no longer pay fees to replenish the fund.
 - a. True
 - b. False
4. The maximum amount that the FREC will pay from the recovery fund for one transaction is \$150,000.
 - a. True
 - b. False

VIOLATIONS



Procedure for Filing a Complaint

A consumer may file a complaint against a licensee by sending a Uniform Complaint Form (RE 2200) to the Division of Real Estate (DRE) by mail or fax. Complaints may also be filed online at <http://www.myfloridalicense.com/DBPR/>. The complaint must identify the licensee and state the allegations. Copies of relevant documents (contracts, checks, etc.) should be included with the complaint.

When the Division receives a complaint, a complaint analyst decides if the complaint is *legally sufficient*. A complaint is considered legally sufficient if it alleges a violation of a Florida statute, a DBPR rule, or a FREC rule. When violations are supported by documentation, a case number is assigned and the case is forwarded to the investigative field office closest to the location of the licensee who is the subject of the complaint. Unless the nature of the complaint requires a confidential investigation, the subject of the complaint will be given a copy of the complaint by the DRE and requested to respond to the allegations. A complaint analyst with the Division will respond to the complainant within three weeks. If, during the investigation, the DRE determines that the licensee is a serious danger to the public welfare, the secretary of the DBPR may issue a summary suspension of the person's license until the disciplinary process is complete.

A complaint without sufficient information to support the claimed violation is assigned a case number, and the complainant is informed that no case will be opened. The complaint is retained as part of the Division's records.

A complaint does not become public information until 10 days after probable cause has been found or until 10 days after the subject of the investigation waives the privilege of confidentiality [455.25(4), F.S.]. If probable cause is found, the DBPR will file a formal complaint against the licensee. If the licensee fails to answer the formal complaint within 20 days, normally the licensee's license is revoked.

The licensee has three options:

1. Request a formal hearing in order to dispute the charges. In this case, an administrative law judge will hear the evidence in the hearing and prepare a recommended order showing the judge's findings and recommending the penalty to be applied. The recommended order is forwarded to the DRE and the other parties in the case.
2. Request an informal hearing before the FREC members who were not members of the Probable Cause Panel for the case. The licensee must admit to the charges, and then a final order is drafted describing the penalties to be applied.
3. Agree to a stipulation, which is a voluntary agreement between the licensee and the DRE.

FREC Penalties

The FREC can fine, suspend, revoke, order probation, or reprimand real estate licensees, but it has no authority to order restitution or payment of money. The FREC may impose an administrative fine not to exceed \$5,000 for each separate offense.

Statute of limitations. An administrative complaint against a licensee must be filed within five years after the time of the act giving rise to the complaint, or within five years after the time the act is discovered or should have been discovered with the exercise of due diligence [475.25(5), F.S.].

Notifying law enforcement and others. The Commission must promptly report to the proper prosecuting authority any criminal violation of any statute relating to the practice of real estate regulated by the Commission [475.25(6), F.S.]. The Department must promptly notify a licensee's broker or employer when a formal complaint is filed against the licensee alleging violations of this chapter or Chapter 455. The Department shall not issue a notification to the broker or employer (if the subject works for an owner-developer) until 10 days after a finding of probable cause has been found to exist by the Probable Cause Panel or by the Department, or until the licensee waives his or her privilege of confidentiality under Section 455.225, whichever occurs first.

Tell DBPR if You Have Been Convicted

Florida licensees who are found guilty of, or plead *nolo contendere* to, any crime (misdemeanors included) must report this fact to the FREC within 30 days after the plea or after being found guilty. If the plea or conviction took place before the effective date of this law (July 1, 2009), the licensee must have reported it within 30 days after the effective date of the law. In fact, the failure to self-report is the most common violation resulting in administrative complaints. During the 12 months ended December 2020, there were approximately 180 violations. [455.227(1)(t), F. S.].

IN PRACTICE

Administrative complaint? Get an attorney

Brokers and sales associates who are notified that the FREC has filed an administrative complaint against them should hire a lawyer with experience in administrative law immediately. Even attorneys don't try to represent themselves in a case; you shouldn't either.

DIVISION OF REAL ESTATE'S RESPONSES TO LAW VIOLATIONS

The DRE has three levels of response to violations: notification of noncompliance, citation, and administrative complaint.

Notification of Noncompliance

For a first-time minor offense, the DRE may issue a notification of noncompliance. The Division must identify the statute or rule violated, show how the violation can be corrected, and allow 15 days for compliance. A *minor violation* is defined by the FREC as one that does not endanger the health, safety, or welfare of the public. This should be considered a warning, and the licensee who receives the notice should take corrective action within the required time limit or face more serious penalties (61J2-24.003).

Citation

In some situations, DRE investigators have the authority to issue a citation. It usually involves an offense that is not a substantial threat to the public, such as failing to maintain the required office entrance sign. The principal purpose of the citation rule is to reduce the time and expense of other disciplinary actions. Citations are served on the subject either by personal service or certified mail (restricted delivery) to the subject's last known address.

Citations usually require that a licensee either pay a fine from \$100 to \$500 within 30 days or dispute the charge and begin the formal hearing process. All fines are payable to the Department of Business and Professional Regulation, and a copy of the citation should accompany the payment. If not disputed within 30 days, the citation becomes a final order of the Commission (61J2-24.002).

Administrative Complaint

The Commission has published a range of disciplinary guidelines from which disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties that normally will be imposed for each count during a formal or informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is:

- reprimand,
- fine,
- probation,
- suspension, and
- revocation or denial.

The Commission may combine these penalties.

The Commission may, in addition to other disciplinary penalties, place a licensee on probation for a period set by the Commission and subject to such conditions as the Commission may specify. Standard probationary conditions may include, but are not limited to, requiring that the licensee:

- attend pre-licensure courses;
- satisfactorily complete a pre-licensure course;
- attend post-licensure courses;
- satisfactorily complete a post-licensure course;
- attend continuing education courses;
- submit to and successfully complete the state-administered examination; or
- be subject to periodic inspections and interviews by a DBPR investigator.

Brokers may be required to:

- place the license on a broker associate status; or
- file escrow account status reports with the Commission or with a DBPR investigator at such intervals as may be prescribed.

The penalties may be increased or decreased because of aggravating or mitigating circumstances.

Aggravating or mitigating circumstances may include, but are not limited to:

- the degree of harm to the consumer or the public;
- the number of counts in the Administrative Complaint;
- the disciplinary history of the licensee;
- the status of the licensee at the time the offense was committed;
- the degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license; and
- violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(4), F.S., previously has been issued to the licensee.

Practice Questions

5. The maximum fine that the FREC may impose on a licensee for each violation is \$2,500.
 - a. True
 - b. False
6. A licensee who has been found guilty of a misdemeanor has six months to notify the DBPR.
 - a. True
 - b. False

Case Study

FUNDS ARE MISSING FROM THE TRUST ACCOUNT

● **Facts:** In June, a sales associate obtained a judgment against her broker in the amount of \$4,437, representing an unpaid commission. The broker failed to pay the judgment, and the sales associate filed a complaint with the FREC. In January of the next year, in response to the complaint, a DRE investigator conducted an audit of the broker's records. The balance in the escrow account was \$4,961, but the broker's trust liability (the total that she should have been holding in the escrow on her clients' behalf) was \$12,242. The broker later stated by letter that the shortfall of \$7,279 was due to an error when the broker wrote a check for \$7,345 to the company's operating account. In February, the broker wrote a check for \$7,345 back in to the escrow account.

The DBPR filed an administrative complaint against the broker.

● **Practice Questions:**

7. With respect to the broker's failure to pay the judgment debt representing the sales associate's commission, what is the MOST likely wording of the charges in the administrative complaint against the broker?
 - a. Fraud, misrepresentation, and dishonest dealing
 - b. Failure to account or deliver to any person, as required by agreement or law, escrowed property
 - c. Moral turpitude
 - d. False, deceptive, or misleading advertising
8. With respect to the shortage in the broker's escrow account, what is the MOST likely wording of the charges in the administrative complaint against the broker?
 - a. Failure to deposit any money in an escrow account immediately upon receipt until disbursement is properly authorized
 - b. Moral turpitude
 - c. Fraud, misrepresentation, and dishonest dealing
 - d. Failure to account or deliver to any person, as required by agreement or law, escrowed property

● **What Really Happened?** The administrative law judge found the broker had violated Sections 475.25(1)(d) and 475(1)(k) of the Florida Statutes. He recommended that the broker's license be suspended for 90 days and that the broker pay an administrative fine of \$2,500 and be placed on probation for a period of at least three years.