

Commission Position 29 – Holding Money Belonging to Others for Activities Not Involving Real Estate Brokerage Services

(Adoption June 7, 2022: CP 29 - Holding Money Belonging to Others for Activities Not Involving Real Estate Brokerage Services)

The Commission has jurisdiction over a Broker's activities not involving Real Estate Brokerage Services. In the case of *Seibel v. Colorado Real Estate Commission*, 530 P.2d 1290 (Colo. App 1974), the Colorado Court of Appeals held that the Commission has jurisdiction over the acts of a Broker even where those acts do not require licensure.

Money Belonging to Others for Activities Not Involving Real Estate Brokerage Services:

Later, in the case *McDonnell v. Colorado Real Estate Commission*, 361 P.3d 1138 (Colo. App. 2015), the Colorado Court of Appeals concluded that the intent of the legislature was to discipline Brokers for failing to account for or remit Money Belonging to Others within their possession, regardless of whether the money was held for a real estate transaction, because the language in the statute explicitly states, "whether acting as real estate brokers or **otherwise**." (see C.R.S. § 12-10-217(1)(h)) (emphasis added).

Examples of activities not involving Real Estate Brokerage Services may include holding security deposits for Broker-owned properties, short-term rental deposits, holding deposits when a Broker is acting as a builder, holding fundraising contributions on behalf of the sport team of the Broker's child, accepting a deposit to paint a house or any other deposits from others regardless of the activity being related to real estate. Therefore, Brokers should exercise care when holding Money Belonging to Others for activities not involving Real Estate Brokerage Services. Brokers holding Money Belonging to Others for any activities not involving Real Estate Brokerage Services must place such funds into a Trust or Escrow Account, making sure that those monies are not commingled with personal or business operating funds, maintaining appropriate records, and following the accounting practices as set forth in Chapter 5 of the Commission Rules.

Recordkeeping of Funds for Non-Real Estate Brokerage Services:

The Court of Appeals in *McDonnell* further held that the Commission's recordkeeping requirements apply when Brokers are in possession of Money Belonging to Others, regardless of the activity being related to real estate. Consequently, Brokers and Brokerage Firms who accept monies for deposit for activities not involving Real Estate Brokerage Services must deposit the funds into the Broker's or Brokerage Firm's Trust or Escrow Accounts, and those funds are subject to recordkeeping requirements.

A Broker who is engaged in activities not involving Real Estate Brokerage Services must first check the Brokerage Firm's Office Policy Manual to see if such conduct is permissible. If the conduct is permitted and the Office Policy Manual states that all deposits must go into the Brokerage Firm's Trust or Escrow Account, then the Broker must deposit all Money Belonging to Others into the Brokerage Firm's Trust or Escrow Account and the Brokerage Firm must follow all the accounting rules as set forth in Chapter 5 of the Commission Rules. (see Rule 5.11.B.1.).

On the other hand, if the Office Policy Manual does not require use of the Brokerage Firm's Trust or Escrow Accounts, the Broker must establish a separate Trust or Escrow Account outside of the Brokerage Firm. A Broker must not divert or convert monies, must maintain a journal of the account and must be able to produce documents and records if requested by the Division. A Broker is also required to perform a two-

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way reconciliation monthly to show that on the date of reconciliation the cash balance shown in the journal and the reconciled bank balance are the same. (*see* Rule 5.11.B.2.).

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