

MAINE STATE LEGISLATURE

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Leo M. Carrigan, Executive Secretary

Real Estate Commission

Phillip M. Kilmister, Assistant

Attorney General

Proposed Rule #38 of the Real Estate Commission

The applicable part of our recently enacted statutory law which requires the establishment of trust accounts by real estate brokers reads as follows:

32 M.R.S.A. § 4004-A Trust Accounts

"Every real estate broker shall deposit in a trust account or accounts in a banking institution located in the State of Maine all earnest money deposits, rental money and other moneys held by him as a real estate broker in which his clients or other persons with whom he is dealing have an interest. . . ."

The proposed rough draft of rule #38 set forth by the Real Estate Commission states:

"Each broker's Real Estate Trust Account shall be maintained in a checking account in a Maine banking institution. However, where it is anticipated that a certain closing may be delayed longer than three months, the broker may, with the approval of the Commission, deposit the funds in escrow in a savings department and must give the forwarder the benefit of all interest which may accrue thereon."

An administrative regulation cannot amend the law or change its positive provisions. A rule or regulation to be valid may only implement the law, it may not unduly restrict the meaning of a statute. The Legislature has determined that trust accounts must be established by real estate brokers. It is not for the Real Estate Commission to additionally legislate that such trust accounts must be in the form of checking accounts.

The major evil which our Legislature intended to eradicate by the enactment of 4004-A was the situation where a broker deposits money, not his own, into a savings account or other interest bearing account, with full control over the disposition of such money including the collection of interest on said deposit for his own use. The language of 32 M.R.S.A. § 4004-A which requires the placing of such moneys into a trust account, beyond the reach of the settlor or depositor of such funds, should cure this evil.

The proposed rule also states that when a certain closing may be delayed longer than three months that funds may be deposited by a broker in escrow. It is set forth that any interest which may accrue to said funds shall be paid to the person entitled to the payment of the trust corpus.

Such a provision is wholly unnecessary. The term "escrow" implies that the depository is not to hold the deposit at the will of the depositor, but that it is to be delivered to the person entitled to it upon the happening of the event upon which delivery is conditioned.

Were a broker, as a depositor of funds in escrow, to retain any part of such funds for his own use, he would be guilty of converting the funds of another as a matter of law.

It is fully realized that the proposed rule is merely a rough draft and is submitted for our consideration to suggest possible changes. We believe however that a regulation is unnecessary at this time in regard to the enforcement of statutory section 32 M.R.S.A. § 4004-A.

The establishment of a valid trust account may occur in several ways. The exact form of the trust should be of no particular concern to the Commission in policing this statute.

It might be well to point out that the establishment of a separate checking account by a broker as proposed in rule #38 is perfectly satisfactory. However, there is no reason why this type of trust account must be established to the exclusion of others.

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PKK/sll