

# 8 Escrow

An escrow is essentially a small and short-lived trust arrangement. It has become an indispensable mechanism in this state for the consummation of real property transfers and other transactions such as exchanges, leases, sales of personal property, sales of securities, loans, and mobilehome sales. This chapter discusses the real estate sale escrow.

## ***Definition of an Escrow***

California Civil Code Section 1057 provides this description of an escrow:

“A grant may be deposited by the grantor with a third person, to be delivered on the performance of a condition, and, on delivery by the depository, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow.”

And, in Section 17003 of the Financial Code:

“Escrow means any transaction wherein one person, for the purpose of effecting the sale, transfer, encumbering or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by such third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by such third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter.”

## ***Essential Elements of an Escrow***

The two essential elements for a valid sale escrow are a binding contract/agreement between buyer and seller and the conditional delivery to a neutral third party of something of value, as defined, which typically includes written instruments of conveyance (grant deed) or encumbrance (deed of trust) and related documents. The binding contract/agreement can appear in any legal form, including a deposit receipt (a residential purchase agreement), other forms of agreements of sale, exchange agreements, option agreements, or jointly executed bilateral or individually executed unilateral escrow instructions evidencing a mutual agreement of the buyer and the seller.

## ***Escrow Holder***

The escrow holder is the agent and depository (as an impartial/neutral third party) having and holding possession of money, written instruments, documents, personal property, or other things of value to be held until the happening of specified events or the performance of described conditions. Once these events occur or the conditions are met and performed (satisfied or waived) in strict compliance with the escrow instructions, the escrow holder (performing as the “escrow agent”) has accomplished its primary duty of faithfully executing the instructions given to it by the principals to the escrow (e.g., the buyer and the seller in a real estate sale escrow).

The escrow holder is the agent and fiduciary of the principals to the escrow, and is defined to be a person who is lawfully engaged in the business of receiving escrows for deposit in behalf of or for delivery to the designated principal(s). As a fiduciary in performing its duties, the escrow holder must at all times exercise reasonable care, loyalty, and good faith towards the principals of the escrow. An escrow holder’s fiduciary duty is generally limited to the faithful performance/execution of the instructions given by the principals to the escrow. *See Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4<sup>th</sup> 705, 711, Civil Code Section 2297 and Financial Code Section 17004.*

The escrow holder acts to ensure that all principals to the transaction comply with the terms and conditions of the contract/agreement as set forth in the escrow instructions. The escrow holder may (within the course and scope of the escrow instructions) coordinate the activities of the professional service providers involved in the transaction, such as the activities of the lender(s), the title company (if distinguishable from the escrow holder), the title insurance company, as well as those among the buyer, seller and real estate broker.

## ***Definition of Principals to the Escrow***

In a real estate sale escrow, the principals include the buyer and the seller and, if applicable, the lender(s) making the “purchase money” loan. While principals are parties to the escrow, not all parties involved are principals. The principals are persons who are executing and performing the escrow instructions and who are

making the conditional deliveries in connection therewith. The lender(s) are included in this category, since they execute and provide to the escrow holder their written instructions together with instruments of encumbrance and related loan documents that are conditionally delivered in anticipation of the issuance of title insurance coverage. These instructions, instruments, funds, and loan documents are essential to the real estate sale escrow when financing by a lender(s) is required.

As discussed above, the escrow holder is (within the course and scope of the escrow instructions) the agent and fiduciary of the principals of the escrow. As a result, the escrow holder is a dual agent, i.e., agent and fiduciary of the buyer and seller and of the lender(s), if applicable. Upon the completion and close of the sale escrow, the escrow holder is the agent for each of the principals to deliver the statements, instruments, funds, documents, and title insurance coverage to which each are entitled in accordance with the escrow instructions.

Escrows include parties who are not principals to the escrow and, therefore, to whom fiduciary duties are not owed by the escrow holder. These parties may include, among others, claimants within the chain of title, persons placing demands for payment into the escrow, persons submitting reports/inspections to be delivered through the escrow. To these parties the escrow holder functions as a custodian with the duty to act in good faith and consistent with the standard of care applicable to escrow holders/agents. *See Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4<sup>th</sup> 705, 711.*

### ***Escrow Instructions***

The conditional delivery of an instrument of conveyance or encumbrance, money/funds, or other things of value is accompanied by instructions to the escrow holder authorizing the delivery of the instruments, funds, and related documents upon the happening of specified events or the performance of stipulated conditions. In California, there are two forms of escrow instructions generally employed: bilateral (i.e., executed by and binding on both buyer and seller) and unilateral (i.e., separate instructions executed by the buyer and seller, binding on each). Since the escrow instructions implement and may supplement the original contract/agreement (e.g., residential purchase agreement or agreement of sale), each are interpreted together.

However if the escrow instructions contain terms in conflict with the original contract/agreement, the instructions constituting the later contract/agreement will usually control, subject to separate consideration regarding the escrow instructions (as may be required). When joint/bilateral instructions have been signed by the principals to the escrow, neither principal may unilaterally change the escrow instructions. The principals may change, by mutual agreement, the instructions at any time and one principal may waive the performance of certain conditions, provided the waiver is not detrimental to the other principal to the transaction.

While an independent/neutral escrow holder can be held liable for violating written instructions (including breaches of fiduciary duty within the course and scope of the escrow instructions), the escrow holder is only a neutral stakeholder who is not to be concerned with controversies among the principals. As such, an escrow holder is entitled to file an action of interpleader and for declaratory relief to ask a court of competent jurisdiction to resolve the controversies and to direct the escrow holder on how to proceed.

### ***Completed Escrow***

Properly drawn and executed escrow instructions become an enforceable contract/agreement. An escrow is termed “completed” or “perfected” when each of the terms of the instructions have been met or performed (satisfied or waived).

### ***Escrow Principles***

The following are major escrow principles:

1. Escrow instructions must contain mutuality, including the understandings and the intentions of the principals to the escrow. Properly drawn instructions should be clear and certain as to the understandings and the intentions of the principals, the duties of the escrow holder, and the fact that it is the principals themselves who must perform the escrow contract/agreement. The escrow holder does not have, and must not exercise, *discretionary* authority. The escrow holder/agent acts in behalf of and not in the place and stead of principals.
2. The escrow holder does not act as a mediator. However, the escrow holder/agent may offer advice to the principals as an agent and fiduciary within the course and scope of the escrow instructions. As previously discussed, the escrow holder/agent does not participate in controversies among the principals or among the parties to the escrow, or arbitrate disputes. Instructions are drawn so that the principals to the escrow make

the promises, perform their obligations, and put the escrow holder in a position to complete and close the escrow. If the claim of the non-principal parties to the escrow is within the chain of title, such claims must be satisfied by the escrow holder to obtain the title insurance coverage required by the principals (including the lender(s)).

3. The escrow holder is prohibited from offering legal advice and must suggest that disagreeing parties consult an attorney (or a real estate broker when the transactional matter may be negotiated within the course and scope of the real estate license).
4. Escrow is a limited/special agency relationship governed by the content of the escrow instructions. As agent for *both* principals (often including an additional principal, the lender(s) extending credit in the form of “purchase money” financing), the escrow holder acts only upon specific *written* instructions of the principals. As previously noted, when the escrow is completed/perfected and closed, the escrow holder becomes the agent for *each* principal with respect to those things in escrow to which the principals have respectively become entitled.
5. When all principals to the escrow have signed mutual (conforming) instructions, the escrow becomes perfected. If only one principal has signed, that principal may terminate the proposed escrow at any time prior to the other principal’s signing of conforming escrow instructions. As an additional principal, the lender(s) typically reserve the right to withdraw their instructions, instruments, funds, and related documents if the escrow instructions of the buyer and seller do not conform to the instructions of the lender(s).
6. The escrow holder must avoid vague or ambiguous terms and provisions in the escrow instructions and related documents.
7. The escrow holder must forward immediately to the title insurance company (or its underwritten title company agent, if other than the escrow holder) any instrument that is to be recorded. Copies are to be furnished to appropriate and concerned principal(s) or third parties, so that the instrument’s sufficiency can be determined. This will help avoid a delay in completing and closing the sale escrow.
8. The escrow holder without authorization of the principals may only accept claims, demands, instruments, funds, as well as related documents contemplated by the escrow instructions. Other claims, demands, instruments, funds, and documents are not to be accepted by the escrow holder.
9. The escrow trust account must be maintained with extreme care. Overdrawn accounts (debit balances) are strictly forbidden.
10. Escrows are privileged and confidential in nature. The escrow holder must not give out any information to third parties (persons who are not principals of the escrow) concerning an escrow without approval of the principals.
11. The escrow holder is the agent of the principals to the escrow. Any facts known by the escrow agent are imputed to the principals. Therefore, the escrow holder owes a duty to communicate to its principals knowledge acquired within the course and scope of the agency relationship established by the escrow instructions with respect to material facts that might affect a principal’s decision as to the pending transaction. Any detrimental or new material information, previously undisclosed, made known to the escrow holder and affecting the principals should be disclosed to them for their instructions in the matter.
12. The escrow holder must maintain a high degree of trust, efficient service, and good public relations, particularly concerning the principals to the escrow.
13. The escrow holder must remain strictly neutral, not favoring either principal, including the lender(s) extending credit in the form of “purchase money” financing. Notwithstanding the required neutrality, the escrow holder must advise the principals to the escrow in the context described in item 11. To the extent possible, the escrow holder must be careful to avoid preceding in a manner that results in a gain to one principal to the detriment of the other principal(s).
14. The escrow holder must constantly maintain records and files to be sure that a procedure is not overlooked. Neat and orderly files, complete with check sheets, will help ensure smooth progression towards completing and closing the escrow.

15. Before closing an escrow, the escrow holder must audit the file, accounting for all items to be handled, recorded and delivered, including cleared funds.
16. The escrow holder must not disburse any funds from an escrow account until all items such as checks, drafts, etc. have cleared, and thus have become available for withdrawal as an automatic right. This “holding period” may range from 1 to 10 days, depending on the type and location of the financial institution upon which the checks, drafts, etc. have been drawn.
17. Completing and closing the escrow must be prompt, using forms and disclosures which are simple and clear.

### **GENERAL ESCROW PROCEDURES**

(May vary according to local custom and practice)

#### 1. ***Prepared Escrow Instructions on the Escrow Holder’s Pre-printed Forms:***

The escrow instructions are expected to describe the understandings and intentions of the principals to the sale escrow.

In Southern California, joint/bilateral escrow instructions are typically prepared and submitted following the execution by the principals of the receipt for deposit (residential purchase agreement) or other form of agreement of sale. These instructions are usually accompanied by an initial earnest money deposit made by the buyer, which is conditionally delivered awaiting the happening of specified events and the performance of the conditions imposed in the joint escrow instructions.

In Northern California, unilateral escrow instructions are typically prepared and submitted a few days before the anticipated completion or close of the sale escrow. Following the execution by the principals of the deposit receipt (residential purchase agreement) or other form of agreement of sale, the buyer’s earnest money deposit is generally delivered to the escrow holder for which a receipt has been obtained (without instructions and in the absence of conditional delivery). Typically, no escrow instructions are prepared at this time describing the happening of specified events or the performance of prescribed conditions, together with the conditional delivery of instruments, money, or other things of value. Therefore, the escrow has not been opened and will not be opened until much later when the unilateral escrow instructions are prepared and signed by the principals of the escrow and conditional delivery occurs.

The principals to the escrow should carefully review any general provisions of the escrow prepared and submitted to them by the escrow holder. These general provisions often include, among others, duties and obligations imposed upon the principals (which may or may not be acceptable) and exclusions or exceptions from the intended title insurance coverage.

In recent years, some “standard” forms of deposit receipts (residential purchase agreements) used by the real estate brokerage industry have included provisions executed by the principals to be transmitted to the escrow holder for the expected purpose of opening or establishing an escrow. The issue is whether conditional delivery to the escrow holder has occurred by one or more principals of instruments, money/funds, or other things of value to be delivered to another principal(s) upon the happening of specified events or the performance of described conditions.

For a home purchase, the mutual escrow instructions of the principals (whether in the form of joint/bilateral or unilateral instructions) are to include, among others:

- the purchase price and terms;
- agreement as to mortgages;
- how buyer’s title is to vest;
- matters of record subject to which buyer is to acquire title;
- inspection reports to be delivered through escrow;
- proration adjustments;
- date of buyer’s possession of the subject property;

- instruments and related documents to be signed by the principals, delivered into escrow, and recorded;
- disbursements to be made, including fees, costs and charges, who pays for them, and who is to receive each disbursement; and,
- the date of closing of the sale escrow.

2. ***Ordering a “Preliminary Report” on the Subject Property:***

A “Preliminary Report” is ordered from the title company selected by the buyer. The escrow holder (which may be the same person/entity as the title company) examines this report carefully for items not contemplated in the escrow instructions. Typically, the seller must clear or remove any such item and it must be brought to the attention of the buyer “for information”, “expression of desire in the matter”, and for the appropriate instructions of the buyer. The real estate broker acting as the agent and the fiduciary of the buyer should review the “Preliminary Report” to offer the broker’s advice and recommendations within the course and scope of the broker’s agency relationship. The “Preliminary Report” provides the information upon which the instructions of the principals and of the lender(s) are based, as applicable, when making/funding “purchase money” loans. The “Preliminary Report” (together with the instructions of the principals and such lender(s)) become the basis upon which the title insurance company provides the requested insurance coverage.

3. ***Requesting Demands and/or Beneficiary Statements:***

Such demands or beneficiary statements are generally obtained by the escrow holder from the lender(s) of record. The necessary documents will include:

- a “Demand for Pay-off”, if an existing loan is to be paid in part or in full through escrow; or,
- a “Beneficiary Statement”, if the buyer is purchasing “subject to” or “assuming” an existing loan. (Purchasing “subject to” should not occur without the buyer receiving independent professional advice regarding the legal and practical consequences of such a transaction.)

4. ***Accepting Structural Pest Control and Other Reports:***

Structural pest control and other reports such as plumbing or roofing inspections are typically delivered to the escrow holder who is to obtain, as instructed, any necessary approvals from the principals in connection with such reports/inspections. The escrow holder receives the reports/inspections (and holds any funds associated therewith) for delivery to the proper principal or party at the completion and close of the escrow (or, depending upon the fact situation, for delivery subsequent to the close of the sale escrow).

5. ***Accepting New Loan Instructions, Instruments, and Related Documents:***

If the buyer is requiring new financing, the escrow holder is to obtain the buyer’s approval/execution of the loan instructions, instruments, and related documents as requested by the lender(s). The escrow holder is to satisfy the instructions of the lender(s) prior to using the funds of the lender(s) to complete and close the sale escrow.

6. ***Accepting Fire Insurance Policies and Completing and Closing the Sale Escrow:***

- Accepting and delivering any fire insurance policy and transferring or establishing the insurance coverage, as instructed by the principals of the escrow, including the lender(s);
- Making all proration’s (e.g., property taxes and insurance premiums) as instructed by the principals of the escrow; and,
- Completing the accounting details and informing the principals the sale escrow is ready to close.

7. ***Requesting Closing Funds:***

Upon the instructions of the principals, the escrow holder orders loan funds from the lender(s). The law prohibits disbursement of funds from an escrow account until all items such as checks, drafts, etc. have cleared and become available for withdrawal as an automatic right.

**8. Auditing the File in Preparation for Closing:**

- Accounting for all funds (Cash Reconciliation Statement) instruments and related documents;
- Determining that the principals have complied with the escrow instructions.

**9. Ordering the Recording:**

The title company (as the agent of the title insurance company), or the title insurance company intending to issue the insurance coverage, will proceed to “date down”, i.e., to run the seller’s title to date. Thereafter, the escrow holder/agent will request recording of the necessary instruments, provided no change has occurred in the seller’s title (since issuance of the “Preliminary Report”).

**10. Closing Escrow:**

After confirming recording of the instruments described in the escrow instructions, the escrow holder prepares:

- Closing or settlement statements for buyer and seller (typically in the form of a HUD 1 statement in a sale escrow);
- Disbursing all funds; and,
- Delivering instruments and related documents to the principals or parties entitled thereto.

***Proration’s***

The seller is the fee title holder/ owner of the subject property until the completion and close of the escrow. If possession is delivered at some time other than at the close of escrow, the principals may agree to adjust accordingly the proration date. Depending upon the operative agreement, possession may alter one or more incidents of ownership. If possession is delivered sometime after the completion and the close of the escrow, the principals may agree to the proration of taxes, rent and/or assessments, along with prepaid items for which the buyer becomes responsible as of the date of possession, or alternatively upon recording of the instrument of conveyance (grant deed). Prepaid items include, among others, interest on a new loan or prepaid fire insurance premiums obtained by buyer.

***Termination***

Escrows are voluntarily completed by full performance/execution and closing, or the escrow may be terminated by mutual consent. The termination of the sale escrow is accomplished by cancellation of the escrow, and by rescission or cancellation of the residential purchase agreement, or other form of agreement of sale. It has been held that compliance with the escrow instructions must be achieved within the time limit set forth (unless the time of performance included within the escrow instructions are mutually extended by the principals). The escrow holder has no authority to enforce or accept performance after the time limit provided in the instructions. When the time limit provided in the escrow instructions has expired and either principal to the escrow has not performed in accordance with the terms of the escrow instructions, the principals may elect to mutually cancel the sale escrow and each are thereupon entitled to the return of their respective property, including funds, instruments and related documents. The escrow holder does not have authority to determine that a principal has not performed, or that evidence of continuation of performance by either principal exists. Therefore, clear and precise instructions from the principals are necessary.

***Cancellation of Escrow - Cancellation or Rescission of Purchase Agreement/ Contract***

Cancellation of escrow may not also cancel or rescind a purchase agreement/contract. In *Cohen v. Shearer (1980)* 108 C.A. 3d 939, a Court of Appeal decided that cancellation of an escrow by mutual agreement of the principals did not rescind the purchase agreement/contract between them. The distinction between cancelling or rescinding the purchase agreement/contract is whether the principals stop the transaction in place (subject to whatever limited fees, costs, and expenses as may be imposed by third parties and/or to the payment of liquidated damages pursuant to the agreement of the principals), or whether the principals are returned to their respective status prior to commencing the contemplated transaction. The former is an example of cancellation and the later an example of a rescission.

Therefore, a real estate broker seeking to carry out the decision of the principal(s) to cancel or rescind a agreement/contract of purchase or sale should be sure the other principal(s) to the agreement/contract agree in writing to do precisely that and not simply settle for written instructions to cancel the sale escrow. As happened

in the *Cohen* case, if a purchase agreement/contract is not canceled or rescinded along with the cancelling of the sale escrow, either principal to the purchase agreement/contract may retain the right to specific performance of the agreement/contract or for the recovery of damages.

### WHO MAY ACT AS ESCROW HOLDER/AGENT

The Escrow Law (Division 6 of the California Financial Code) provides the Commissioner of Corporations must license escrow holders/agents who conduct what are commonly known as public escrows. However, banks, savings and loan associations, title insurance companies, underwritten title companies, trust companies, attorneys and real estate brokers have certain exemptions from the licensing requirements of the Escrow Law.

Pursuant to Section 17006(a)(4) of the California Financial Code, a real estate broker licensed by the Real Estate Commissioner is exempt from the Escrow Law when performing acts in the course of or directly incidental to a real estate transaction. The exemption further requires that the real estate broker must either be an agent or a party to the real estate transaction *and* performing an act for which a real estate license is required. For example, if a real estate broker is acting as an agent on behalf of a buyer or seller in a real estate transaction, the broker may lawfully perform the escrow. In contrast, if the real estate broker is acting solely as a party (i.e., principal) to the transaction, and is not acting as a real estate agent on behalf of himself or any other party, the broker is not authorized to perform the escrow under the Financial Code exemption.

The Department of Corporations has interpreted Section 17006 (a)(4) to mean that:

1. the exemption is personal to the broker and the broker (when acting as the escrow holder) cannot delegate other than ministerial duties/functions;
2. the exemption is not available for any association or arrangement with other brokers for the purpose of conducting escrows; and
3. when the broker's escrow business is a substantial factor in the utilization of the broker's services, the escrow business is not "incidental to a real estate transaction."

A real estate broker cannot advertise in any manner that would tend to be misleading to the public, or advertise that he or she conducts escrows under the above exemption without specifying in the advertisement that such services are only in connection with the broker's real estate brokerage business. Moreover, a real estate broker may not use a fictitious name containing the word "escrow," or any name which implies that escrow services are provided in connection with that broker's licensed activities, unless the fictitious business name includes the term "a non-independent broker escrow" following the name. Real estate brokers who have been or are issued a license with a fictitious business name with the term "escrow", or any term which implies that escrow services are provided, must include the term "a non-independent broker escrow" in any advertising, signs, or electronic promotional material (Real Estate Commissioner's Regulation 2731(d)).

A real estate broker who conducts an escrow under the exemption must maintain all escrowed funds in a trust account and keep proper records in accordance with the Real Estate Law and the Real Estate Commissioner's Regulations pertaining thereto, including Regulations 2830.1 et seq. and 2950 and 2951.

The agency and fiduciary duties of the real estate broker when acting as an escrow holder are **not limited** to the course and scope of the escrow instructions (as previously described regarding neutral third party escrow holders/agents). The real estate broker is an agent and fiduciary of one or more principals in the real estate sales transaction, and the purpose and scope of the agency is expanded to include the escrow (when the broker conducts the escrow pursuant to the previously described exemption from licensing under the Escrow Law). In addition, the real estate broker representing either the buyer or seller or acting as either the buyer or seller becomes the agent and fiduciary of the other principal(s) to the transaction when the broker elects to conduct the escrow. The additional agency and fiduciary relationships created are to be disclosed and consented to by the principals and the conflicts involved with the multiple roles of the broker must be identified.

#### ***Escrow Companies Must Be Incorporated***

An individual cannot be licensed as an escrow holder/agent. A corporation duly organized for conducting an escrow business must hold the license. Applicants for escrow licenses must be financially solvent and furnish a surety bond in the amount of \$25,000 or more, based upon yearly average trust fund obligations. All officers, directors, trustees, and employees having access to money or negotiable instruments in the possession of the

corporate licensee must furnish a bond of indemnification against loss. All money deposited in escrow must be placed in a trust account that is exempt from execution or attachment.

### **AUDIT**

An escrow holder/agent licensed under the Escrow Law is required to keep accurate accounts and records, which are subject to examination by the Commissioner of Corporations. The corporation must submit annually, at its own expense, an independent audit prepared by a Certified Public Accountant. Real estate brokers conducting sale escrows are subject to the audit of their trust funds and the examination of their accounts and records by the Real Estate Commissioner.

### **PROHIBITED CONDUCT**

No escrow holder/agent licensee may disseminate misleading statements or describe as an “escrow” any transaction that is not included under the definition of “escrow” in the Financial Code or in the Civil Code.

An escrow holder/agent may not pay fees to real estate brokers or others for referral of business. Such prohibited “fees” would include gifts of merchandise or other things of value.

An escrow holder/agent cannot disburse from the escrow proceeds a real estate broker’s commission prior to closing of the escrow.

Escrow holders/agents may not solicit or accept escrow instructions, or amended or supplemental instructions, containing any blank to be filled in after signing or initialing. They may not permit any person to make any addition to, deletion from, or alteration of an escrow instruction, unless it is signed or initialed by all principals who had previously signed or initialed the instructions. At the time of execution, escrow holders/agents are charged by law with delivering a copy of any escrow instruction, or amended or supplemental instruction, to all principals executing the instructions. However, escrow instructions, being privileged and confidential, may not be disclosed to non-principals.

Real estate brokers when conducting escrows must follow similar standards of conduct and as required in the Real Estate Law and the Commissioner’s Regulations pertaining thereto, including 2830.1 et seq. and 2950 and 2951.

A real estate broker may not nominate an escrow holder/agent as a condition precedent to a transaction, but may suggest an escrow holder/agent, if requested to do so by the principals to the transaction. The buyer in the real estate sales transaction generally makes the selection of the escrow holder/agent and the title insurance company intending to issue the title insurance coverage.

### **RELATIONSHIP OF THE REAL ESTATE BROKER AND THE ESCROW HOLDER/AGENT**

A real estate broker should consult the escrow holder/agent before informing the principals that escrow will close on a certain date. An escrow includes a myriad of details, any of which could cause delay. Submission of accurate instructions, instruments, and documents will expedite closing. Some suggestions:

1. As far as possible, make certain that the deposit receipt (residential purchase agreement/contract and the escrow instructions) reflect the understandings and the intentions of the principals.
2. When opening escrow, a copy of the recorded grant deed (instrument of conveyance) conveying title of the subject property to the seller, or a copy of a deed of trust (instrument of encumbrance) encumbering the title to the subject property, or a copy of the seller’s title insurance policy should be provided to the escrow holder. Such instruments and documents should establish the correct legal description and the manner in which seller holds title to the property.
3. Remember that escrow instructions and amended instructions must be in writing. If the buyers are planning to be away, the real estate broker should check with the escrow holder/agent (the authorized representative of the escrow holder) before the buyers leave to determine if their absence will in any way hold up closing of escrow. Without instruction from the buyers as a principal to the escrow, the real estate broker cannot offer to put up money due from the buyers or instruct the escrow officer to deduct the amount owing by the buyers from the real estate broker’s commission. The buyers may be deliberately withholding the



deposit of closing funds until the seller performs some condition precedent known only to the principals. Except pursuant to the instructions of the buyers, accepting the funds required of the buyers from any one other than buyers may cause an escrow to close against the understandings and intentions of the principals of the escrow.

4. Furnish the escrow officer (representative of the escrow holder) with the correct spelling of the principals' names, addresses, and telephone numbers. Business and cell phone numbers should be included. Some escrow holders would appreciate being told of the email addresses of the principals to the escrow.
5. Be sure the escrow officer (representative of the escrow holder) knows how the buyers want to take title. Real estate brokers, salespersons, or escrow officers, should not assist with this decision, as it may involve legal and tax consequences. Independent professional advice is required.
6. Give escrow holders/agents the names and addresses of the existing lender(s) and/or loan servicing agents and the applicable loan numbers. Many existing lender(s), and FHA, require a 30-day advance payoff notice or the sellers may be subject to additional charges on any loan payoff.
7. Check with the sellers regarding bonds or other liens on the subject property. Those not being assumed may be paid during the escrow.
8. Notify the escrow officer (representative of the escrow holder) when the loan commitment required by the buyers has been received, i.e., the loan terms have been "locked" and/or an approval letter has been issued by the intended lender(s). The approval letter must come from the lender(s) and not from a mortgage broker. A copy of the approval letter (if any) should be provided to the escrow holder.
9. Determine how fire insurance coverage is to be handled. The buyers may want to do business with their insurance agent or with a certain insurance company. The sellers' insurance policy may include other property and the sellers may not want the coverage transferred to the buyers.
10. Be aware of the escrow holder's/agent's time requirement relating to non-cash deposit of funds. Checks must clear and the funds must be available as an automatic right before the escrow holder/agent can make disbursements.
11. The principals of the escrow (buyers and sellers) should meet with the escrow officer when executing the escrow instructions. It is the responsibility of the escrow officer (as the authorized representative of the escrow holder) to explain and to provide copies of the escrow instructions to the principals and to carry out what instructions may be required by the lender(s) when "purchase money" financing is a necessary part of the transaction.

### **DESIGNATING THE ESCROW HOLDER/AGENT**

The selection of an escrow holder/agent may not be critical to the principals in a real estate transaction. In the past, real estate brokers have played a large role in deciding where such transactions would be escrowed. In recent years, there has been an increasing effort on the part of federal and state regulators to minimize the influence of the real estate broker in selection of the escrow holder. The rationale is that buyers and sellers have the right, and should have the opportunity, to compare escrow holders, escrow services and charges and, if they so desire, negotiate among themselves as to where escrow will be held and conducted. In addition, the buyers and the sellers (as principals to the escrow) may wish to assert independent control over the preparation of the escrow instructions.

### **DEVELOPER CONTROLLED ESCROWS - PROHIBITION**

Civil Code Section 2995 prohibits any real estate developer (defined as any person or entity having an ownership interest in real property which is improved by such person or entity with single-family dwellings which are offered for sale to the public) from requiring, as a condition precedent to the transfer of real property containing a single-family residential dwelling, that escrow services effecting such transfer be provided by an escrow entity in which the developer has a "financial interest." The phrase "financial interest" means ownership or control of 5 percent or more of the escrow entity. A developer who violates this statute is liable for damages of \$250 or three times the charge for escrow services, whichever is greater, plus attorney's fees and costs. Any waiver of this prohibition is against public policy and therefore void.

