



# LEGAL HOTLINE Q&A

FROM GET THE FACTS, November 14, 2023

## Question:

Recently our office has had transactions fail to close at the last minute for no contingency related issues. Buyer just did not want to proceed. Buyer brokerage offered a form 51 rescission and a form 50 earnest money disbursement and no other forms. My office policy is to reject any Form 51 unless approved by legal counsel. Reviewing all the 90 series forms and not finding a suitable form other than blank notice, what is the best option to document the file? If buyer agrees that earnest money is to be forfeited to seller then we advise signing the disbursement form.

## Answer:

It is important to remember that if the closing date has passed, then the PSA is expired and already void. There is no agreement to be rescinded or terminated and thus, no need for a Form 51 or a Form 90. Instead, all that remains is disbursement of the EM making Form 50 the appropriate form to use. If escrow claims that a form terminating the PSA is necessary in this set of facts, escrow is simply wrong and brokers, who are held to the standard of care of a lawyer in preparing transaction documents, should not take knowingly wrongful action based on prompting from escrow.

If the closing date has not yet passed and buyer is simply stating an intention to breach the contract by failing to close on the closing date, this is a more challenging scenario. Simply put, RE brokers are licensed to get consumers into real estate transactions. RE brokers are not licensed to assist consumers to breach an agreement. If buyer wants to breach or if seller has been warned that buyer intends to breach, then broker should advise broker's client to seek legal counsel. Each party has rights and obligations under the existing agreement that should be considered in determining how to proceed. Should the parties seek to end the agreement early? Should the parties wait for the closing date to pass? Is there some other option the parties should consider? Answering these questions requires an analysis of the party's rights and obligations under the contract and an evaluation of the party's best option in light of the party's goals. Said differently, answering this question requires the giving of legal advice, advice that broker is neither licensed nor insured to give.



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## Continued...

This is particularly true in that, as broker's question highlights, there is no statewide form intended to be used in assisting the buyer to breach the PSA. Notice forms are intended to be used when either party has a unilateral right to take action. That is not the case if buyer intends to breach. The rescission agreement is intended to be used when the parties mutually agree to rescind or unwind the transaction. That is also not the case when buyer announces a unilateral intent to breach the contract. As unsatisfying as it is, the only answer the Hotline lawyer can give in this situation is that broker must advise broker's client to seek legal counsel.

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