The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho Association of REALTORS®

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WHEN SHOULD THE HOTLINE BE UTILIZED?

Questions should be submitted to the Hotline by an *agent's Broker or by an agent previously authorized by the Broker*. The Hotline is open from 9:00 a.m. to 12:00 p.m., MST, Monday through Friday. Typically, the Hotline responds to calls verbally within twenty-four (24) hours of receipt of a call, and follows up with a written response to the Association with a copy to the member within forty-eight (48) hours after initial contact.

RISCH ♦ PISCA, PLLC represents the Idaho Association of REALTORS® (IAR) and, in that capacity, operates the Legal Hotline to provide general responses to the IAR regarding Idaho real estate brokerage business practices and applications. A response to the IAR which is reviewed by any REALTOR® member of the IAR is not to be used as a substitute for legal representation by counsel representing that individual REALTOR®. Responses are based solely upon the limited information provided, and such information has not been investigated or verified for accuracy. As with any legal matter, the outcome of any particular case is dependent upon its facts. *The response is not intended, nor shall it be construed, as a guarantee of the outcome of any legal dispute*. The scope of the response is limited to the specific issues addressed herein, and no analysis, advice or conclusion is implied or may be inferred beyond the matters expressly stated herein, and RISCH ♦ PISCA, PLLC has no obligation or duty to advise of any change in applicable law that may affect the conclusions set forth. This publication as well as individual responses to specific issues may not be distributed to others without the express written consent of RISCH ♦ PISCA, PLLC and the IAR, which consent may be withheld in their sole discretion. For legal representation regarding specific disputes or factually specific questions of law, IAR members should contact their own private attorney or contact RISCH ♦ PISCA, PLLC for individual representation on a reduced hourly rate which has been negotiated by IAR.

Note on Legislative Changes

The responses contained in the 2014 "Hotline Top Questions" are based on the law in effect at the time, and the IAR forms as printed in 2014. The Idaho Legislature has enacted changes to the laws that apply to real property, and made changes to the Idaho Real Estate Licensing Law during the 2015 legislative session. In addition, IAR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2014 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which may reflect the 2015 legislative changes to the law.

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AGENCY/LICENSE LAW

Can a relocation company sign on behalf of a property owner?

QUESTION: Broker has a listing agreement with the property's owner. The owner has help from a relocation company to sell the property. Broker states that the relocation company wants to sign the contracts as the seller and provide other instruction to broker. Broker questions if they are able to do this when they do not own the property.

RESPONSE: Idaho Code § 54-2050(1) states that every Representation Agreement must contain:

> (e) The signature of the **owner** of the real estate or the owner's legal, appointed and duly qualified representative, and the date of such signature. (Emphasis added).

Unless the relocation company helping the seller provides written documentation legally appointing them as the owner's agent, Brokerage must contract directly with the owner of the property, who is also the one who must sign all of the relevant paperwork to sell the property.

Can an agent take a client to a new brokerage if client terminates their agreement with the former brokerage?

QUESTION: Broker has a new agent that had active listings with his old brokerage. Two of the sellers wrote letters to the former brokerage asking to remove the listing so they could list it with the agent, as when they signed the old contract they were under the impression that only this particular agent would be representing them. Agent's new broker sent the letters to the old broker and has heard no response. She questions if just notifying her is enough or if they need some type of response before going any further.

RESPONSE: The Hotline does not encourage or give advice about the termination of a Representation Agreement. However, broker is correct to consider needing a response from the other broker. The RE-16 is a binding contract between a seller and a brokerage, and defaulting on it may have consequences for the seller. Until they hear a response or an acknowledgement of receipt from the other broker, new broker should be careful about going any further with these listings. New broker should feel free to send the request via other means if old broker is not responding to the first request.

What are a broker's duties if a dispute arises when acting as a limited dual agent?

QUESTION: Broker represents both the buyer and seller in a transaction that closed over a month ago. Now that buyer has moved in, buyer alleges that many things that were supposed to be included in the sale were discovered to be missing and/or not working. Buyer wants compensation from seller and they are communicating through the broker. Broker questions what she should do in this situation.

RESPONSE: Section 8 of the Buyer's Representation Agreement, the RE-14, states in relevant part:

> Broker will act in an unbiased manner to assist the BUYER and Seller in the introduction of BUYER to such Seller's client's property and in the preparation of any contract of sale which may result.

The Seller's Representation Agreement contains the same language. The role of the broker acting as a dual agent is to introduce the buyer and seller and to prepare the Purchase and Sale, as well as other pertinent documents. Broker is under no obligation to continue to act as limited dual agent now that the sale has closed. Broker should advise both buyer and seller that she is not going to be involved in their dispute and that they need to work things out between themselves.

Can an agent terminate a Representation Agreement due to a client's failure to communicate?

QUESTION: Brokerage represents both the buyer and seller in a transaction. Agent has not heard anything from the buyer in over a week and critical decisions are not being made by buyer. Agent questions if he can terminate his representation agreement with the buyer.

RESPONSE: Yes. Section 15 of the Buyer's Representation Agreement (RE-14) states "Failure of BUYER to reasonably maintain communication with BROKER is a breach of this agreement." The best practice in this situation would be to send the buyer an email notifying him that he is in breach of the Representation Agreement for failure to communicate and that agent will be terminating the contract if buyer does not respond within a reasonable time.

Can an agent represent a relative in a short sale?

QUESTION: Broker is a listing agent in a short sale. Broker's daughter wants to make an offer on the home, and broker questions whether or not he can act as a limited dual agent or if it would be a conflict of interest to represent a member of his family.

RESPONSE: In most real estate transactions, as long as the relationship is disclosed to all parties and each party confirms in writing that they do not have an issue with the broker representing a family member, broker can represent that family member. However, in a short sale situation, the bank is probably less likely to let a broker represent relatives, and broker may consider referring his daughter to another agent in the area to ensure there are no conflicts, and to provide her with independent representation. Even if broker's daughter is represented by another brokerage, full disclosure should still be provided to seller.

Should an agent alter large portions of a contract with an addendum?

QUESTION: Agent has a customer that wants to make changes to the RE-16. Seller is an attorney, and is requesting large portions to be taken out of the contract completely and wants

significant changes made to other sections. Agent questions if this can be done with an addendum or if an attorney should be drafting a new contract.

RESPONSE: In Idaho, real estate licensees must use caution when deviating from the standard terms of pre-printed legal forms. If large portions of the pre-printed agreements are being changed, that could be considered practicing law and real estate licensees can expose themselves to liability and possible penalties for the unlicensed practice of law for doing so. The Idaho Supreme Court has clearly defined practicing law to include this type of activity:

> The drafting of the documents… or the giving of advice and counsel with respect thereto, by one not a licensed attorney at law, would constitute an unlawful practice of law, whether or not a charge was made therefore, and even though the documents or advice are not actually employed in an action or proceeding in a court. (*Idaho State Bar v. Meservy*).

The Supreme Court has previously sanctioned members of other industries for drafting documents for clients or customers. Real estate licensees should advise clients and customers to seek competent legal counsel if the need arises to significantly amend or alter pre-printed forms. Additionally, in that type of circumstance, real estate licensees should document that is was not the agent who drafted the contracts, confirm with broker to make sure that a contract drafted outside of the IAR forms will be covered by their insurance, and should also check with the MLS to determine if the contract will be valid within the MLS guidelines.

In certain circumstances, a brokerage's client may be allowed to draft legal documents themselves so long as it is pertaining to their personally owned real estate. Again, caution is advised in that if the property in question is owned by a legal entity such as a trust, corporation or limited liability company, the client or customer may be viewed as providing legal services to that company and therefore may find themselves engaging in the unauthorized practice of law.

COMMISSIONS & FEES

Must a referral fee be paid through the brokerage?

QUESTION: Broker A is paying a referral fee to Broker B. Broker A was under the impression that all fees must be paid through the brokerage and he wants to verify that assumption.

RESPONSE: Idaho Code § 54-2054 Paragraph 9 states in relevant part:

All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker.

Given the facts presented to the Hotline, this fee can be paid to the other agent personally, as long as he is the designated broker. The statute does not mention the brokerage entity. It clearly

states that all fees must be paid through the broker, and so long as Broker B is the only designated broker, there should be no issue. However, given that this is a compensation and fees question, broker should contact IREC to ensure that they would not have an issue with this type of payment.

Can an agent make a commission for finding rental property?

QUESTION: Agent represents out-of-state clients looking for a property to rent. Agent questions whether her clients or the property owner should pay her commissions once she finds a property for her clients to rent.

RESPONSE: Agent's only contractual relationship is with her out-of-state clients. Unlike when a property is listed for sale on the MLS, where the listing brokerage offers to share commissions with a cooperating brokerage, Agent is searching for rental properties that are not likely listed on an MLS. Therefore, Agent's only contractual right to commissions is with her clients. Only if a property owner were to agree to pay Agent's commissions would the owner be obligated for said commissions.

The Hotline does not resolve disputes between parties or commission disputes. Agent may wish to consult private legal counsel regarding her contractual obligations and rights to commissions.

Should commissions be paid to an inactive agent?

QUESTION: Broker has an agent that is planning to transfer their license to inactive status. However, Agent is currently referring clients to another Agent in the brokerage. Broker would like to know if the other agent sells real property after Agent is inactive should Broker pay inactive Agent referral fees.

RESPONSE: Idaho Code § 54-2054(9) states:

> All fees must be paid through broker…A broker may pay a former sales associate for services performed while the sales associate was actively licensed with that broker, regardless of the former sales associate's license status at the time the commission or fee is actually paid.

In Idaho, both buyer and seller representation agreements are between the client and the broker. In addition, all fees must be paid through the broker. In this case, Agent is attempting to establish an agreement with another agent within the same brokerage to receive compensation after Agent's license goes inactive. This however is likely not a viable solution, as the representation agreements with any buyer or seller is with the broker, and not with Agent.

Moreover, both agents likely have a commission agreement with the broker, as commissions must be paid through the broker. However, because Agent currently maintains an active license, Agent is likely able to establish an agreement with Broker so that it is still

possible for Agent to receive commission splits even with an inactive license. This commission agreement should be with Agent's broker and not the other agents.

Can a broker accept a commission from a client if they have not formally entered into a Representation Agreement?

QUESTION: Broker has represented Buyer over an extended period. However, Broker and Buyer have never established nor executed a representation agreement. Buyer recently purchased property that was for sale by owners. Broker did not show the property to Buyer nor assist Buyer in the transaction. Subsequent to the Buyer purchasing the property, Broker received a check in the amount of 3% commissions from Buyer. Broker would like to know if it is legal and appropriate to accept the check from Buyer.

RESPONSE: Idaho Code § 54-2054(9) stated in relevant part:

> All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker with whom the sales associate is licensed…

Given the facts provided to the Hotline, Broker received a check from Buyer for 3% commissions. As stated above, Idaho Code requires that all fees must be paid through broker. Since Buyer presented the check to Broker, there does not appear to be a violation of Idaho licensing law. However, because Broker does not have a contractual right to compensation and did not assist Buyer in the transaction, it is unclear whether the payment is a commission or a gift.

Regardless, the Hotline is unaware of Idaho case law or statute that would prohibit Broker from accepting the check. However, Broker may wish to contact the Idaho Real Estate Commission to obtain clarification on Broker's obligations and prohibitions, if any, while accepting gifts or unearned commissions.

Are agents entitled to compensation if the sale of the property does not go through?

QUESTION: Agent represents buyer who performed under the contract all the way up to closing. Right before closing, seller didn't show up and refused to deliver warranty deed, causing the deal to fall through. Agent wants to know if the brokerage can go after the seller for its commission and also if the buyer can get monetary damages from the seller because the purchase fell through.

RESPONSE: Idaho law provides that "the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of a contract." *The Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 260 (1993). "[This rule] does not, however, alter the obligation to pay the commission if the sale is not completed due to the fault of the

seller….if the failure of completion of the contract results from a wrongful act or interference of the seller, the broker's claim is valid and must be paid." *Id*. at 260.

Additionally, Idaho Code § 54-2046(4) states:

> No disbursement of any portion of the broker's commission shall take place without prior written, signed authorization from the buyer and seller or until copies of the closing statements, signed by the buyer and seller, have been delivered to the broker and until the buyer or seller has been paid the amount due as determined by the closing statement.

Given the facts provided to the Hotline, the buyer performed fully on the contract all the way up to closing and the seller didn't show up and failed to deliver a warranty deed. Since it was solely the sellers' fault this transaction didn't close, the brokerage would need to go through the seller's broker in order to try to get a commission. The unilateral contract between the two firms would more than likely need to go to arbitration through the Idaho Association of REALTORS® since there is no privity of contract between Agent and seller. As for the buyer, he can go after the seller for damages incurred and would need to seek private legal counsel to see if it is worth moving forward.

CONTRACTS

Does an addendum supersede the Purchase and Sale Agreement?

QUESTION: Seller and Buyer both signed an RE-11 Addendum stating that the earnest money is non-refundable. Buyer's lender did not provide a loan acceptable to buyer so buyer had to cancel the transaction. Now, lender is saying that buyer is entitled to their earnest money back. Broker questions whether or not this is correct, given that the addendum was fully executed by both parties.

RESPONSE: The Addendum form (RE-11) states in relevant part:

> This is an ADDENDUM to the □ Purchase and Sale Agreement □ Other ("Addendum" means that the information below is added material for the agreement {such as lists or descriptions} and/or means the form is being used to change, correct or revise the agreement {such as modification, addition or deletion of such terms}).
>
> **To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums and Counter Offers, these terms shall control…. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.** (Emphasis added).

Given the facts stated to the Hotline, if both parties signed the addendum, the addendum clearly supersedes the default provisions of the RE-21 and the earnest money is non-refundable. Broker is correct in her advice to her client. The Hotline does not resolve earnest money disputes, and broker should advise buyer to seek private legal counsel.

Can a party be forced to perform under the contract?

QUESTION: Agent co-listed vacant land. The sale fell through at the last minute because buyer allegedly changed his mind. Agent would like to know what seller's rights are in this situation and wonders if seller can make buyer perform through specific performance.

RESPONSE: If a buyer defaults on the agreement, Section 25 of the RE-24 states in relevant part:

> If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled… If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred… on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees.

As stated above, if the seller chooses to proceed under the second option, the buyer could be responsible for the costs incurred before the contract was terminated, likely including the survey that was done at seller/agent's expense. Further, seller can likely go after buyer for specific performance. However, such cases are difficult to prevail upon, as courts will generally look to contractual (monetary) damages first. Only if there is no proper contractual remedy may a court impose the equitable damage of specific performance.

The Hotline does not resolve disputes between buyer and seller. Agent's client should seek private legal counsel to determine his or her rights and responsibilities in the current default situation.

In a short sale, is the accepted RE-21 enough to have a binding contract or does it not become valid until the RE-44 is signed by both parties?

QUESTION: When dealing with a property as a short sale, agent questions if the buyer and seller have a contract when the Purchase and Sale Agreement (RE-21) is signed by both parties or if it is not a valid contract until the Short Sale Addendum (RE-44) is also signed.

RESPONSE: In contract formation, the parties must mutually assent to the contract. Mutual assent, or a "meeting of the minds," generally is some form of negotiation, during which one party makes an offer and the other agrees to it. Each party is bound to the terms that were agreed upon by both parties. No other arrangements made outside of the contract document will become part of the contract unless both parties also assent to the inclusion of additional terms.

The parties memorialize their assent by placing their signatures on a document or documents. The moment a Seller signs the Buyer's RE-21 the parties would have a valid contract that does not include the terms of the Short Sale Addendum. Unless of course the Seller conditioned his acceptance on the Buyer's assent on the RE-44. The checkbox on line 406 of the RE-21 was included for this very purpose.

The Hotline does not resolve disputes between Buyers and Sellers, and agent should advise client to seek private legal counsel if this is a dispute between parties.

Do the parties have a binding contract if the signature page was not received, but the rest of the contract was?

QUESTION: Agent represents buyer, and they tendered an offer and sent it over to the seller for their acceptance. Seller accepted the offer, but when seller's agent faxed the contract back, the last page never came through. Seller's agent also confirmed acceptance orally and by changing the MLS listing. Now seller is trying to change terms of the contract. Agent wants to know if they still have a binding contract.

RESPONSE: Given the facts presented to the Hotline, they likely still have a binding contract. The Restatement of Contracts § 50(1) defines acceptance of an offer as "a manifestation of assent to the terms [in the offer] made by the offeree in a manner invited or required by the offer." Assuming the Buyer conditioned the acceptance upon a returned fax containing the identical terms from the offer, then the initials on each page and the delivery of the majority of the executed contract indicate a manifestation of assent even though the Seller mistakenly did not send the last page with a signature.

More importantly, the so-called "Mailbox Rule" codified in the Restatement of Contracts § 63(a) states that "[u]nless the offer provides otherwise, an acceptance made in a manner and by a medium by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, *without regard to whether it ever reaches the offeror"* (emphasis added). The only real question is whether the acceptance is deemed to have left the offeree's possession when they intended to fax the last page with the rest and it was lost.

This question is clearly answered in the comments of § 63, specifically in Comment b, which squarely addresses acceptances "loss or delay in transit." The comment states that the rule embedded in § 63 "extend[s] to cases where an acceptance is lost or delayed in the course of transmission." Further, Comment c states "Nor…does the actual recapture of acceptance deprive it of legal effect." Therefore, even though the Seller in this instance still has possession of the last page of the acceptance and it was lost in transit, legally it is still considered an acceptance since they attempted to put the acceptance out of their possession to the Buyer per § 63.

Notwithstanding the above, the Hotline does not get involved in disputes between buyers and sellers and the advice tendered herein is to assist Broker, and is not to be relied upon by either party. Agent should advise client to seek private legal counsel and should avoid providing legal advice to the client.

Does a buyer have Right of First Refusal if the bank decides to put the short sale property up for auction?

QUESTION: Buyer and seller are or were involved in a short sale transaction. Buyer requested that the Seller not continue to market the property and accept other offers. Lender did not approve of that term, nor did Lender provide Lender Consent as that term is defined in the RE-44. Lender and Seller decided to auction the property and ended up accepting an offer from the highest bidder. Buyer's broker questions if they have a legal Right of First Refusal in this situation.

RESPONSE: The Short Sale Addendum (RE-44) Section 3 does include a Right of First Refusal:

> If the parties agree that Seller may accept offers from other buyers, or if the creditor requires that Seller must continue to market the property, then the Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ___ (3 days, if left blank) to submit an offer under this Right of First Refusal.

However, Section 2 states that the Short Sale Addendum and all underlying transaction documents are entirely contingent upon Lender Consent. It states in relevant part:

> The Purchase and Sale Agreement referenced above, any addendums, and/or counter offers are all contingent upon the Seller obtaining written consent from Seller's creditor(s) for the Short Sale and Seller's acceptance of any conditions imposed by Seller's creditor(s) ("Lender Consent"). Seller shall have ____ (90 days, if left blank) after mutual acceptance of this Addendum to obtain Lender Consent…. **If Seller's lender does not consent within the timeframe stated above or imposes terms unacceptable to Seller then immediate notice shall be given to the Buyer and this Addendum, the Purchase and Sale Agreement referred to above and any addendums and/or counter offers shall terminate** and the Earnest Money, if deposited, shall be refunded to the Buyer. Buyer and Seller acknowledge that Seller has limited control over whether Seller's creditor(s) will consent to the sale and when such consent will be given. Emphasis added.

Given the information presented to the Hotline it does not sound like the lender consented to the transaction, yet Buyer is still relying on the Right of First Refusal claiming it is a binding agreement between Buyer and Seller with or without Lender Consent. The Hotline has never seen a circumstance where Buyer's position has been attempted and cannot interpret or predict if

buyer would prevail in a court of law. However, if Buyer does wish to assert this provision, Buyer must exercise their right in writing within 3 days.

Regardless, the Hotline does not resolve disputes between buyer and seller, and cannot weigh in on contracts with third party lenders. Both buyer and seller's brokers should recommend that their clients seek private legal counsel due to the complexity of the situation.

Can a seller be found in breach of contract for not honoring an addendum accepted by both parties?

QUESTION: Agent represents the buyer. The seller submitted an addendum regarding the purchase price, stating that the price would be "X or the appraisal price, whichever price is lower." Both parties signed this addendum. Once the appraisal came in, it was significantly less than price X but now seller wants out of the transaction. Agent questions whether or not this would be a breach of contract.

RESPONSE: Given the facts presented to the Hotline, if both parties accepted and signed this addendum, they have a legally binding contract. If seller backs out of this transaction, seller will most likely be in breach of contract and will have defaulted in their performance of the agreement. However, the Hotline does not resolve disputes between buyer and seller. Agents on both sides of this transaction should advise their respective clients to seek private legal counsel to determine each party's rights.

When does the earnest money become non-refundable when using the RE-24?

QUESTION: Broker questions if the RE-24 – *Vacant Land Real Estate Purchase and Sale Agreement* – creates a binding contract between the parties executing the document, and if so, when does the Buyer's earnest money become non-refundable, specifically in relation to the Buyer satisfaction language contained in Section 6.

RESPONSE: Yes. When two parties execute an RE-24, it becomes a legally binding contract; the parties are notified of this fact with a clear and conspicuous warning in the box at the top of the form. However, the contract is conditioned on certain circumstances. The two most prominent conditions are seller financing (enumerated is Section 3) and Seller satisfaction (enumerated in Section 6).

On an "all cash" contract, the financing contingency does not come into play as Paragraph 3(C) is not applicable. The other main contingency is enumerated in Section 6 of the RE-24 and allows the Buyer to cancel the contract within a certain amount of time, based upon Buyer's satisfaction, it states:

> (1) If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this agreement, BUYER shall conclusively deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to

> proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed to in writing to repair or correct. (Emphasis added).

The contract goes on to state that if Buyer does terminate the agreement within the strict time period, then "the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER." (Line 122).

According to facts presented to the Hotline, the contract was executed by the last party on March 13, 2014, which would trigger the 30 business day contingency which would then expire on April 24, 2014. If Buyer did not, before this date, provide Seller with a document that would constitute "written notice of termination," Buyer's earnest money becomes non-refundable and if Buyer thereafter breaches the agreement, the earnest money may be forfeited under the liquidated damages clause. (Section 29).

The specific RE-24 provided to the Hotline by Broker included additional language that stated:

> BUYER to have 15 day due diligence period to review all documents that the SELLER has regarding the development, including but not limited to the following: site engineering plans, community well information, etc.

This additional term appears to create a due diligence period for Buyer to conduct various document reviews, but in any event, does not cancel out the inspection terms provided in Section 6. If the parties had intended to limit the Buyer satisfaction period of Section 6, there is a blank on line 110 which is to be specifically used for that purpose. Since the parties did not fill in an alternate number, the Buyer had the default 30 business days to cancel the contract.

Notwithstanding the above, the Hotline review of this matter was limited to the specific sections inquired into by Broker and does not provide legal advice to either Buyer or Seller in real estate transaction disputes. Each party should be advised to obtain their own private legal counsel to instruct them on their respective legal rights.

Can a party terminate the contract when they have had no communication from the other side?

QUESTION: Agent represents the seller. Buyer had until 5 pm on Friday, May 16, 2014 to provide lender approval to seller. They have not heard anything from buyer. Agent questions if seller can legally terminate this agreement since they have had no communication from the buyer.

RESPONSE: Section 3(C) of the RE-21 states in relevant part:

> Within ___ business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. **If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within ___ business days (three [3] if left blank) after written confirmation was required.** (Emphasis added).

Given the facts presented to the Hotline, the timeframe for the buyer to submit their lender approval was up on Friday at 5. If they did not receive anything from the buyer's, seller has three days (or the number of days decided by the parties) to notify the buyer that they will not continue the transaction. Agent should notify the buyers that seller is terminating the agreement.

Buyer terminated within their timeframe but the RE-20 did not get sent to the seller on time. Was the contract legally terminated?

QUESTION: Agent represents the buyer. During the inspection timeframe, the buyer decided to terminate the agreement. Buyer signed an RE-20 and timely sent an email to the seller. The RE-20 was not attached to the email, but the body of the agent's email clearly conveyed the intent to cancel the transaction. The seller did not receive the RE-20 during the timeframe to terminate, and now seller does not want to honor the cancellation of the contract. Agent questions if the contract was legally terminated even though the RE-20 did not get to the buyer in the strict time allotted.

RESPONSE: Section 10(A) of the RE-21 states in relevant part:

> BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items **or written notice of termination of this Agreement** based on an unsatisfactory inspection. (Emphasis added).

Given the facts presented to the Hotline, if the buyer's agent sent the email within the timeframe, clearly notifying the seller that the buyer was terminating, they most likely legally cancelled the contract regardless of the RE-20 not being received. The above stated section of the Agreement states that buyer must give notice to the seller. It does not require any specific language, form or agreement, just that written notice must be given.

However, the Hotline does not resolve disputes between buyer and seller. Agent should advise client to seek private legal counsel to determine their rights in this particular case.

Can a seller terminate because they don't like that the buyer has co-signers?

QUESTION: Broker represents the seller. The buyers were not able to obtain financing so they added co-signers to the loan and were approved. Seller is not fond of the idea that there are two new co-signers on the contract and Broker questions if this is enough reason to terminate the agreement.

RESPONSE: The RE-21 Financial Terms section states in relevant part:

> (C). This Agreement is contingent upon BUYER obtaining the following financing…Within ___ business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification… and evidence of sufficient funds and or/proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within ____ business days (three [3] if left blank) after written confirmation was required.

Given the facts presented to the Hotline, seller has not cancelled the agreement within the three business days allotted, and therefore cannot rely on the financing contingency to get out of the contract. The Hotline does not resolve disputes between buyers and sellers and broker may wish to advise her client to seek private legal counsel to determine their rights.

Is an inspection performed by a gas company sufficient for termination based on and unsatisfactory inspection?

QUESTION: Broker represents the buyer. Buyers sent over their Notice to terminate the contract after finding things in the home that were deemed unsatisfactory. They did this within the inspection time frame. Seller has put the home back on the market but is refusing to sign the RE-20. The title company is holding the earnest money and will not release it until both parties agree. Broker questions what the options are for his buyers.

RESPONSE: Section 10A of the RE-21 states in relevant part:

> BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies and BUYER'S expense. BUYER shall, within ___ (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

Given the facts presented to the Hotline, the buyers had found certain items to be unsatisfactory after inspecting the home. They were within the contract's strict time period when they gave seller their written notice of termination. The term "unsatisfactory inspection" is not defined in the contract, therefore the common interpretation of that term controls. Black's Law Dictionary defines inspection as:

> To examine; scrutinize; investigate; look into; check over; or view for the purposes of ascertaining the quality, authenticity or conditions of an item, product, document, residence, business, etc. Word has broader meaning than just looking, and means to examine carefully or critically, investigate and test officially, especially a critical investigation or scrutiny.

In addition, in 2012 the Supreme Court of Idaho reviewed similar language in a Purchase Sale Agreement and stated:

> Despite appellants' contentions, when read as a whole, the Buyer's Obligations clause expressly and unambiguously grants Buku the right to refuse to close, in the event that Buku is not "fully satisfied with the condition of the property."…[This] is what is sometimes referred by real estate law practitioners as a "free look" provision, granting the Buyer the ability to decline the purchase for virtually any reason, without losing the earnest money deposit. *Buku Properties, LLC v. Clark* 153 Idaho 828.

Based upon the terms of the contract at issue and the Supreme Court's previous interpretation of similar contracts, it is likely that the Purchase and Sale Contract can be terminated by buyer for any slight item or condition which is not satisfactory to buyer. However, the unsatisfactory item or condition must be based on some sort of inspection. There is no requirement that inspections need to be performed by professional home inspectors and may be performed by the BUYER themselves.

The Hotline does not resolve disputes between buyer and seller. Brokers may wish to advise clients to seek private legal counsel.

What is the validity of a verbal contract?

QUESTION: Broker represents the seller. An offer was made verbally by a proposed buyer. Broker prepared the documents and sent them to the buyers. Broker has not received the signed contracts back from the buyers, but did receive oral notification that they would like to accept the offer. Broker questions if seller can continue to accept other offers.

RESPONSE: Yes, seller can accept other offers. Idaho Code § 54-2051 states in relevant part:

(4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein **are in writing** and contain all of the following specific terms, provisions and statements:

(a) All terms and conditions of the real estate transaction as directed by the buyer or seller;

(b) The actual form and amount of the consideration received as earnest money;

(c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;

(d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;

(e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;

(f) All appropriate signatures; and

(g) A legal description of the property. (Emphasis added).

Generally speaking, an offer to purchase must be in writing and must contain signatures in order for it to be a binding contract. Given the facts presented to the Hotline, the buyers did not sign the RE-21 and had only made a verbal offer. Since there is no document with both the buyer's and seller's signatures, they do not have a binding contract and seller can continue to accept offers.

When does the inspection timeframe start when a transaction has many counter offers and addendums?

QUESTION: Agent represents the seller. According to seller's broker, buyer submitted an offer on October 30. On November 1 all parties came to an agreement on Counter Offer #2. Once the buyers had previewed the property on November 8, buyer's agent sent over Counter #3 changing the purchase price. The parties went back and forth until both signed Counter #5 on November 10. On November 14 buyer terminated contract based on an unsatisfactory inspection. Broker is under the impression that the inspection timeframe started when Counter #2 was signed and questions if his interpretation is right.

RESPONSE: The RE-21 states in relevant part that "BUYER shall, within ___ business days (five [5] if left blank) of acceptance, complete these inspections." (Section 10, emphasis added). It also states "On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof." (Section 44, emphasis added).

Given the facts provided to the Hotline, it appears that acceptance was accomplished on November 1 when the parties signed Counter #2. The "counter offers" circulated after the execution of the Purchase and Sale Agreement and Counter #2 were technically addendums.

The Hotline does not resolve legal disputes between Buyers and Sellers. Broker should advise clients to consult private legal counsel in regards to their specific rights and obligations in these matters.

Can a seller revive a contract by singing the original RE-10 after buyer has terminated based on an unsatisfactory inspection?

QUESTION: Agent represents the buyers. According to the agent, beginning on Wednesday, November 12th buyers had ten business days to complete inspections. On the 19th buyers' agent sent over an RE-10 with a list of requested repairs. On the 21st seller countered back agreeing to fix some but not all of the requested items. On the 25th buyers terminated the contract. Later that same day sellers signed the original RE-10 stating that they will fix all of the requested items. Buyers no longer want property and agent questions if the seller is able to revive the contract once it has been cancelled.

RESPONSE: Given the facts presented to the Hotline, and given the specific timeline of events, it appears the buyers cancelled the contract within the time stated in Section 10 of the Purchase and Sale Agreement and more specifically, subsections (B)(3) and (B)(4) since both parties did not come to a consensus of items to be corrected before the contract was terminated. The seller's act of signing the original RE-10 was an attempt to revive the contract which cannot be done unilaterally; it requires all parties' consent.

The Hotline does not resolve disputes between buyers and sellers and all parties involved in this transaction should seek private legal counsel to determine their rights and responsibilities in this matter.

DISCLOSURE

Can a buyer hold a seller responsible if a foundation issue was not discovered until after closing?

QUESTION: Broker represented a seller on a property that closed a week ago. Before closing, heavy rain filled the window wells and caused water to leak through to the basement. Seller paid for clean-up and also offered to pay for exterior drainage. Buyer decided that seller could pay for the emergency clean-up service, but they would take care of the drainage system once they own the property. Now, while working on some of these drainage issues, buyers have found a crack in the foundation and want seller to pay for repairs.

RESPONSE: Idaho Code § 55-2507 states:

> MANDATORY REQUIRED DISCLOSURE STATEMENTS. To comply with the provisions of this chapter, a form shall set forth a statement of purpose of the form, including statements substantially similar to the following:

> (1) The form constitutes a statement of the conditions of the property and of information concerning the property actually known by the transferor.
> (2) That unless the transferee is otherwise advised in writing, the transferor, other than having lived at or owning the property possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee.
> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) That the statement is not a substitute for any inspections.
> (5) That the transferor is familiar with the particular residential real property and each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.
> According to I.C. § 55-2507, Seller is required to disclose the condition of the property and any information actually known by the Seller. Further, any disclosure statement made by the Seller regarding the property condition is not a substitute for any inspections performed at the request of the Buyer.

Given the information provided to the Hotline, the seller was unaware of the issue with the foundation, and therefore did not disclose this information. Therefore, seller may have performed their disclosure of the property honestly and in good faith. Also, any disclosure made by the seller was not a substitute for an inspection, and buyer was given the opportunity to have the seller pay for the costs of the drain system yet buyer refused. Buyer was also given the opportunity to have these things inspected and in fact is encouraged to do so in Section 10 of the Purchase and Sale Agreement.

Is a mobile home owner exempt from filling out the RE-25 since it is not a permanent structure?

QUESTION: Broker would like to know if sellers of mobile homes are exempt from filling out the RE-25 since it is not a permanent structure.

RESPONSE: No. Idaho Code § 55-2504 states in part:

> Any person who intends to transfer any residential real property, including nonowner occupied rental property…by any of the methods as set forth herein shall complete all applicable items in a property disclosure form prescribed under section 55-2508, Idaho Code. Except as provided in section 55-2505, Idaho Code, this chapter applies to any transfer by sale, exchange, installment sale contract, a lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real

> property improved with or consisting of not less than one (1) nor more than four (4) dwelling units. (Emphasis added).

Idaho law defines "residential real property" as:

> Real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use.

Every transfer of residential property requires a Property Disclosure Form to be filled out. A mobile home is "residential real property" according to the legal definition above. The only exceptions are listed in Idaho Code § 55-2505 and selling a mobile home does not fall under the list of exemptions.

Does a seller need to disclose that the neighboring property has a cockroach infestation?

QUESTION: Agent is representing the seller. The seller disclosed to agent that the home next door has a cockroach infestation. Sellers have had pest control come out to spray the area in between the homes so that the infestation will not migrate over to the listed property. Agent wants to know if this infestation next door is something the agent needs to disclose when they list the home.

RESPONSE: Idaho Code § 55-2506, which discusses the required disclosures under the Property Condition Disclosure Act, states in relevant part:

> Seller shall disclose "material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances."

In addition, Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. Broker and seller will need to decide whether or not the infestation rises to the level of an "adverse material fact", and for that matter if the infestation is even a condition related to the property being listed. The Hotline cannot act as a substitute for providing sellers legal advice, and only advises Brokerages on Brokerage duties. If seller is unable to make a decision, seller should consult seller's own legal counsel.

Is emailing the Property Disclosure Form a valid form of delivery?

QUESTION: Broker noticed that Idaho Code § 55-2510, which deals with property disclosure delivery requirements, does not mention email as a valid form of delivery.

RESPONSE: Idaho Code § 55-2510 states in relevant part:

> The transferor's delivery…of a property disclosure form…and the prospective transferee's delivery of an acknowledgment of that form shall be made by personal delivery to the other party or his agent… by ordinary mail or certified mail, return receipt requested or by facsimile transmission.

Broker was right to question this statute. The Uniform Electronic Transactions Act (Idaho Code § 28-50-107) states:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.
> (e) If a law requires any notice or other record to be sent by certified mail, the record may, with the express consent of the recipient, be transmitted electronically.

Given the facts presented to the Hotline, if the delivery of this form was made via email, and the other party acknowledged its receipt, that is most likely the express consent of the recipient as mentioned above. However, Broker should contact IREC about this specific statute to ensure compliance and could recommend that it should be amended to include electronic mail.

Should it be disclosed that the sale is contingent upon the sale of another home?

QUESTION: Broker represents the seller. Broker states that buyer had the water company come out to inspect the property and buyer was made aware that the water system did not meet federal regulations. Broker questions if brokerage's agent could be liable for not disclosing this information.

RESPONSE: Idaho Code § 54-2087 4(a) states in relevant part:

> Brokerage and its licensees owe the following agency duties and obligations to a client: "disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee."

Given the facts presented to the Hotline, if Broker's agent was not aware of an issue with the backflow system, agent could not disclose this information and therefore the agent and broker would not be held responsible. Further, agents are under no obligation to perform inspections on listed property.

The seller could be liable if they knew about the issue with the water system and did not disclose the situation to buyer. However, the Hotline does not solve disputes between buyers and sellers, and broker should advise client to seek private legal counsel to determine their rights in this matter.

Does a seller need to disclose if the roof has been repaired during the course of the listing?

QUESTION: Agent represents the seller. The property was listed for over two years. During the course of the listing the roof was repaired to fix a leak but it was not disclosed on any forms. The property sold and now the new owner discovered that the roof is leaking. Was seller obligated to disclose that the roof was repaired?

RESPONSE: The seller's responsibilities regarding the delivery of the disclosure form are:

> 55-2509. DELIVERY OF DISCLOSURE FORM AND ACCEPTANCE. Every transferor shall deliver, in accordance with section 55-2510, Idaho Code, a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) days of transferor's acceptance of transferee's offer. Every prospective transferee of residential real property who receives a signed and dated copy of a completed property disclosure form as prescribed under section 55-2508, Idaho Code, shall acknowledge receipt of the form by doing both of the following:
> (1) Signing and dating a copy of the form;
> (2) Delivering a signed and dated copy of the form to the transferor or his agent or subagent.

Given the facts presented to the Hotline, even though the disclosure form was filled out prior to the roof leak and repair, seller has an obligation to deliver an updated and correct Property Disclosure Form to the offeror within 10 days of accepting the offer.

The Hotline does not resolve disputes between buyer and seller. Agent may wish to advise her clients to seek private legal counsel to determine their rights and responsibilities in this matter.

DUTIES TO CLIENT & CUSTOMER

Does a broker have a duty to disclose radon testing?

QUESTION: Brokerage is acting as a dual agency in a transaction. Broker is the listing agent for a seller she had worked with 2 years ago when he was buying the property that is now listed. When the seller bought the home, he had radon testing done but the results were low and apparently not at an alarming level. Now he is selling the property, but did not mark anything

down in the RE-25 about radon. Buyer decided to have his own radon testing done, however he signed off on the inspection contingency before the results of the testing came back. Now that the results are in and are positive for radon, buyer wants seller and broker to pay for the testing and broker questions if she and seller are liable.

RESPONSE: Idaho Code § 54-2087 4(a) states in relevant part:

> Brokerage and its licensees owe the following agency duties and obligations to a client: "disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee."

Given the facts presented to the Hotline, if broker was not aware of the radon testing and had never seen the results from her client, broker would have no reason to disclose the radon testing and broker would not be held responsible. The seller could be liable because he had the radon testing done previously and may have been required to disclose it to the new buyer. However, the Hotline does not solve disputes between buyers and sellers, and broker should advise both parties to seek private legal counsel to resolve this issue.

Is a licensee required to closely inspect the title report with their client?

QUESTION: Agent has a client who wants to sell his home. Agent also represented the client when he bought the same property. Now, they have discovered that there is an easement across the property that was not disclosed or known when he bought the property ten years ago. Agent questions if he is at fault for not reading through the title report with his client.

RESPONSE: Given the facts presented to the Hotline, the easement was defined in the title report. Buyer may not have been aware of the easement as it was on the last line of the report. Agents have no affirmative duty to inspect title documentation and/or walk through the report step-by-step with their client. If the buyer received the title report which disclosed the easement when he purchased the home, legal action by the buyer against any other entity will likely fail.

Does listing agent have any duty to disclose multiple offers to the buyer?

QUESTION: Listing Agent would like to know if it is required by law to disclose all multiple offers to Buyer and Buyer's agent.

RESPONSE: Idaho Code § 54-2083(6) defines confidential client information:

> (6) "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and

> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code…

Idaho Code prohibits Agents from disclosing confidential client information to third parties. Offers to purchase are not a matter of public record, could potentially be detrimental to the client if disclosed, and are not required to be disclosed under any particular statute. Therefore, unless there is a contractual provision stating that all offers are to be disclosed to Buyer and Buyer's agent, offers should not be disclosed without client approval, as these purchase offers may be considered confidential client information.

What are a dual agent's responsibilities if a dispute arises after closing?

QUESTION: Broker represents the seller. Another agent in the office represented the buyer, so they are in a limited dual agency situation. The buyer needs a new furnace because there was an issue with the old one. Broker has been trying to help find a solution but has yet to succeed. The buyer called to inform her of a possible lawsuit to get the furnace situation resolved. She questions what her next step should be.

RESPONSE: Broker's efforts to help buyer and seller find a solution are admirable. However, given the facts presented to the Hotline, this is a post-closing dispute between the buyer and the home warranty company and/or the seller. Brokerage should inform buyer and seller that Broker can no longer assist the parties and advise each to seek private legal counsel.

EARNEST MONEY

Can the earnest money be released to the seller if they feel as though the buyers did not explore other financing options?

QUESTION: Agent represents the buyer in a transaction on a condo. Her offer was accepted by the seller and the buyer proceeded to apply for financing. Ultimately, buyer was unable to obtain financing because the lender did not like the fact that one investor owned several of the condos. There is a potential earnest money dispute as agent states the seller feels like the buyer did not explore other financing options. Agent would like to know who is entitled to this earnest money.

RESPONSE: The RE-21 Financial Terms section states in relevant part:

> (C). This Agreement is contingent upon BUYER obtaining the following financing… In the event BUYER in unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request.

Given the facts presented to the Legal Hotline, the buyer was not able to obtain financing. If the buyer exercised good faith efforts to obtain the funds, then according to the terms of the contract the buyer is entitled to a return of their earnest money. However, if seller has made claim to the earnest money then the responsible broker has three options in an earnest money dispute. Idaho Code § 54-2047 states:

> DISPUTED EARNEST MONEY.
> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall: (a) Notify each party, in writing, of the demand of the other party; and (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

Similar language is contained in the RE-21 Section 30. The Hotline does not resolve disputes between buyer and seller. Agent should advise client to seek private legal counsel to determine their rights in this matter.

What happens to the earnest money in the event of a party's default?

QUESTION: Broker represents seller in a sale that did not close. The buyer's financing was initially approved, though on the day of closing, the lender contacted the broker stating that the buyer had not been honest on his loan application forms so the loan had been denied. Buyer's broker and lender have tried several times to reach out to buyer but have received no response. The contract ended on January 31st, and broker questions if she can release the earnest money to her sellers, because she believes the buyer did not act in good faith.

RESPONSE: Idaho Code § 54-2047(2) states:

> The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the

> broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

The RE-21 explains what happens if either party defaults. Section 29 states in relevant part:

> If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled.

Given the facts presented to the Hotline, if broker feels that buyer did not use good faith then broker can release earnest money at broker's own discretion, and if the buyer has defaulted in the agreement, seller can elect either of the two options outlined in Section 29 of the RE-21. If seller chooses option 1, broker can rely on that clause to distribute the money to seller.

The Hotline does not provide opinions on earnest money disputes. Broker should instruct clients to seek private legal counsel to determine client's rights and responsibilities.

What should the responsible broker do in an earnest money dispute?

QUESTION: Broker is acting as a dual agent in a transaction. The buyer's loan was contingent on the house appraisal price, therefore when the home appraised for $20,000 less than the asking price, the financing fell through. Broker questions what to do with the earnest money. Pursuant to Section 3C of the RE-21, buyer is entitled to the earnest money when the appraisal is less than the purchase price, however the buyer and seller are currently disputing $1000 of the earnest money.

RESPONSE: Idaho Code § 54-2047 states:

> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall: (a) Notify each party, in writing, of the demand of the other party; and (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

(3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

Given the facts presented to the Hotline, broker can carry out any of the three options stated above. However, the Legal Hotline does not make determinations regarding Earnest Money disputes, and broker should advise both buyer and seller to seek private legal counsel to determine each party's rights and responsibilities.

What is the necessity of signing the RE-20 for release of earnest money?

QUESTION: Buyer's broker questions if she can release the earnest money to the buyer, even though the sellers have not signed a written release (RE-20). Broker has been trying to get the sellers to sign it for weeks, but they will not do it. Do the sellers need to sign the release, or can she go ahead and release the earnest money back to the buyers?

RESPONSE: Given the facts presented to the Hotline, broker does not believe there is an earnest money dispute in this case. The sellers are not disputing the earnest money; they are simply refusing to sign to release it. The parties do not need to sign the Release of Earnest Money in order for the earnest money to be returned to the buyer. The purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may assert. It is always best practice to obtain one, but one is not required.

The broker should write a letter to the sellers stating that unless they make broker aware of an earnest money dispute, the earnest money will be released back to the buyer within 5 days. Broker should note in her file that she tried many times to get the sellers to sign the release form, and keep a copy of the letter sent to the sellers for her records.

FORMS USE

Who is responsible for payment when the Costs Paid By Section (Section 17) of the RE-21 is marked "N/A?"

QUESTION: Broker represents the seller on a cash only transaction. Section 17 of the RE-21 is filled out stating the seller agrees to pay up to $500 of closing costs, lender fees and prepaid costs. Everything in the box is checked as N/A except for Title insurance. Buyer wants seller to pay HOA dues, but seller's broker questions if they need to pay for that when it is not covered anywhere in this section.

RESPONSE: Section 17 of the Purchase and Sale Agreement states:

> **Upon closing SELLER agrees to pay up to EITHER _____& (N/A if left blank) of the purchase price OR $_____ (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees,**

> **and prepaid costs which includes but is not limited to those items in BUYER columns marked below.**

Given the facts stated to the Hotline, the seller is only responsible for the items checked in the table. If all are checked as N/A, seller is not responsible. There is nothing in the table that mentions HOA dues, so seller does not have an obligation to pay for those. Seller will have to pay for closing costs and anything checked as "SELLER" in the table in Section 17. If the total amount of closing costs, lender fees and prepaid costs is less than $500, seller is only obligated to pay up to the total amount of those costs.

What form is appropriate to use when a licensee represents both the buyer and the seller?

QUESTION: Broker is from Washington and has recently become a broker in Idaho. He questions what the proper forms are to use in the event that a broker is representing both the buyer and the seller.

RESPONSE: The Representation Agreement Forms (RE-14 and RE-16) have sections specifically for dual agency situations. Section 8 in the Buyer Representation Agreement (RE-14) and Section 18 in the Seller Representation Agreement (RE-16) are both titled "Consent to Limited Dual Representation and Assigned Agency." When a broker is acting as a limited dual agent, both the buyer and seller in the transaction must initial these sections. If broker does not have consent from all parties in the transaction, broker cannot act as a limited dual agent. Broker should also read Idaho Code § 54-2088 very thoroughly before entering into a limited dual agent agreement so broker is aware of his duties and obligations to both clients.

When is it appropriate to initial the late approval acceptance in the RE-21?

QUESTION: Buyer and Seller were to close on an offer by 5:00 p.m. on a Friday. However, Buyer and Agent did not receive acceptance from Seller until Saturday. Agent questions when it is appropriate to initial the late approval acceptance in paragraph 41 of the RE-21 Purchase and Sale Agreement.

RESPONSE: Paragraph 41 of the RE-21 states:

> **41. ACCEPTANCE**: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) his A.M. P.M. If acceptance of t offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE _____. **If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER**. (Emphasis added.)

Buyer is able to proceed with an accepted offer subsequent to the allotted time for acceptance if they so choose. When negotiating the contract, the parties may agree on a specific amount of

time allowing the Buyer to approve of a late acceptance, or the time will be 3 calendar days if left blank. If the Buyer decides to move forward within the allotted time, the initialed copy must *immediately* be sent to the Seller.

Given the information provided to the Hotline, Buyer received a late acceptance on Saturday. If Buyer approves this late offer, Buyer should initial the appropriate area and immediately deliver the approval of late acceptance to Seller. Immediately delivering the approval may mean that an initialed copy is faxed, emailed or hand delivered directly following the Buyer's approval of the late acceptance.

It is not necessary for Buyer to initial the late approval when preparing the offer; because the section should only be initialed if and when Buyer chooses to approve a late acceptance. Paragraph 41 of the RE-21 is designed to provide the Buyer with the option of either approving a late offer by initialing the contract and returning it immediately to Seller or by terminating the contract and not initialing since Seller submitted an offer past the allotted time frame for acceptance.

In this instance, Buyer received a late offer on Saturday. Therefore, if Buyer still wishes to accept Seller's offer, Buyer has a specific time frame to initial and promptly return the agreement to Seller. If Buyer does not wish to accept the late offer because Seller did not meet the specified deadline, Buyer does not initial paragraph 41 of the RE-21.

Do the Idaho Association of REALTORS® forms allow for a buyer or seller to complete a transaction without disclosing their identity?

QUESTION: Broker has a client who would like to purchase a home but does not want to disclose who they are on any of the forms. He questions whether or not this is something that can be done.

RESPONSE: In Idaho, any entity can own real property, including Trusts, LLCs, Corporations, etc. Buyer can form a business entity to enter into this transaction without divulging personal information. If this is how the buyer would like to proceed, Broker should make sure that the Assignment section (Section 37) of the RE-21 is checked that the Agreement can be transferred or assigned.

When should counter offers and addendums be used?

QUESTION: Agent would like to know the proper use of Addendums and Counter Offers and the appropriate time to use each form during a transaction.

RESPONSE: The RE-11 states:

> "Addendum" means that the information below is **added** material for the agreement {such as lists or descriptions} and/or means the form is being used to **change, correct or revise** the agreement {such as modification, addition or deletion of a term}.

Typically, Counter Offers are used prior to the seller's acceptance of the RE-21 and are commonly used to change the purchase price and/or other terms of the Purchase and Sale Agreement before the parties sign the RE-21. After the RE-21 has been signed by both parties, the Addendum form should be used to modify the Purchase and Sale Agreement.

Can a seller use non-IAR forms in a transaction?

QUESTION: Broker is involved in a transaction in which the clients do not want to use IAR Forms. They have their own Forms and would prefer to use those. Broker questions what he should do in this situation and if there are any repercussions for not using the IAR Forms.

RESPONSE: Given the facts presented to the Hotline, the seller is a corporate entity selling a commercial property. It is not uncommon for corporations to insist on using their own forms in a commercial real estate transaction. There is no rule that mandates REALTORS® to use a specific form. It is best practice to use the IAR Forms, however if a client insists on using their own there is no law from stopping the broker from using these forms. It would be prudent to confirm in writing with client that broker is not familiar with the client's forms and therefore assumes no responsibility for their use, appropriateness or legality. If the client wants to use their own Representation Agreement, it is important that broker run it by his legal counsel for review. Brokerage can always refuse to take the client's business if client insists on documents that broker is not comfortable with.

If a seller is exempt from filling out the RE-25, do they still need to initial each page?

QUESTION: Agent questions what the best practice is for contracts in which seller is exempt from filling out the Property Disclosure Form. Do the parties need to initial every page in the document, or will just initials on the first page and signatures on the last page suffice?

RESPONSE: From a legal standpoint, a contract that only has the signature page signed but did not have any initials would be sufficient. However, the Hotline has been informed by the Idaho Real Estate Commission that having pages that are missing initials can be problematic from their point of view. IREC prefers that every page be initialed and that both buyer and seller sign the contract. Therefore, it is best practice to advise agents to have all parties initial each page and sign all pertinent parts of the contract.

What form should be used to revive an expired Representation Agreement?

QUESTION: Broker represents the sellers. The home was shown to buyers during the term of the representation agreement. The same buyers put in an offer after the agreement had expired. Broker questions what paperwork is required to revive the representation agreement.

RESPONSE: Broker can extend the representation agreement in order to receive the commission. The sellers can sign a RE-16A to extend the original contract. The document should be prepared to include language in the "Other" Section that reads "This agreement specifically revives and continues the Original Broker's Representation Agreement referenced above."

ADVERTISING/MARKETING

A licensee has creative marketing ideas in which she could end up personally purchasing some properties. Does she need to disclose her license and brokerage name if it is personal?

QUESTION: Agent is thinking of some creative marketing ideas including properties that she wants to personally buy. She questions whether she still has to disclose that she is a licensee and her brokerage information when it is a personal transaction.

RESPONSE: Based upon the facts provided to the Hotline, agent should be advised that as a licensee, agent must conduct all real estate transactions through the brokerage and fully disclose her status as a real estate licensee. Idaho Code § 54-2055 Paragraph 3 states:

> Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the brokerage with whom he/she is licensed, whether or not the property is listed.

Although agent wants to conduct a personal transaction in order to purchase a property, agent still has to disclose and conduct all business through the brokerage she works for. In addition, licensee should review the applicable law relating to advertising and be aware that the Idaho Real Estate Commission keeps a close eye on all advertising. It would be strongly advised for agent to run the proposed marketing tactics by the State to avoid negative consequences.

Can Craigslist be used to advertise real estate?

QUESTION: Seller would like agent to advertise her real estate property on Craigslist. Agent would like to know if there are specific advertising requirements she must follow in order to utilize Craigslist.

RESPONSE: Idaho Code §54-2053 requires the following:

> (1) Only licensees who are actively licensed in Idaho may be named by an Idaho broker in any type of advertising of Idaho real property, may advertise Idaho property in Idaho or may have a sign placed on Idaho property.
> (2) All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.
> (3) All advertising by licensed branch offices shall contain the broker's licensed business name.
> (4) No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a

> distinct probability that such information will deceive the persons whom it is intended to influence.

Electronic venues such as Craigslist are not prohibited means for real estate property advertisement. Therefore, agent must adhere to Idaho Law as cited above when advertising seller's property on Craigslist.

MISCELLANEOUS

Does the lease transfer when an investment property sells?

QUESTION: Agent represents seller of an investment property in foreclosure, where only half of the duplex is listed and would like to know if the current lease would have to be carried over to the new buyers and respect the terms of the lease or can the tenant be evicted immediately?

RESPONSE: Idaho Code § 55-208 (1) states in relevant part:

> Termination of tenancy at will. A tenancy or other estate at will, however created, may be terminated:
> (1) By the landlord's giving notice in writing to the tenant, in the manner prescribed by the code of civil procedure, to remove from the premises within a period of not less than one (1) month, to be specified in the notice;

In this instance, Agent asked if the landlord needed to respect the current tenant's lease or if they could evict the tenant immediately. Unless stated otherwise in the previous lease agreement, the new owner of the duplex wouldn't have a lease agreement with the current tenant. Therefore, tenant likely is considered a tenant at will under the new owner. As stated above, Idaho Code requires that the landlord give notice in writing to the tenant within a period of not less than one month to terminate the tenancy.

Can a Trustee list the property if their role as the Trustee is being challenged?

QUESTION: Agent has a client who is a Trustee, and is attempting to sell a property. There is a dispute between the siblings because they do not approve of the Trustee. A lis pendens was filed but the judge threw it out. The siblings have since appealed the issue, and agent questions whether or not this appeal hinders the sale of the home.

RESPONSE: Given the facts presented to the Hotline, the appeal filed on the trust will not affect the Trustee's ability to list the property or to sell it. Rule 13 of the Idaho Appellate Court Rules states:

> Temporary Stay in Civil Actions Upon Filing a Notice of Appeal or Notice of Cross-Appeal. Unless otherwise ordered by the district court, upon the filing of a notice of appeal or notice of cross-appeal

> all proceedings and execution of all judgments or orders in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days. Any further stay shall be only by order of the district court or the Supreme Court.

If the lower court has not entered a further stay, Trustee is free to list the property after 14 days.

The Hotline does not weigh in on disputes between parties, and broker should advise seller to seek private legal counsel to determine their rights and responsibilities, and seller should consult seller's trial counsel to confirm the Hotline's facts and assumptions and to ensure no stay has been obtained by the siblings.

Are one seller's signatures enough if the other seller is not physically capable to sign her name to anything?

QUESTION: Agent represents an older couple in selling their home. Agent states that the wife has suffered many strokes and finds it difficult to sign documents. The husband signed everything for her. There is no power of attorney, so agent is wondering if the husband's signatures are enough to list and sell the home.

RESPONSE: The listing contract can be signed by only one owner of community property, although it is best practice to always obtain both signatures. However, to transfer ownership of the property both owners' signatures are necessary. Agent's clients should get a power of attorney to ensure that the husband can legally sign the deed for both parties.

Can lenders seek deficiency judgments?

QUESTION: Agent represents a client whose property was foreclosed. Agent questions the legality of a lender seeking to recover the monetary difference between the amount owed on the property versus the amount recovered at a foreclosure sale, otherwise known as a deficiency judgment.

RESPONSE: In Idaho, deficiency judgments are legal both under mortgages (Idaho Code § 6-108) and deeds of trust (Idaho Code § 45-1512). However, several factors come into play in determining the amount which may be claimed under a deficiency judgment. Generally speaking, the amount must relate back to the "fair market value" of the property. Obviously this term varies from market to market and from house to house. Agent should advise client to seek legal counsel if client needs advice specific to client's property, loan or deficiency. In addition, on deeds of trust the lender has only three months from the sale to initiate an action for collection.

Further, if the lender chooses to discharge or write off some of the indebtedness, another situation may come into play which agent's client may want to be aware of. The IRS requires a creditor to file a Form 1099-C when a debt is cancelled by an identifiable event, such as "a discharge of indebtedness under an agreement between the creditor and the debtor to cancel the

debt at less than full value." However, Form 1099-C states, "This form is provided for informational purposes only."

When a buyer receives a Form 1099-C for a discharged debt from a creditor, receipt of the 1099-C does not prohibit the creditor from later obtaining a deficiency judgment against the debtor. The 1099-C is provided for informational purposes, and the creditor is required by the IRS to send out the form to the IRS and to the debtor. In some circumstances, the discharged debt can be treated as income of the debtor on the debtor's individual income tax return.

However, in 2007 Congress passed the Mortgage Forgiveness Debt Relief Act, which allows some debtors to forgive the "income" from the written off debt. Currently this act has expired but it is believed Congress will revive it in the coming months. Debtors should watch this issue closely. Nonetheless, whether a debtor qualifies under this act is a factually specific question. Agent's client may wish to consult an accountant or private legal counsel to determine her responsibilities, rights, and remedies regarding deficiency judgments and relief under the Mortgage Debt Relief Act.

Would a weather vane be considered an included item as defined in the Purchase and Sale Agreement Form?

QUESTION: Broker represents the sellers. Upon closing, the sellers took the weather vane because it was a family heirloom. Its inclusion or exclusion had not been discussed with the buyers. Buyers assumed it was included with the purchase because it was attached. Broker questions if weather vanes would be considered an attached fixture.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100."

Determining whether a particular item is attached to the property has to be done on a case by case basis. Given the facts presented to the Hotline, if the weather vane was bolted down it is most likely an attached fixture.

If there is any question about what is included in the purchase, it is the best practice for buyer or seller to specifically address the matter in the blank lines immediately following Section 5 of the RE-21. Nevertheless, the Hotline does not resolve disputes between parties.

Are curtains and curtain rods considered "window coverings" in Section 5 of the RE-21?

QUESTION: Agent called asking if curtains and curtain rods were considered window coverings as noted in the RE-21 Section 5, and asked for clarification of a previous Hotline response.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are **INCLUDED IN THE PURCHASE PRICE** (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100." (Emphasis added.)

According to RE-21 Section 5 above, if the existing curtains and curtain rods are "attached" to the real property or are considered "window coverings" they are included in the purchase of the home unless excluded in Section 5(B).

Determining whether a particular item is attached to the property has to be done on a case by case basis. For example, if the curtains are fabric material draped over the curtain rods and can be easily removed without damaging the property or the attached rods, the hanging curtains are most likely not fixtures. However, if the curtains are blinds, roller shades, wood paneled, etc., and cannot be removed without damaging the property, those would most likely be considered attached fixtures. Each case also depends on what the parties would consider "window coverings."

If there is any question, buyer or seller should specifically address the matter in the blank lines immediately following Section 5 of the RE-21. That is what they are there for. The Hotline does not resolve disputes between parties. Brokers may advise clients to seek legal counsel to determine what would be considered permanent fixtures in this particular case.

If Section 37 (Prorations) of the RE-21 is checked "No," who has rights to the fuel in the tank?

QUESTION: Agent represents buyer. The Prorations Section (37) of the RE-21 was checked "No." Now, after closing, there is a dispute as to who has rights to the fuel in the tank. Agent questions what the correct interpretation of Section 37 is.

RESPONSE: Section 37 of the Purchase and Sale Agreement states:

> **PRORATIONS:** Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations assumed, and utilities shall be prorated as of _____. BUYER to reimburse SELLER for fuel in tank ☐ Yes ☐ No (Not Applicable if left blank). Dollar amount may be determined by SELLER's supplier.

If the "No" box is checked, buyer does not reimburse seller. Assuming the fuel was owned by the seller at closing and seller did not ask to be reimbursed, then buyer would have acquired the fuel through the purchase of the property.

However, if there is a contract with the fuel company that contract may affect all parties' rights to the fuel. Buyer should be advised to hire legal counsel to review the gas company contract and determine buyer's rights in this situation.