# The Hotline Top Questions

# THE LEGAL HOTLINE

**1-800-324-3559**
**Idaho REALTORS®**

## 2015

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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 REALTORS® (IR) and, in that capacity, operates the Legal Hotline to provide general responses to the IR regarding Idaho real estate brokerage business practices and applications. A response to the IR which is reviewed by any REALTOR® member of the IR 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 IR, which consent may be withheld in their sole discretion. For legal representation regarding specific disputes or factually specific questions of law, IR 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 IR.

### Note on Legislative Changes

The responses contained in the 2015 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2015. 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 2016 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2015 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho REALTORS® "RE" forms, which may reflect the 2016 legislative changes to the law.

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## AGENCY/LICENSE LAW

**Can an agent meet with a prospective client if client is still under representation by another brokerage?**

QUESTION: Agent has been contacted by a seller who has a current representation agreement with another brokerage. The seller informed agent that the current representation agreement is going to expire on October 31 and that seller would like to meet with the agent prior to that date. Agent questions if she would be violating any licensee practices if she met with the seller while he is under contract with another brokerage.

RESPONSE: It is appropriate for agent to be concerned after being contacted by a seller with an active representation agreement. Even though the agent was sought out by the seller, agent could still open herself and the brokerage up to liabilities if she meets with the potential client. While it may be appropriate for the agent to obtain minimal information from the seller in anticipation of representation, the conversations with the seller need to be restricted to the issues of agent's future representation. Agent should exercise caution when conducting any meetings with sellers who still have active representation agreements, as the other brokerage may accuse agent of interfering with an active contract. There are various REALTOR® Code of Ethics considerations as well. The Hotline advises that the best practice is always to wait for the current contract to expire prior to meeting with future customers, unless the purpose is merely to obtain information that will expedite the transition from the old brokerage to the new brokerage.

**Should changes to commissions be included in PSAs or counter offers?**

QUESTION: Both brokers to a transaction contacted the Legal Hotline. The MLS listing stated 3% would be paid to the buyer's agent. Buyer put in an offer and seller countered. Allegedly the counter offer contained language that reduced the selling brokerage's commission to 2½%. The counter offer was accepted. Brokers question the best practices for documenting and effectuating a reduction in commissions.

RESPONSE: Given the facts presented to the Hotline, the buyer and seller agreed to a reduction in commissions and they documented this in the signed counter offer. Commission negotiations should never be contained in a Purchase and Sale Agreement or any counter offers or addendums because the brokers are not parties to that contract. A listing in the MLS is a unilateral offer to provide a commission to another participating broker. If this commission offer is changed outside the MLS it should be documented in a contract signed by the brokerages, and in certain circumstances signed by the Buyer and Seller. Many MLSs have a form to accomplish this task but the parties could also use an addendum like the RE-16A (Broker Agreement Addendum).

There is also some dispute as to whether or not the brokerages agreed to the commission reduction. The Hotline does not get involved in brokerage disputes. If the brokerages need advice on the legal effect of reducing the commission in a purchase and sale agreement brokers should contact independent legal counsel.

**How should a dual agent proceed if seller wants to accept a different offer?**

QUESTION: Broker is a dual agent, representing both the buyer and seller. He presented the offer to the seller and the seller sent back a counter offer. Buyer accepted the counter offer and tendered the earnest money. Later, Broker received notice from the seller that he got a better offer from another buyer and wants to withdraw his counter offer to the first buyer and accept offer #2. Broker questions if seller can do this and whether or not the first buyer had a valid and binding contract. He also questions how to proceed since he is a dual agent.

RESPONSE: Based upon the facts communicated to the Hotline, the seller's counter legally constituted an offer, which once accepted by buyer #1 created a valid and legally binding contract between the two parties. Pursuant to contract law, the offeror may only revoke an offer by communicating his revocation prior to acceptance. Nevertheless, the Hotline does not resolve disputes between buyer and seller and Broker should advise both clients to seek private legal counsel to advise them of their rights.

As to Broker's continued involvement with the seller, if a Broker's client is undertaking an illegal transaction and/or Broker believes that continuing with the transaction will result in a violation of the Broker's legal and/or ethical obligations, Broker should, in consultation with the Idaho Real Estate Commission, notify the client that he cannot legally continue to represent client or provide client with Brokerage's services and terminate the representation.

## COMMISSIONS & FEES

**Is a licensee obligated to disclose their commission agreements with cooperating agents?**

QUESTION: Broker called regarding whether or not an agent is obligated to disclose their commission agreement with a cooperating agent.

RESPONSE: No. There is no Idaho law that requires a licensee to disclose the commission agreement that they have with their client to another agent. Typically, when a property is listed in the MLS it discloses how much a cooperating agent who brings a willing buyer will get, but the agreement between the listing brokerage its and client does not be disclosed to another party or agent.

The Hotline does not resolve disputes between brokerages, and if a cooperating brokerage demands to see a representation agreement between another agent and client, Broker may wish to consult private legal counsel.

## CONTRACTS

**Is an oral termination enough to cancel a contract?**

QUESTION: Broker represents the seller. According to the broker, buyers' agent may or may not have called seller's agent and said that buyers will probably not continue with the transaction. However, buyers did not submit their written notice to terminate during the

strict time period. Broker questions what happens now, and wonders if seller has any right to the earnest money.

RESPONSE: Section 10B(1) of the Purchase and Sale Agreement states:

> 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 be deemed to have: (a) completed all inspections… (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 in writing to repair or correct.

Given the facts presented to the Hotline the buyers did not give seller written notice of disapproved items or notice to terminate within the strict timeframe. The RE-21 is very clear that notice must be given in writing, therefore any oral communication will not likely be considered. If both parties have elected not to proceed with the transaction and both have made a demand upon the earnest money, then the responsible broker has three options:

> (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. (Idaho Code § 54-2047).

The Hotline does not get involved in earnest money disputes and brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

**Can a seller accept another offer while under contract?**

QUESTION: Broker represents a Seller who entered into a contract with Buyer #1, but said contract was subject to Seller's right to continue to market the property (RE-27). Broker received a subsequent acceptable offer from Buyer #2 and notified Buyer #1 who, under the RE-27 has 72 hours to remove various contingencies or forfeit the contract. Brokerage questions if there is a way to accept Buyer #2's offer during the 72 hours, thus binding Buyer #2 to the transaction if Buyer #1 forfeits his contract.

RESPONSE: Yes. Seller may accept Buyer #2's offer, however Seller must make it clear in an addendum to Buyer #2 that Seller's acceptance is subject to Buyer #1's right to remove his contingencies and proceed with the first contract. Further, since Seller's acceptance is something less that an unconditional acceptance of Buyer #2's offer, Buyer #2 will also have to agree to the conditional acceptance. Seller must be very clear that the acceptance of the second offer is conditional otherwise Seller could be entering into two purchase sell agreements, one of which he cannot perform and thus exposing Seller to liability.

**When would a post-closing occupancy clause go into effect?**

QUESTION: Brokerage represented a seller in a transaction that closed but contained a post-closing occupancy clause in favor of the Seller. The addendum stated Buyer has a right to occupancy on November 1, 2015 which was a few days after closing. Broker questions at what specific time on November 1, 2015 the Seller must surrender the premises

RESPONSE: Given that the contact does not specify a specific time on the stated date of occupancy, the timing will be subject to interpretation. The interpretation will turn on the very specific wording of the amendment and the parties' intent at the time of executing the contract. Given the facts presented to the hotline the addendum appears to grant the Buyer the right to take possession on November 1st. November 1st would appear to begin at 12:00 AM that day. However, for the brokerage to offer a legal interpretation of a contract may constitute engaging in the practice of law which could subject the brokerage to liability. In addition the Hotline does not provide legal advice to individual buyers or sellers. The brokerage's best course of action to advise its client that the brokerage cannot provide legal advice and encourage its client to obtain independent legal counsel.

**Is square footage a valid reason to terminate a contract?**

QUESTION: Broker represents the seller. A few days prior to closing buyer decided to terminate because the square footage of the property was less than they thought it was. Broker questions whether or not this is a valid reason to terminate the contract.

RESPONSE: The RE-21, Section 13 states:

> SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS

APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

Given the facts provided to the Hotline, all contingencies had been satisfied and the parties were set to close on the property. If the buyer was concerned about the exact square footage they should have confirmed the actual number during the inspection time period.

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 buyer accept a counter offer that a seller already withdrew?**

QUESTION: Broker is representing the seller, who sent a counter offer to a potential buyer. While waiting for the buyer to respond, the seller received a better offer from a second buyer. Seller immediately notified the first buyer's agent that the seller was withdrawing their counter offer. The next day the seller received the signed counter offer from the first buyer. Broker questions whether or not the seller's revocation of the offer is valid.

RESPONSE: The first buyer's right to accept the counter offer ends when the counter offer is revoked. The offeror may revoke an offer by communicating his revocation to the offeree any time *before* acceptance.

Based upon the information provided to the Hotline, since the seller gave notice of revocation of the counter offer prior to receiving acceptance, the counter offer was likely terminated. The first buyer cannot unilaterally revive the counter offer by attempting to accept it after revocation. Nevertheless, the Hotline does not resolve disputes between buyer and seller and broker should advise client to seek private legal counsel should the first buyer attempt to enforce the revoked counter offer.

**Can a seller rely on "escalating price" language in the RE-21 once the contract has been accepted?**

QUESTION: Broker represents the sellers. Broker informed the Hotline that the RE-21 contains a clause that states "Buyer will pay $1,000 more than highest offer received up to purchase price of X." One hour after this contract was accepted an offer came in for $5,000 more than first buyer's offer. Broker questions if the seller now has the right to rely on this verbiage to ask Buyer 1 to increase the purchase price.

RESPONSE: In reviewing the information supplied it appears the escalation is related only to the buyer's "offer." Once the offer is accepted the agreement between the parties ripens into a contract and the offer ceases to exist. Therefore, there is no longer anything to escalate.

Further, the seller cannot accept other offers once under contract with this buyer so there would be no reason for buyer to consider an escalation. However, if this deal falls through for any reason this buyer would have to compete and submit new offers along with all other buyers.

**At what point are parties responsible for paying fees outlined on Section 17 of the RE-21?**

QUESTION: Agent represents the seller. Section 17 of the RE-21 is filled out stating the seller agrees to pay the appraisal fee. Agent questions at what point in the transaction the seller is responsible for paying this fee.

RESPONSE: This opinion is based on the facts presented to the Hotline by one party to a two party transaction. This opinion is based on those facts and requires several assumptions about the contracts which govern the parties' behavior and legal obligations. The Hotline does not review contracts for each individual circumstance, but rather assumes the basic Idaho REALTOR® Forms are utilized in an unmodified fashion. If additional facts are disclosed or the assumptions are inaccurate, this opinion may be subject to change.

The contractual terms of the Purchase and Sale Agreement will dictate exactly when the appraisal fee must be paid. Assuming no other modifications were made to the boilerplate language of the Idaho REALTOR® RE-21 and assuming the only place where the seller indicated their willingness to pay for an appraisal fee was in the table located in Section 17, then the timing of seller's payment for appraisal will be upon closing:

> **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. (Emphasis added).

Based upon the language in the paragraph immediately preceding the table, seller agrees to pay certain *prepaid* costs *upon closing*. However, if there were additional terms agreed to between the parties, the timing of payment could have easily been modified.

The Hotline does not resolve disputes between buyers and sellers and brokers and agents should advise their clients to seek independent legal counsel to ascertain their exact legal obligations.

**Is an all cash offer for the same price a "better" offer?**

QUESTION: Agent represents the seller in a short sale. Buyer 1 made an offer and agent presented the offer to the lender. Buyer 2 made an offer for the same price but it would be an all cash transaction. Agent questions if the seller can also accept this offer and if the Right of First Refusal is applicable in this situation. Is an all cash offer for the same price a better offer?

RESPONSE: The Short Sale Addendum (RE-44) Section 3 states:

> 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.

If the parties signed the RE-44, Buyer 1 would retain the Right of First Refusal. Assuming the all-cash offer is a better offer than offer 1, agent should notify Buyer 1 of the subsequent offer. Buyer 1 then has three days (unless modified) to meet or exceed Buyer 2's offer.

The Hotline cannot give an opinion on whether or not an all cash offer for the same purchase price is a better offer. Short sales are entirely contingent on lender consent and the lender will likely determine the best offer. The Hotline does not resolve disputes between buyer and seller. Both buyer and seller's brokers should recommend that their clients seek private legal counsel if a dispute arises.

**If a contract does not specify calendar or business days, what is the default?**

QUESTION: Agent questions if the RE-44 timeframes are referring to business or calendar days.

RESPONSE: The RE-21 Real Estate Purchase and Sale Agreement section 27 states in relevant part:

> Any reference to "day" or "days" in this agreement means the same as calendar day, unless specifically enumerated as a "business day."

Given that the RE-44 is an addendum to the RE-21 it means that the timeframes listed in the Short Sale Addendum are to be calendar days.

**Should parties sign the RE-10 and RE-20 when terminating a contract?**

QUESTION: Broker questions if the Notice to Terminate Contract (RE-10) and Release of Earnest Money (RE-20) should be signed when the buyer terminates based on an unsatisfactory inspection and both parties have signed the RE-10.

RESPONSE: If Section 3 of the Inspection Contingency Notice is checked and both parties have signed it, the parties have legally agreed to terminate the Purchase and Sale Agreement and to return the earnest money to the buyer. However, the purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may later assert. It is always best practice to obtain one, even when the buyer terminates using the RE-10.

**Is timber on property considered "attached" and included in the property?**

QUESTION: Broker represents the buyer on a property that has recently closed. After the sale the seller's agent informed them that the cut logs on the property belonged to the seller and that they were taking them. Broker questions if the timber would have been included in the sale.

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…

Trees are referenced in the above paragraph; however it is referring to trees that are still in the ground. Trees that have already been cut down, or logs, would likely be considered private property and would belong to the seller.

If the buyer assumes that something is included in the sale it is the best practice to specifically address the matter in the blank lines immediately following Section 5 of the RE-21 so that there is no confusion after closing.

**What happens if seller does not provide preliminary title commitment within time frame?**

QUESTION: Broker questions if a seller could be in breach of contract for not providing the preliminary title commitment within the specified timeframe.

RESPONSE: Section 9A of the RE-21 states in relevant part:

> Within ___ business days (six [6] if left blank) of final acceptance of all parties, □ SELLER or □ BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY. Buyer shall have ___ business days (two [2] if left blank) after receipt of the preliminary commitment, within which to object in writing to the condition of the title as set forth in the preliminary title commitment.

If the "Seller" box is checked and the seller does not give the buyer the preliminary title commitment within the strict time period specified, seller could likely be in breach of contract. However, if buyer accepts a late title commitment buyer would then have a certain amount of days (two if left blank) to object to the title report. The parties will probably be deemed to have agreed to waive seller's breach and continue with the transaction.

**Can a seller cancel a contract if another all-cash offer comes along?**

QUESTION: Broker represents the buyer. They have had their offer accepted and are now under contract with the seller. The buyer is getting a FHA loan and the lender is requesting seller to sign a FHA Disclosure. Broker alleges that seller is refusing to sign the disclosure because they want to accept another cash offer. Broker questions how to advise her client.

RESPONSE: Given the facts presented to the Hotline the seller accepted the offer and signed the contract knowing that buyer was going to get a FHA loan. It is unlikely that seller can now cancel the contract unless the FHA is requiring the contract to be substantially modified. While under contract seller cannot legally accept another first position offer.

Broker or buyer cannot force seller to perform under the contract. Broker should advise client to seek private legal counsel in this matter to determine their rights.

**What happens if a buyer terminates based on inspection but purchases another home in subdivision?**

QUESTION: Agent represents the sellers. The buyers had an inspection done and sent the RE-10 to the seller. Buyers had checked Box 3, the notice to terminate based on an unsatisfactory inspection. Sellers allege that buyers did not act in good faith because they ended up purchasing another property in the same neighborhood. Agent questions if sellers have any cause for legal action.

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 indicated they 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 Buyer] 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, 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 cannot weigh in on whether or not the buyers acted in good faith. Agent should advise clients to seek private legal counsel to determine their rights in this matter.

**Is a central vacuum canister considered an attached fixture or private property?**

QUESTION: Broker represents the sellers. Upon closing, the sellers took the central vacuum canister because they had purchased it when they bought the home. Its inclusion or exclusion had not been discussed with the buyers. Buyers assumed it was included with the purchase and buyers' Broker alleges that the listing was advertised having a central vacuum unit. Brokers on both sides of the transaction have contacted the Hotline to try to determine whether or not the canister would be considered and included/attached item.

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."

Given that the above language does not expressly name central vacuums, determining whether a particular item is attached to the property has to be done on a case by case basis. The Hotline cannot determine whether something is or is not an attached fixture.

**If there is any question about what is to be included or excluded 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 and cannot weigh in on whether or not the listing could be classified as false advertising. Brokers on both sides of this transaction should advise clients to seek private legal counsel.

**Can a seller get out of a contract they don't think will close?**

QUESTION: Broker represents seller. Seller and broker have a feeling that the transaction is not going to close. The buyers are from Afghanistan and are having trouble getting pertinent documents signed. The contract is set to close on the 15th but broker questions if there is a way for seller to get out of the contract. Further, broker questions if they can object to receiving a "prequalification letter" rather than a "lender approval letter" or if seller is able to terminate based on unsatisfactory lender approval.

RESPONSE: Given the facts presented to the Hotline the contract appears valid through May 15, which means that seller must allow the buyer until the 15th to meet all of their contingencies and purchase the property.

The Hotline does not provide legal advice to buyers and sellers. It is a service for Idaho Association of REALTORS® Brokers. Broker should advise her clients to seek independent legal counsel if they want to terminate the contract. Further, if Broker provides advice to a client relating to remedies for breaching a contract Broker could be exposing herself to liability and runs the risk of being fined for practicing law.

**Can a buyer submit another RE-10 in response to seller's RE-10?**

QUESTION: Broker represents buyer who tendered a RE-10, the Inspection Contingency Notice, to seller listing several items to be addressed. Seller thereafter either refused to make the complete list of requested items or agreed to only a partial list of repairs. Pursuant to the clarified terms in the 2015 RE-21, Purchase and Sale Agreement, it is clear that when seller rejects buyers requests either in whole or in part, buyer then may terminate the transaction or proceed without the seller being responsible for correcting any deficiencies. However, Broker would like to know the legal consequence of buyer responding by tendering another RE-10 to seller.

RESPONSE: The RE-21 contains the following relevant language:

> 10(B)(4). If SELLER does not agree to correct BUYER's items within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within ___ business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.
>
> 10(B)(5). If BUYER **does not** give such written notice of cancellation within the strict time period specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

Given the existence of these clauses in the Purchase and Sale Agreement, it is incumbent upon buyer to watch the deadline in which they are required to terminate the contract, otherwise they will be legally obligated to continue with the transaction with the property in an "as is" condition. If buyer tenders to seller *another* RE-10, buyer has <u>not</u> notified the seller of buyer's intent to terminate and therefore should ensure that they receive a response from seller within the 10(B)(4) timeframe, otherwise buyer will need to provide written notice of termination in order to exercise that right.

An option for buyer would be to tender buyer's second RE-10 under the condition that if seller does not respond within the allotted 10(B)(4) timeframe then buyer is thereby terminating the transaction.

**Can a seller terminate after rejecting a buyer's RE-10 requests?**

<u>QUESTION</u>: Broker represents the buyer. They still have a day left of their inspection timeframe. Buyer is going to submit an RE-10 requesting that they get $1000 from the seller for replacement of a well pump. Broker questions if seller responds to this by saying no, can the seller then terminate the purchase and sale agreement?

<u>RESPONSE</u>: Section B4 of the Purchase and Sale Agreement (RE-21) states in relevant part:

> If both parties do not come to a consensus as to the disapproved items to be corrected by SELLER within the strict time period specified… then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice… that they will not continue with the transaction.

Once the buyer submits a list of disapproved items, seller has the chance to respond in writing whether or not they are going to accept the requests made by the buyer. If they do agree to fix the items then both parties agree to move forward with the transaction and the buyer has removed their inspection contingency. If the seller does not agree to the items listed in the RE-10, buyer then has to decide if they want to move forward with the transaction without seller fixing the items or buyer can decide to terminate and get their earnest money back.

**Buyers submitted RE-10 one day late. Can seller terminate?**

QUESTION: Broker represents the sellers. According to the broker, buyers submitted their RE-10 with a list of disapproved items a day after their timeframe to do so had ended. Broker questions what happens if his sellers respond saying they will fix only a few items. Will the buyers then have the option to terminate?

RESPONSE: Section 10B(1) of the Purchase and Sale Agreement states:

> 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 be deemed to have: (a) completed all inspections… (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 in writing to repair or correct.

Given the facts presented to the Hotline the buyers did not give seller written notice of disapproved items within the strict timeframe. The above language states that when this happens the buyers have decided to proceed with the transaction. If the sellers wish to fix a few of the items, even though the RE-10 was not delivered on time, the written notice they give to buyers informing them of what they will fix will not likely allow Buyer the chance to terminate. However, seller should make it clear in writing that seller's agreement to repair certain items is not reviving the inspection timeframes or altering the strict time periods in any way.

**If both parties agreed to terms in a counter offer but only one party signed the RE-21, would they have a binding contract?**

QUESTION: Agent represents the seller. Both parties signed Counter Offer #2. Prior to the seller signing the RE-21 he decided he no longer wanted to sell the home. Is his signature on the RE-13 enough to have a binding contract?

RESPONSE: The RE-13 Counter Offer form states in relevant part:

> To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. **All other terms of the**

> **Purchase and Sale Agreement including all prior Addendums not modified by the Counter Offer shall remain the same.**

Based on the above quoted language, the RE-13 Counter Offer incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with the provisions of the Counter Offer and signifies a "meeting of the minds." Since the Counter Offer incorporated all of the non-conflicting terms of the Purchase and Sale Agreement and terms of the counter offer, the Buyer and Seller signing only the Counter Offer likely creates a binding agreement between the parties, which includes the original terms of the Purchase and Sale Agreement. Although it is possible for the parties to also sign the original Purchase and Sale Agreement subject to the counter offer, such practice is likely not necessary to create a binding contract between the parties. Therefore, the parties likely need only to sign the Counter Offer.

The Hotline does not resolve disputes between parties to a transaction. Therefore, each party may wish to consult private legal counsel regarding their rights and responsibilities under the transaction contract.

## DISCLOSURE

**Is a seller liable for things found by buyer post-closing?**

QUESTION: Agent represented the seller in a transaction that has closed. The buyers recently sent a bill to the seller for the sprinkler repair claiming that seller should have known the sprinklers were not working. Seller never lived in the home and was unaware that they did not work. Agent questions if seller could be liable for not disclosing this and how best to advise her client.

RESPONSE: Seller is required to disclose all adverse material facts which seller knows or had reason to know. Buyers would have to prove that seller knew about the sprinkler system not working and failed to disclose it. However, given the facts presented to the Hotline and that the transaction has already closed, this is going to be a dispute between the buyer and the seller. Agent should inform client that a demand has been made and the brokerage cannot provide legal advice, and that seller should seek independent legal counsel.

**Should information given by a neighbor be disclosed?**

QUESTION: Broker is representing the seller. The seller apparently has a neighbor that has some concerns about a wall on the property and has shared them with the seller and brokerage. Broker questions the duty to disclose this information to possible buyers.

RESPONSE: Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. An adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

The Hotline cannot determine what an adverse material fact is. Seller will need to decide whether or not the complaints from the neighbor rise to the level of an "adverse material fact" as defined by Idaho Code. If seller is unable to make a decision, seller should consult seller's own legal counsel.

**What should an agent do if they have knowledge of a property, yet it was not disclosed?**

QUESTION: Broker represents buyer purchasing a property that was well known in the community as a former drug laboratory or "meth lab." In fact, a previous MLS listing describes the situation at length, but also notes that the property went through certified clean up. However, seller's Property Condition Disclosure Form indicates that seller checked the "Do Not Know" box in response to the question "Has the property ever been used as an illegal drug manufacturing site?" Broker questions seller's disclosure responsibilities as well as the broker's obligations to disclose.

RESPONSE: Idaho Code § 55-2801 states in relevant part:

> PSYCHOLOGICALLY IMPACTED DEFINED. As used in this chapter, "psychologically impacted" means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to the following:
>
> …
>
> (2) That the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon… (Emphasis added.)

I.C. § 55-2801 states that an owner does not need to disclose that a property has been psychologically impacted if a felony was committed on the property which had no effect on the physical condition of the property. But frequently there is an effect on the condition of the property due to the operation clandestine methamphetamine laboratory.

Given the information provided to the Hotline, the property has been cleaned and has met all requirements set by law and is now considered to be in a safe condition. However, if the

seller actually knows about the prior use he should disclose the same. Seller should also disclose the cleanup process and provide the relevant reports.

Idaho Codes § 54-2086(1)(d) and 54-2087(4)(a) require an agent to disclose adverse material facts actually known or which reasonably should have been known by the licensee to a customer and/or their client. An adverse material fact is defined as "...a fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligation under a real estate contract." (Idaho Code §54-2083(1)). Disclosure of adverse material facts applies to listing agents as well as buyer's agents.

A fact must be disclosed only if it would "significantly affect the desirability or value of the property to a reasonable person." According to the information provided to the Hotline, if the agent knew or reasonably should have known, that the property had been used to produce dangerous substances such as methamphetamines, that fact would likely have a "significant affect" on the desirability or value of the property to a reasonable person. Thus, it may be considered an "adverse material fact" that agent should disclose to potential buyers.

However, if appropriate remediation occurs, such as certified meth lab cleanup that will eliminate any dangerous chemicals, the past drug production may no longer be considered an adverse material fact affecting the property and would not have to be disclosed.

All parties may also need to be aware of Idaho Code § 6-2607 which states:

> RESIDENTIAL PROPERTY OWNER IMMUNITY. Once a residential property meets the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, the residential property owner and any representative or agent of the residential property owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs. (Emphasis added.)

According to I.C. § 6-2607, once a property has met the cleanup standards the owner is immune to any civil action brought against them by any future owners or tenants.

**Should less reliable short term radar tests be disclosed?**

QUESTION: Broker questions the responsibility to disclose that a short term radon test done on the property yielded high results. The short term tests are less accurate and she would like to know how to best disclose the information.

RESPONSE: Both the licensee and the seller have the duty to disclose all known adverse material facts. If the seller was given the results of a radon test performed by a prospective buyer and it yielded high results, seller is obligated to disclose this information to any future buyers as it would likely be considered an adverse material fact. If seller or its licensee are aware of facts that mitigate the original report, like a subsequent and more accurate report, then that may negate the need to disclose the original report.

**Does a sober-living home in the neighborhood need to be disclosed?**

QUESTION: Agent represents the seller. The property next door is a sober living home and a previous buyer had terminated the contract when the sober living home was discovered. Agent and her client question whether or not this needs to be disclosed and if there is any liability if it is not disclosed.

RESPONSE: Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. An adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

In addition, Idaho has a statute that governs psychologically impacted property, which is defined as:

> The effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to the following:
> (1) That an occupant or prior occupant of the real property is or was at any time suspected of being infected or has been infected with a disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or
> (2) That the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon; or
> (3) That a registered or suspected sex offender occupied or resides near the property.
> I.C. § 55-2801.

This Idaho statute states that these types of conditions do not require disclosure.

The Hotline does not determine adverse material facts. Seller will need to decide whether or not the sober living house next door rises to the level of an "adverse material fact" or if it is "psychologically impacted property" as defined by Idaho Code. If seller is unable to make a decision, seller should consult seller's own legal counsel. Further, NAR provides guidelines to assist members in this type of situation.

The sober living property could also be protected under the Fair Housing and Americans with Disabilities Acts. The Hotline cannot weigh in on Fair Housing issues and seller would need to contact a federal agency or their own counsel to determine whether or not it falls under either of those Acts.

**Does remediated mold need to be disclosed?**

QUESTION: Broker is representing the seller, Fannie Mae. The seller claims to be exempt from Idaho's Property Disclosure Act. The property had contained excess amounts of mold but it has been fully and properly. Now Broker questions whether or not this needs to be disclosed.

RESPONSE: If the property no longer has mold then it is not an adverse material fact, regardless of whether or not seller is exempt from Idaho's Property Disclosure Act. However, given that Broker is aware of the past mold issue, Idaho Code § 54-2086(1)(d) states that Broker has a duty to:

> Disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee.

If a buyer were to ask about mold, Broker may have to disclose it based upon the above statute if Broker determines it to be an adverse material fact. If buyer asks, the best practice for Broker would be to have seller disclose the mold history along with proof of full remediation.

## DUTIES TO CLIENT & CUSTOMER

**Do agents have an obligation to perform inspections of a property?**

QUESTION: Broker represented the seller in a transaction that has closed. Two days before closing the seller died but the executor of his estate was able to close on time. The buyers are now claiming that they are not satisfied with several things including repairs that were not completed and that the RE-25 did not disclose an issue with the pool. They are claiming that executor and selling agent are both responsible. Broker questions if buyers have a legitimate claim against her agent or the seller.

RESPONSE: The seller's agent has no legal obligation to perform inspections, to ensure that the Property Condition Disclosure Form is filled out correctly or to confirm that all repairs have been completed. Given the facts presented to the Hotline, the buyers completed an inspection and the final walk through and went to closing. The inspection or final walk through

is when these issues should have been addressed by buyer. Further, pursuant to Idaho Code § 55-2505 the executor of the estate is exempt from filling out a new RE-25 or probably even checking the original for accuracy.

Given that this is occurring after closing the dispute is going to be between buyer and seller. Broker should advise seller/executor to retain private legal counsel in this matter as the Hotline does not resolve disputes between buyer and seller.

## EARNEST MONEY

**If a seller does not properly deliver the RE-25, what happens to the earnest money?**

QUESTION: Broker represents the buyers and is the responsible broker. Broker alleges that the seller did not deliver the Property Disclosure Form (RE-25) to the buyers and that after the inspection contingency had expired the Buyer had to obtain the RE-25 from the MLS. Once the buyers obtained a copy they found items disclosed in the RE-25 which caused them to terminate the contract. Seller is claiming that Buyers had no right to terminate despite failing to provide an RE-25. Both parties feel they are entitled to the earnest money and broker questions what he should do.

RESPONSE: The relevant parts of Idaho's Property Condition Disclosure Act state:

> 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.
>
> 55-2510. DELIVERY REQUIREMENTS. The transferor's delivery under section 55-2509, Idaho Code, of a property disclosure form as described under section 55-2508, Idaho Code, and the prospective transferee's delivery under section 55-2509, Idaho Code, of an acknowledgement of his receipt of that form shall be made by personal delivery to the other party or his agent or subagent by ordinary mail or certified mail, return receipt requested or by facsimile transmission.

> 55-2515. RESCISSION BY TRANSFEREE. Subject to section 55-2504, Idaho Code, if a transferee of residential real property receives a property disclosure form or an amendment of that form as described in section 55-2508, Idaho Code, after the transferee has entered into a transfer agreement with respect to the property, the transferee, after his receipt of the form or amendment may rescind the transfer agreement in a written, signed and dated document that is delivered to the transferor or his agents in accordance with section 55-2510, Idaho Code. Transferee's rescission must be based on a specific objection to a disclosure in the disclosure statement. The notice of rescission shall specifically identify the disclosure objected to by the transferee. Transferee incurs no legal liability to the transferor because of the rescission including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property.
>
> Subject to the provisions of section 55-2505, Idaho Code, a rescission of a transfer agreement may only occur if the transferee's written, signed and dated document of rescission is delivered to the transferor or his agent or subagent within three (3) business days following the date on which the transferee or his agent receives the property disclosure form prescribed under section 55-2508, Idaho Code. If no signed notice of rescission is received by the transferor within the three (3) day period, transferee's right to rescind is waived.

However, regardless of the facts and timelines, if both parties have made a demand upon the earnest money, then the responsible broker has three options:

> (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. (Idaho Code § 54-2047).

The Hotline believes that the best practices are for the broker to keep the money in trust until the parties work it out between themselves, ensuring that the brokerage will not be exposed to any liabilities. The Hotline does not get involved in earnest money disputes and brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

**Is responsible broker required to give agent a proof of earnest money deposit?**

QUESTION: Broker would like to know if the responsible broker is required to deliver a proof of deposit of the earnest money. Broker states that they often receive just an email confirming that the earnest money has been deposited but she would like to know if she and her client are entitled to a copy of the actual deposit slip.

RESPONSE: The Purchase and Sale Agreement (RE-21) acts as the receipt of the earnest money deposit. However, if the seller asks for more than just an email confirmation from the responsible broker there should be no reason to withhold it. If a licensee makes verbal or written representations that they are holding the earnest money and they are not, they would likely be subject to serious punishment from IREC.

**Would a seller ever be entitled to earnest money when the transaction fails due to financing?**

QUESTION: Broker represents the seller in a transaction that has failed to close after buyers failed to get financed. According to Broker, buyers tried to get financed through various companies, not just one. The buyers have requested the earnest money back. Seller believes he is entitled to the earnest money. Broker questions the best way to proceed.

RESPONSE: The RE-21 Financial Contingency 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 buyers have not been able to obtain financing. If the buyers have exercised good faith efforts to obtain the funds, then pursuant to the contract they are entitled to their earnest money.

Additionally, Idaho Code § 54-2047 states that the responsible Broker has three options when there is an earnest money dispute:

> (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.

The Hotline does not resolve disputes between buyer and seller. Broker may wish to advise parties on both sides of the transaction to seek legal counsel in this matter.

**Is a seller entitled to earnest money if buyer removed carpet but the sale ultimately fell through?**

QUESTION: Broker represents the seller. Ultimately, buyer was unable to obtain financing. However, broker states that the buyer entered the home and started removing the carpet to do repairs. The carpet has been removed and has not been replaced. Both parties have demanded the earnest money and broker questions what his responsibilities are.

RESPONSE: Given the facts presented to the Legal Hotline, the buyer was not able to obtain financing. The contract states that if the buyer exercised good faith efforts to obtain the funds, then buyer is entitled to a return of their earnest money. However, the Hotline cannot weigh in on the damage that took place to the property. If both parties have 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. Broker should advise client to seek private legal counsel to determine their rights in this matter.

**Can a seller revive a contract once buyer terminates because seller won't do repairs?**

QUESTION: Broker represents the sellers. According to the broker, beginning on July 5th buyers had seven business days to complete inspections. On the last day of the time period buyer provided the RE-10 with requested repairs to the seller. On July 16th sellers tendered their own RE-10. After receiving Sellers' RE-10 Buyer terminated the contract later that day, thereafter seller signed the original RE-10 in an attempt to salvage the deal. Both parties now feel as though they are entitled to the earnest money.

RESPONSE: Typically the RE-10 is used in a circumstance where the Buyer has found problems with the property upon inspection and is not interested in continuing with the purchase. Buyer has the right to terminate the contract at this point but instead of doing so, offers to continue if certain items are corrected. Buyer's offer to continue under the original purchase sale agreement is basically an offer just like the original offer to purchase the property. In order for Seller to accept the Buyer's offer, the standard rules of contract law apply and Seller must accept the offer to create a binding contract.

Pursuant to Idaho case law Seller's acceptance must "unqualifiedly and unequivocally agree to all the material terms of the offer and must not include any new conditions or provisions." If the Seller's acceptance does not meet this standard then it will most likely be considered a counter offer and again the basic rules of contract law will apply. The law holds

that a counteroffer is two things: a rejection of the original offer, and a new offer. The 2015 modifications to the RE-21 attempt to clarify this point by stating that "immediately upon a written response from SELLER that rejects the BUYER's requests, in whole or in part, BUYER may proceed under 10(B)(4) below."

If the Sellers' RE-10 was a counteroffer then it appears the Buyer 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. Once the Buyer terminated the contract, and the Sellers' act of signing the original RE-10 was an attempt to revive the contract which cannot be done unilaterally, it requires all parties' consent.

Additionally, whenever an earnest money dispute arises the responsible broker has three options:

> (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. (Idaho Code § 54-2047).

The Hotline does not resolve disputes between Buyers and Sellers. Given the complexity of this matter and all of the specific timeframes, brokers on both sides of the transaction should advise their clients to seek private legal counsel if they disagree with the actions of the responsible broker in regard to the earnest money.

## FORMS USE

**Should every person listed on the title sign the transaction documents?**

QUESTION: Broker represents the buyer. A RE-21 was executed by the buyer and one seller. As the transaction proceeded, the buyer learned that two sellers are listed on the title. The listing agent sent over an addendum adding the second seller, and both sellers signed that document. Buyer's broker requested that the second seller sign all of the prior documents and sellers' agent thought it was not necessary. Should both the sellers' signatures be on all the contracts?

RESPONSE: Given the presence of the second seller's signature on the addendum, and given that the addendum refers back to the original contract, the buyer likely has a binding legal contract with both sellers. However, it is always best practice to have all sellers' signatures on every form when purchasing property from individuals.

Further, the brokers may wish to consult the Idaho Real Estate Commission to see if they require and/or look for all signatures during an audit as that may be a factor as well.

**What is the proper way to fill out the RE-16?**

QUESTION: Broker questions the proper way to fill out Section 6 of the Seller's Representation Agreement. She has seen agents fill in "$0" and has also seen them fill in "N/A." What is the best practice?

RESPONSE: Section 6 of the RE-16 states in relevant part:

> (A) If Broker or any person, including SELLER, procures a purchaser… the SELLER agrees to pay a total brokerage fee of ____% of the contract or purchase price OR $_____.

Given the facts presented to the Legal Hotline, agents are writing in a percentage and also writing in $0. This could cause several problems and possibly result in the seller not paying the brokerage fee. The use of the word "OR" in the contract means that only one or the other is to be filled out. Agents should be filling out either a percentage or a dollar amount, and they should write "N/A" into the line that is not filled out.

**How does the rescission language in the RE-25 interact with the RE-21?**

QUESTION: Broker enquires into the basis of the rescission language in the RE-25 and how it interacts with the contingencies in the RE-21.

RESPONSE: The Seller's Property Condition Disclosure Form (RE-25) states:

> BUYER hereby acknowledges receipt of a copy of this disclosure form and does hereby ☐ **WAIVE** ☐ **NOT WAIVE** the statutory

> right to rescind the related purchase and sale agreement within three **(3) business days... IF BUYER DOES NOT WAIVE THE RIGHT TO RESCIND BUYER** may only exercise BUYER'S statutory right to rescind the purchase and sale agreement within **three (3) business days.**

If the buyer checks the "not waive" box and within three days objects to an item on the RE-25, they have the ability to rescind the Purchase and Sale Agreement that they entered into with the seller. Termination under this section is statutory based and is entirely separate from the other contingencies in the RE-21. Once the Purchase and Sale Agreement is rescinded, no further timelines in the RE-21 are relevant; the transaction is immediately terminated.

**How should an agent fill out forms if a party is an entity?**

QUESTION: Broker questions the legally appropriate signature on all pertinent forms when the buyer or seller is an entity or corporation.

RESPONSE: Legally, the buyer or seller of the property is the entity and therefore the "Buyer" or "Seller" line on the purchase and sale forms should state the name of the entity. The officer who will be signing the documents on behalf of the entity should put their title after or under each signature. Nevertheless, the title company may have other rules and preferences and the contracts may have to be filled out according to the title company instructions.

**How should agents fill out forms if seller is a trust or an estate?**

QUESTION: Broker questions how to list "Seller" on the RE-21 and all pertinent forms when the seller is a trust or estate. Is the name of the trust sufficient or does it need to include the name of the trustee or personal representative; i.e. "Sam Smith, Trustee of Jane Doe Trust?"

RESPONSE: Legally, the seller of the property is the trust and therefore the "Seller" line on the purchase and sale forms should be the name of the trust. However, the trustee is the person who will be signing the documents on behalf of the trust and should put their title after or under each signature. Nevertheless, the title company may have other rules and preferences and the contracts may have to be filled out according to the title company instructions.

## MISCELLANEOUS

**If a buyer opts out of having an inspection, can they still review CC&Rs?**

QUESTION: Broker represents the Buyer on a vacant land transaction. The Buyer elected not to have an inspection but did want to review the CC&Rs. Broker noticed that the contract states the timeframe for reviewing the CC&Rs is not to exceed the time allotted for the inspection. Since Buyer is not having an inspection how should Broker draft the Purchase and Sale Agreement?

RESPONSE: Due to the wording of the CC&R Section of the Idaho REALTOR® Purchase and Sale Agreement form, Broker is correct that placing a "zero" in the time allowed for inspections could interfere with, or waive, a Buyer's right to review the CC&Rs and make them a basis to cancel a contract. If Buyer wants to review the CC&Rs care should be taken to ensure this right is preserved. Best practices would be to add a statement to the Other Terms and Conditions section of the contract, clearly stating that although the Buyer is waiving a right to an inspection he or she is specifically reserving the right to review the CC&Rs and cancel the contract in Buyer finds unacceptable terms. It would also be prudent to strike the line in the CC&R that ties the CC&R review to the inspection contingency timeframe.