The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho 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 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 2016 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2016. 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 2017 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2016 "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 2017 legislative changes to the law.

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AGENCY/LICENSE LAW

What are the obligations of the brokerage if the transaction falls apart?

QUESTION: Broker represents Buyer in a transaction. Recently Buyer learned that the individual executing the purchase and sale agreement was not the owner of the property Buyer was purchasing. Upon discovering this information Buyer notified broker that he intends to abandon the transaction and pursue other property. Broker questions the appropriate action for the brokerage in this type of circumstance.

RESPONSE: Based upon the facts given to the Hotline, it appears that the Seller and the Buyer are at an impasse with this transaction. Buyer thinks buyer has legal right to abandon the transaction, as there was no legal contract between the parties. Seller thinks the Seller has the ability to force Buyer to perform. It does not appear that there is any reasonable action which can be taken by the brokerage to resolve the dispute between the buyer and seller. Brokerage should advise all parties to seek competent legal counsel to advise them of their rights. Brokerage should take care not to offer legal advice. Buyer alone should decide if it is appropriate to enter into a new contract.

Further, based upon the facts presented to the Hotline, it appears the earnest money was deposited with a title company. The title company is unlikely to release the earnest money to either party until all parties are in agreement as to who is entitled to receive said earnest money.

The Hotline does not get involved with, nor does it offer advice in attempt to, settle disputes between buyers and sellers and therefore will not address the issue of whether or not there ever was a legally binding contract.

Can a licensee who is employed as a property manager represent their employer in a real estate transaction?

QUESTION: Agent is employed as a manager of a mobile home park and the owner would like to list the lots for sale. Agent questions if there is anything that would prevent him from representing the Seller/Boss. Would it be violating any licensing laws?

RESPONSE: No, there is nothing in Idaho Code that prevents this type of relationship. Licensee should have no issue representing the Seller. The best practice for the agent would be to always disclose to potential buyers that agent is also employed as a manager by the Seller/owner of the park. Agent should also be aware that as an individual with knowledge about the property he may be aware of various adverse material facts which require disclosure. Agent's knowledge likely goes beyond that of a typical agent involved in an arm's length transaction.

Does a licensee have a duty to disclose that their client is a registered sex offender?

QUESTION: Agent represents a Buyer. The Buyer is a registered sex offender and wishes to purchase a home. Agent questions whether she has an obligation to disclose to the seller that a sex offender is buying a house in the area.

RESPONSE: Idaho Code Title 18 chapter 83 governs sex offender registration. The Hotline is unaware of any Idaho law or court opinion that extends the disclosure obligation of a registered sex offender to a real estate salesperson hired to represent the offender in the purchase of a home. Furthermore, Idaho Code § 18-8325 which governs sex offender registration states:

> (1) No person or governmental entity, other than those specifically charged in this chapter with a duty to collect information under this chapter regarding registered sexual offenders, has a duty to inquire, investigate or disclose any information regarding registered sexual offenders.
> (2) No person or governmental entity, other than those specifically charged in this chapter with an affirmative duty to provide public access to information regarding sexual offenders, shall be held liable for any failure to disclose any information regarding registered sexual offenders to any other person or entity.

In addition, when it comes to disclosure of adverse material facts by licensees, that term is defined in Idaho Code § 54-2083(1) as:

> (1) "Adverse material fact" means 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.

As seen in the definition above it pertains to facts relating to the property or an individual's intent or ability to close the transaction. It does not include any facts about the actual buyer or seller.

Given the facts provided to the Hotline, there is no duty for the Agent to disclose the fact that her client is a registered sex offender.

Can a licensee share knowledge about a certain property they used to list to an interested Buyer?

QUESTION: Broker represented Seller who cancelled their listing and representation agreement. Seller has relisted with another brokerage. The brokerage now has an interested Buyer in the property, and Broker questions what information, if any, can be given to this Buyer since the brokerage has prior knowledge about the Seller and the property.

RESPONSE: Idaho Real Estate License Law states:

> DUTIES AND OBLIGATIONS OWED AFTER TERMINATION OF REPRESENTATION. Except as otherwise agreed in writing, a

> brokerage owes no further duty or obligation to a client after termination of the agreed representation except:
> …
> (2) Maintaining the confidentiality of all information defined as confidential client information by this act.
>
> Idaho Code § 54-2092.

Licensees have an obligation to maintain confidential client information, even after termination of representation. Idaho Code § 54-2083(6) enumerates the following definition of confidential client information:

> (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. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.

Broker is urged to exercise caution in this circumstance, so long as the information known about the property falls within the definition of confidential client information as described above, the brokerage cannot give the information to the potential buyer. It would be best practice to also inform the Buyer that brokerage previously had this listing, and inform Buyer that license law requires the brokerage to keep certain information regarding the listing confidential.

COMMISSIONS & FEES

Does a licensee have to disclose their commission agreements to 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

When does a timeline start if a contract is delivered before 8:00 am?

QUESTION: Broker questions when a "business day" timeline will start ticking if certain documents are delivered at 7:50 a.m. Would the timeline start that same day or would it start the next day?

RESPONSE: The RE-21, Section 26 defines "business day" as follows:

> A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day, thus the first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.

Given the facts presented to the Hotline, the agent delivered an executed contract at 7:50 a.m. The date of execution is excluded, but given that 7:50 a.m. does not fall within a business day, the first business day, and therefore the timeline would begin at 8:00 a.m. that same day.

Does the inspection time period reset each time a party responds?

QUESTION: Brokers question the timeframe for the Inspection Contingency (RE-10). Specifically, they are wondering if the timeline resets each time a party submits the RE-10 to the other party. For example, if a Buyer submits to the Seller the RE-10 with a list of ten requested repairs and Seller responds within the strict time period with an RE-10 in which Seller agrees to correct only 7 of those items, does the Buyer then have another three days (or however many days are listed in the contract) to submit another RE-10?

RESPONSE: No. The strict time period of the Inspection Contingency does not reset each time a party delivers an RE-10. If the Seller responds with a counter offer to the Buyer's RE-10, that is considered a rejection of the Buyer's RE-10, which then gives the Buyer the option to either continue with the transaction or terminate the contract.

If the parties wish to use the inspection period for negotiation purposes it needs to be specifically agreed to by all parties through an addendum. The Hotline does not give advice to

Buyers and Sellers. Brokers should advise clients to seek independent legal counsel if a dispute arises regarding the strict timeframes.

If a Buyer releases their inspection contingency, does that also waive their ability to object to the CC&Rs?

QUESTION: Brokers represents the Buyer. Buyer submitted a list of requested repairs to the Seller, long before the inspection time period was up. Broker now questions if the Buyer still has until the end of the inspection time period to also review the CC&Rs, or if the Buyer has also released the inspection contingency for reviewing the CC&Rs because Buyer submitted the RE-10 early?

RESPONSE: The Covenants, Conditions and Restrictions (CC&Rs) referenced in Section 15 of the RE-21 identify a separate and distinct contingency apart from the inspection contingency referenced in Section 10 of the RE-21. While Section 15 does passively reference Section 10, it goes on to state a specific and independent timeframe which, while being loosely tied to the Section 10 timeframe, still provides Buyer the opportunity to raise "reasonable objections within such time period as set forth above…" This language would indicate that regardless of what happens with the inspection contingency in Section 10, a Buyer has the right to raise an objection to the CC&Rs at any time before the prescribed time period expires.

The Hotline does not resolve disputes between Buyer and Seller. If a dispute arises as to the timeframes mentioned above, Brokers on both sides of the transaction should advise their clients to seek independent legal counsel.

What happens if both lines of an either/or clause are filled out?

QUESTION: Broker called with a question regarding the Costs Paid By section of the RE-21 (Section 17). The issue at hand is that both blank lines were filled in on line 239. Broker questions which would prevail when both are filled out.

RESPONSE: Beginning on Line 239 of the RE-21, it reads as follows:

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

Given the facts presented to the Hotline, the contract in question had both blank lines filled in. It states that Seller agrees to pay 3% of the purchase price or $0 of lender approved closing costs. The agent filling out the form likely meant to put N/A but instead put $0, but nevertheless, the conflicting terms create an ambiguity and the parties do not have an agreed upon amount that Seller is to pay. If a court finds an ambiguity in a contract it will look outside the four corners of the contract to ascertain the parties' intent.

Can signing Counter #1 after Counter #2 has been presented create a legally binding contract?

QUESTION: Buyer tendered an offer to Seller; Seller responded with Counter Offer #1, Buyer then responded with Counter Offer #2. Later the Buyer signed and delivered to Seller, Counter Offer #1. The question presented to the Hotline is, did Buyer's acceptance of Counter Offer #1 create a legally binding contract?

RESPONSE: It is unlikely that a legally binding contract was created in this case. In Idaho, a tender of a counter offer that adds a new term or changes a term of the original offer constitutes rejection of the original offer in its entirety:

> An acceptance of an offer to be effectual must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter-proposition which must in turn be accepted by the offeror in order to constitute a binding contract.
>
> *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 43 (Ct. App. 2005).

Given the facts presented to the Hotline, the original offer from Buyer was rejected when Seller tendered Counter Offer #1. Then Counter Offer #1 was rejected when Buyer tendered Counter Offer #2. Buyer cannot sign Counter #1 as it is no longer a valid offer. Once an offer is rejected it cannot be unilaterally revived by one party to a transaction. Nevertheless, the Hotline does not resolve disputes between buyer and seller and if an agreement cannot be reached brokers may wish to advise their respective clients to seek independent legal counsel.

Do the contract timelines begin upon acceptance by both parties or upon delivery?

QUESTION: Broker questions when the timelines listed in the Purchase and Sale Agreement start ticking, is it upon signature indicating acceptance of the offer or upon delivery of the document back to the offeror?

RESPONSE: A contract is not fully executed until the other party is made aware of the acceptance. One party cannot accept a contract in a vacuum, meaning that the acceptance, typically in the form of a signed contract, must be delivered to the other party to create a contract. Both parties have to be aware of the acceptance for the acceptance to be complete and legally binding. The Idaho Supreme Court summarizes it as follows:

> Formation of a valid contract requires a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer followed by an acceptance. … **The acceptance is not complete until it has been communicated to the offeror.** Acceptance of an offer must be unequivocal. Generally, silence and inaction does not constitute acceptance. More specifically:

> Because assent to an offer that is required for the formation of a contract is an act of the mind, it may either be expressed by words or evidenced by circumstances from which such assent may be inferred, such as the making of payments or the acceptance of benefits. Anything that amounts to a manifestation of a formed determination to accept, and is communicated or put in the proper way to be communicated to the party making the offer, completes a contract.
>
> A response to an offer amounts to an acceptance if an objective, reasonable person is justified in understanding that a fully enforceable contract has been made, even if the offeree subjectively does not intend to be legally bound. This objective standard takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.
> 17A Am.Jur.2d Contracts § 91 (2d ed.2008).
>
> *Justad v. Ward*, 147 Idaho 509, 512 (2009) Emphasis added. Internal citations omitted.

For example, Buyer submits an offer to Seller on Monday and Seller sends Buyer a counter offer on Tuesday which Buyer "accepts" and signs Tuesday night. However, Buyer's agent does not deliver the signed contract to Seller's agent until Wednesday morning at 9:00 am. Based on this sequence of events, acceptance was complete on Wednesday and therefore the timelines in the RE-21 would not begin until Thursday morning at 8:00, the next business day.

Does the lender have to see a copy of the RE-10 Inspection Contingency Notice?

QUESTION: Broker is representing the Seller in a transaction. The parties have negotiated on the RE-10 that a repair company would be paid directly, rather than through closing, but the Buyer has no intention of giving the RE-10 to the lender. Broker questions if this would be considered loan fraud, specifically because Buyer said the RE-10 was drafted in order to avoid providing it to the lender.

RESPONSE: If a lender requires that all documents pertaining to the transaction must be submitted, then that means all documents. The Idaho REALTOR® Forms were not created so that the parties would not have to submit them to lenders. Frequently, all lending institutions require all agreements between the parties to be submitted for review. Lenders almost always want to see the inspection report and review what repairs are requested or required. Sometimes lenders want to see all versions of the RE-10, sometimes they do not. If the lender requests these documents and they are not provided it could very well constitute loan fraud.

Further, by not disclosing the agreements made in the RE-10 to the lender, the parties could be facing a "double contract" situation, which is prohibited by Idaho law. A double contract is defined in Idaho Code § 54-2004(22) as:

> [T]wo (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one (1) of which is not made known to the prospective loan underwriter or the loan guarantor… An agreement or loan application is not

> made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.

It is important to note that contracts can be oral or written. Licensed real estate agents are prohibited from being involved in double contracts. Idaho Code § 54-2054(5) states:

> Double contracts prohibited. No licensed broker or salesperson shall use, propose the use of, agree to the use of, or knowingly permit the use of a double contract, as defined in section 54-2004, Idaho Code, in connection with any regulated real estate transaction. Such conduct by a licensee shall be deemed flagrant misconduct and dishonorable and dishonest dealing and shall subject the licensee to disciplinary action by the commission.

Broker should use extreme caution when these circumstances arise and advise their client that these types of transactions may be prohibited under Idaho law. Broker may also wish to advise client to seek private legal counsel in this matter.

If a Purchase and Sale Agreement contains an incorrect legal description, is the contract still binding?

QUESTION: Broker questions the validity of nonrefundable earnest money language in the Purchase and Sale Agreement which has a defective legal description.

RESPONSE: When a Purchase and Sale Agreement lack an accurate legal description, it may invalidate the entire agreement. According to Idaho Code § 54-2051(4), an offer to purchase real property must contain the following:

> 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 the dates of such signatures; and
> **(g) A legal description of the property.** (Emphasis added).

In addition to the statute cited above, Idaho has another statute that governs purchase and sale agreements; Idaho Code § 9-5-03:

> TRANSFERS OF REAL PROPERTY TO BE IN WRITING. No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

The Idaho Supreme Court recently considered a similar situation and stated:

> Under Idaho's statute of frauds pertaining to transfers of real property, agreements for the sale of such property must be in writing and subscribed by the party to be charged. I.C. § 9–503; The writing must contain all "conditions, terms[ ] and descriptions necessary to constitute the contract," including a description of the property to be sold. The property description must be specific enough, either by its own terms or by reference, to ascertain the quantity, identity, or boundaries of the property without resorting to parol evidence. In other words, the description "must adequately describe the property so that it is possible for someone to identify 'exactly' what property the seller is conveying to the buyer." Parol evidence may only be relied on "for the purpose of identifying the land described and applying the description to the property." It may not be used "for the purpose of ascertaining and locating the land about which the parties negotiated" or for "supplying and adding to a description insufficient and void on its face." Consequently, under the statute of frauds, "the issue is not whether the parties had reached an agreement. The issue is whether that agreement is adequately reflected in their written memorandum." Agreements for the sale of real property that do not "comply with the statute of frauds are unenforceable both in an action at law for damages and in a suit in equity for specific performance."
>
> *Callies v. O'Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009).

If an offer to purchase or an accepted Purchase and Sale Agreement does not contain all of the above items, including a true and accurate legal description of the property, the contract is likely void. The Hotline cannot get involved in disputes between the parties. Buyer may wish to seek private legal counsel to determine her rights and responsibilities in this matter.

Can a Buyer who previously terminated the contract rescind the termination and continue to move forward with the transaction?

QUESTION: Broker represents a Buyer who terminated a transaction based upon an unsatisfactory inspection. Broker questions if Buyer can rescind this termination and legally revive the transaction.

RESPONSE: The Buyer's right to terminate the transaction based upon an unsatisfactory inspection is unilateral, meaning no consent is required from the Seller. Once Buyer has notified Seller of the termination, said termination is effective immediately. In order to revive a contract there would have to be a meeting of the minds and an agreement by all parties to revive the contract.

Can Buyer and Seller agree to terms outside of the Purchase and Sale Agreement?

QUESTION: Broker is listing agent on a property that is currently deemed "uninhabitable" by the county. It requires several thousand dollars in improvements to get the occupancy permit. Buyer and Seller independently agreed that Buyer will put up money in order to have Seller repair the house prior to closing. At the same time, Buyer is applying for a loan. Broker questions the need to disclose the side agreement to repair the house to the lender.

RESPONSE: All agreements must be disclosed to the lender in order to avoid a "double contract" situation, which is prohibited by Idaho law. Idaho Code § 54-2054(5) enumerates this prohibition:

> Double contracts prohibited. No licensed broker or salesperson shall use, propose the use of, agree to the use of, or knowingly permit the use of a double contract, as defined in section 54-2004, Idaho Code, in connection with any regulated real estate transaction. Such conduct by a licensee shall be deemed flagrant misconduct and dishonorable and dishonest dealing and shall subject the licensee to disciplinary action by the commission.

A double contract is defined as follows:

> "Double contract" means two (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one (1) of which is not made known to the prospective loan underwriter or the loan guarantor, to enable the buyer to obtain a larger loan than the true sales price would allow, or to enable the buyer to qualify for a loan which he or she otherwise could not obtain. An agreement or loan application is not made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.
> I.C. § 54-2004(22).

Based upon the facts given to the hotline, if Buyer and Seller enter into two agreements and do not disclose one to the lender, this type of circumstance would land the parties squarely within the definition of a double contract. Broker should advise his client that these types of transactions are prohibited under Idaho law and that all agreements whether written or oral, must be disclosed to the lender.

Does accepting a property "as is" remove a Buyer's ability to terminate based on the results of an inspection?

QUESTION: Broker represents a Buyer who submitted an offer to purchase a property. After the Purchase and Sale Agreement was executed, the Seller sent over an Addendum stating that the property was to be sold "as is" and the Buyer signed it. Broker questions if this language will remove the inspection contingency contained in the RE-21 and prevent the Buyer from getting the earnest money back if Buyer decides to terminate the contract based on the results of the home inspection.

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

> To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Real Estate Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. (Emphasis omitted).

Given the information provided to the Hotline, the language contained in the Seller's addendum does not specifically remove the inspection contingency in the Purchase and Sale Agreement; however, "as is" can be an ambiguous term as used in this circumstance, and both parties likely have different interpretations. If the intent was to remove the Buyer's inspection contingency, best practices would involve explicitly spelling it out in the Addendum to eliminate any confusion.

The Hotline does not get involved in disputes between Buyer and Seller nor does it interpret specific addendum language. Given the possibility of the ambiguity of the "as is" language used, Brokers on both sides of the transaction should advise their clients to seek private legal counsel to determine their rights in this matter.

If the parties have executed a RE-27, can Seller accept another offer if Buyer removes their contingencies?

QUESTION: Brokerage represents the buyer. The Seller accepted the Buyer's offer and the parties agreed the Seller could continue to market and both parties had executed the RE-27 (Right to Continue to Market). The Seller received another offer and notified the Buyer who then waived the contingency stated in the RE-27. Seller allegedly wants to accept the second offer because even though Buyer waived their contingency, Seller believes they still will not be able to

get financing unless their current home sells. Broker questions how to proceed and if Seller can terminate once Buyer waives the contingency.

RESPONSE: The Buyer and Seller have entered into a contract and both parties signed the RE-27, which states in relevant part:

> CONTINGENCY RELEASE CLAUSE: This agreement is subject to SELLER'S right to market the property and accept other offers as specified in this Addendum. SELLER shall have the right to continue to offer the herein property for sale and to accept written offers, subject to the rights of the BUYER, until such time as said contingency(s) have been waived or removed by BUYER. Should SELLER receive another acceptable offer to purchase, SELLER shall give BUYER written notice of such acceptable offer. **BUYER shall have ____ consecutive hours (seventy-two [72] if left blank) after receipt of such written notice to waive or remove all BUYER(S) contingencies in this addendum.** In the event BUYER does not waive or remove the contingency(s) in writing within the hours noted above, then the purchase and sale agreement shall be terminated and all deposits returned to BUYER. … In the event BUYER(S) elect to waive such contingencies after receipt of said notice, BUYER shall proceed to purchase the property under the remaining terms and conditions of this Agreement, notwithstanding that the terms and conditions of the new offer may be more or less favorable.

If Buyer removes their contingency upon notice of a second offer, the Seller is contractually obligated to allow the Buyer to perform and proceed with the transaction.

The Hotline does not weigh in on disputes between Buyers and Sellers and Brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

Does the RE-27 have an effect on the timelines listed in the Purchase and Sale Agreement?

QUESTION: Broker represents the Seller. The parties have agreed that Seller can continue to market the property, and Broker questions what this means for the timelines listed in the RE-21. Does the RE-27 alter them in any way?

RESPONSE: No, the Right to Continue to Market Property (RE-27) makes no reference to the time periods in the Purchase and Sale Agreement and therefore do not alter them. Whether or not the parties have an executed RE-27, the timelines begin when the RE-21 is executed by both parties.

The RE-27 is not to be confused with the Short Sale Addendum (RE-44) which does alter the Purchase and Sale Agreement timelines.

DISCLOSURE

If a Seller is exempt from filling out the RE-25, can a Buyer insist Seller fill one out to reflect items discovered during the inspection?

QUESTION: Broker represents the Seller. Seller is a non-profit housing organization presumed to be exempt from filling out the Seller Disclosure (RE-25). The Buyer has completed inspections and is now requesting that the Seller fill out a RE-25 and include the items that Buyer found during the inspections. Broker questions if this is something that Seller is required by law to do.

RESPONSE: The Hotline cannot comment on whether or not the Seller is indeed exempt from filling out the property condition disclosure statement and Broker should have Seller contact private legal counsel to determine its exemption status.

Assuming that the Seller is exempt, there would be no need for the Seller to update something they were not obligated to provide in the first place.

Further, Seller has the obligation to disclose any adverse material facts known about the property. An adverse material fact is described as:

> "Adverse material fact" means 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.
>
> Idaho Code § 54-2083(1).

If a Buyer is already aware of what Buyer considers an adverse material fact, there would be no need for Seller to re-disclose it.

The Hotline cannot weigh in on disputes between Buyer and Sellers. Broker may wish to advise client to seek independent legal counsel to determine client's rights and responsibilities in this matter.

Does a nearby property that allegedly has a lease with the State of Idaho need to be disclosed?

QUESTION: Broker is representing the Seller. The property is near another property that allegedly has an oil and gas lease with the State of Idaho. Broker questions the duty to disclose this information to possible Buyers.

RESPONSE: Idaho law requires Sellers and Agents to disclose all adverse material facts known about the property. 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 because it has to be done on a case by case basis. Seller will need to decide whether or not the lease in question would 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.

Does a Seller of a vacant lot need to fill out a RE-25?

QUESTION: Broker represents the Seller on a vacant land transaction. Broker questions if this Seller has to fill out a Property Condition Disclosure Form when selling vacant land.

RESPONSE: Idaho Code § 55-2514 states:

> PROPERTY CONDITION DISCLOSURE REQUIRED. Any person who intends to transfer any residential real 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.

Vacant land does not fall into this category so a Seller does not need to fill out a disclosure form. However, Sellers and agents are always obligated to disclose any known adverse material facts. And 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).

Can a Buyer terminate due to an inaccurate RE-25?

QUESTION: Broker represents the Buyer. During the inspection period, the home inspector discovered fans and buckets in the crawl space. Seller admitted that they had prior water damage, but it was not disclosed because the RE-25 was filled out prior to the occurrence of the water damage. The inspection timeframe has now passed, and Buyer

wants to back out because this information was not disclosed to them. Broker questions if the Buyer is entitled to their earnest money and if the Seller should have amended their disclosure form.

RESPONSE: The Property Condition Disclosure Form (RE-25) is required to be delivered to buyer within 10 days of mutual acceptance of an offer. If the disclosure form was filled out prior to receiving an offer, seller has a statutory obligation to amend the RE-25 and deliver the amendment to the buyer as follows:

> AMENDMENT TO FORM. Any disclosure of an item of information in the property disclosure form described in section 55-2508, Idaho Code, may be amended in writing by the transferor of the residential real property at any time following the delivery of the form in accordance with section 55-2510, Idaho Code. Transferor shall amend the disclosure statement prior to closing if transferor discovers any of the information on the original statement has changed. In the event of amendments to the statement, transferee's right to rescind is strictly limited to the amendments to the disclosure statement. The amendment shall be subject to the provisions of this chapter.
> Idaho Code § 55-2513 (Emphasis added).

This provision allows the Buyer to have the option to rescind based on the amendments made to the disclosure form as follows:

> 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. Idaho Code § 55-2515.

The Hotline does not get involved in disputes between the Buyer and Seller. Brokers on both sides of the transaction should advise their clients to seek private legal counsel if this matter cannot be amicably resolved, and the Responsible Broker should refer to Idaho Code § 54-2047 for what to do when there is a dispute over earnest money.

Is a Seller that has never occupied the property exempt from the RE-25?

QUESTION: Broker represents the Seller. The Seller has never lived in the property and Broker questions whether or not the Seller needs to fill out the RE-25.

RESPONSE: Idaho Code § 55-2505 exempts certain Sellers from completing a Seller's Property Condition Disclosure Form; however, there is no exemption for Sellers who have simply not lived in the property. The Seller is obligated to fill out the RE-25 to the best of Seller's ability.

DUTIES TO CLIENT & CUSTOMER

Does the brokerage have an obligation to inspect the property?

QUESTION: Broker called regarding vacant lot transactions in which the Seller made certain statements regarding the "availability" of power to the lot. Upon closing the Buyer took issue with that statement. Broker questions if the brokerages have any liability in these circumstances.

RESPONSE: Idaho real estate license law controls licensees' obligations regrading this situation. Specifically, the "Duties to a Client" section found in Idaho Code § 54-2087 states in relevant part:

> (7) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property.

And further, Idaho Code § 54-2093(2) states:

> A licensee or brokerage engaged in representation of a client shall be entitled to rely upon representations made by a client and shall not be liable for a wrongful act, error, omission or misrepresentation made by the client unless the licensee or brokerage had actual knowledge or reasonably should have known of the wrongful act, error, omission or misrepresentation.

Licensees have no obligation to conduct inspections of the property for their client. If the Seller discloses to the agent that power is "available" and the agent passes that along, neither the listing nor selling agent has an obligation to confirm this information, and therefore the brokerage would not be liable if a dispute arises.

The Hotline does not get involved in Buyer and Seller disputes. Broker should advise clients to seek independent legal counsel.

What is a licensee's obligation when the Buyer and Seller are involved in a dispute and licensee is acting as a dual agent?

QUESTION: Broker acted as a dual agent in a transaction that has recently closed. Buyer now reports a recent discovery of various local land use ordinances unique to the subdivision which may increase the cost of construction. Buyer believes that Broker is responsible and should have disclosed this information to him. Broker had no specific knowledge of any such ordnances. Broker questions the parties' various legal obligations.

RESPONSE: Idaho real estate license law controls Broker's obligations regrading this situation. Specifically, the "Duties to a Client" section found in Idaho Code § 54-2087 states in relevant part:

> (7) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property.

Brokers have no obligation to conduct inspections of the property for their client. Given the facts presented to the Hotline, the Buyer was afforded ample opportunity to conduct due diligence inspections and decided to proceed to closing. Any conditions related to the property should have been researched and addressed by Buyer during the inspection period.

EARNEST MONEY

Would Buyer get earnest money returned to them if they terminated based on an unsatisfactory inspection if the contract stated the earnest money would be nonrefundable?

QUESTION: Broker called with a question regarding nonrefundable earnest money. The parties agreed that the earnest money would become nonrefundable upon acceptance of the offer.

Later, the Buyer terminated the transaction with the RE-10. The Buyer is claiming he is entitled to the earnest money because the language in the RE-10 states the Buyer gets the earnest money back if the transaction was terminated due to an unsatisfactory inspection. Seller thinks that it is still nonrefundable. Who would be entitled to the earnest money in this case?

RESPONSE: Given the facts presented to the Hotline, the parties both signed the Purchase and Sale Agreement under the condition that Buyer's earnest money would become nonrefundable upon acceptance of the contract. Typically, when the parties agree to make earnest money nonrefundable, it becomes nonrefundable, and the Buyer is likely not entitled to a return of the earnest money based upon other contingencies in the contract.

However, the Hotline does not get involved in disputes between the Buyer and Seller. Broker is acting as dual agent and responsible broker in this transaction. The responsible broker has the following options in an earnest money dispute:

> 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.
>
> Idaho Code § 54-2047.

The Hotline believes it is best practice to keep the earnest money in the trust account and to not release it until the Broker is instructed by all parties or a court order to release the disputed funds. Broker may also wish to advise clients to seek private legal counsel in this matter.

What are Buyer's or Seller's options if they are involved in a dispute over earnest money but the title company is holding on to the funds?

QUESTION: Agent represents the Seller. They had an accepted contract and the Buyer is using an FHA loan. During the inspection timeframe, the mortgage company requested many repairs in order to comply with FHA requirements. Seller agreed to fix everything listed. Before the transaction closed, the mortgage company informed the parties that the transaction would not

be closing because Buyer allegedly has many years of unpaid taxes. Seller has spent a lot of money working with the Buyer to close the transaction. Seller feels entitled to the earnest money. Does Seller have any legal recourse?

RESPONSE: Given the facts presented to the Hotline, the parties have an earnest money dispute. If a title company is holding the money, they probably will not release it until they are instructed to by mutual agreement of the parties to the transaction or a court order. The Hotline does not get involved in disputes between Buyers and Sellers. Agent should advise his client to seek legal counsel. An alternative for the Seller would also be Small Claims Court if the amount of disputed money is under $5,000.

Would nonrefundable earnest money language supersede the FHA/VA loan clause?

QUESTION: Broker questions if a Seller can ask for earnest money to become nonrefundable in a counter offer when the transaction is being financed with an FHA/VA loan.

RESPONSE: The pertinent part of the RE-21, Section 3C Lines 45-49, states:

> FHA/VA: If applicable, it is expressly agreed that notwithstanding any other provisions of this contract, BUYER shall not be obligated to complete the purchase of the PROPERTY described herein or to incur any penalty or forfeiture of Earnest Money deposits or otherwise unless BUYER has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration or a Direct Endorsement lender setting forth the appraised value of the PROPERTY of not less than the sales price as stated in the contract.

The above language is mandated by the Federal Housing Authority on all Purchase and Sale Agreements where the purchase is financed by a FHA or VA loan. The language is required by federal statute and rule and is called the "Amendatory Clause." If the parties sign an addendum that removes this clause from the Purchase and Sale Agreement then the Buyer will not qualify for a FHA or VA loan. Lenders are required to look for the clause as part of the application process and can get penalized by the Federal Government if the lender allows the use of a Purchase and Sale Agreement that does not contain the clause. REALTORS® with Buyers who intend to get a FHA or VA loan should also ensure the clause is not removed as well. However, the earnest money can become nonrefundable for any other contingency in the contract, just not for a low appraisal.

FORMS USE

Can the RE-18 be used for multiple back-up offers?

QUESTION: Broker represents the Seller. Seller is under contract with Buyer 1 and has accepted a back-up offer from Buyer 2. Other Buyers would like to submit even more offers. Broker questions what Seller's obligations are if the contract with Buyer 1 fails; would Seller have

to go through back-up offers chronologically or is Seller allowed to choose the most appealing of the three back-up offers?

RESPONSE: A properly executed RE-18 Back-Up Offer binds the Seller to the back-up contract if the first contract fails. However, the RE-18 is not designed to and should not be used in multiple back-up offer situations. Further, there is no language in the RE-18 which allows Seller to choose whichever offer he or she wants if the contract in first position fails.

In a multiple back up offer situation it would be prudent for Seller to have an attorney draft specific language for a multiple back-up offer circumstance since the Idaho REALTORS® currently do not have a form that deals with a Seller accepting multiple back-up offers.

If the RE-14 is checked for "Residential" property, would a licensee still be entitled to commission if the Buyer ended up purchasing a "Residential Income" property?

QUESTION: Agent questions what the definitions of "Residential" and "Residential Income" are on the RE-14. He specifically wonders if an agent would still be entitled to commission if the Buyer selected the "Residential" check box but ended up purchasing a property that would be considered "Residential Income."

RESPONSE: The Buyer Representation Agreement is a binding contract between a Buyer and the Brokerage wherein Buyer promises to pay a commission if Broker locates a property for Buyer. It is unlikely that a Buyer would be able to get out of paying a commission by claiming Buyer checked a different property box then what was purchased. Further, if a Buyer tried to argue that they didn't have to pay commission because of this, the MLS cooperating brokerage rules and the procuring cause standard would ensure that the Brokerage gets paid for producing a Buyer ready, willing and able.

If Broker believes Buyer may be interested in multiple types of properties, then the best practices would be to teach agents to check all of the "type of property" boxes on the RE-14 so that there is no confusion and the brokerage is covered if a Buyer decides to buy a different type of property.

What is the intent of the RE-28?

QUESTION: Broker questions if the RE-28 needs to be utilized for an additional fee that is already incorporated into the Representation Agreement they have with a client.

RESPONSE: No. The RE-28, Disclosure of Broker's Intent to Offer Additional Services and/or Collect Compensation, is to be used to give notice to a party to the transaction that the Broker intends to collect an additional fee from a third party, may provide additional services outside of the regulated real estate transaction for a fee or provide notice that they are going to receive compensation from more than one party. If disclosure of offering an additional service for an additional fee is already incorporated into a Representation Agreement and the client is already aware of the fee, it is not necessary for the Broker to fill out the RE-28 with this information.

What is the difference between the RE-16 and the RE-12?

QUESTION: Broker has an agent that has an RE-12 with a Seller. While looking over the contract, agent questioned how the compensation section works when using the RE-12, as it states payment is received only if agent procures a buyer. Is she interpreting this correctly? How does the RE-12 differ from the RE-16?

RESPONSE: The RE-12 is designed for a customer rather than a client. The most significant legal difference is that Sellers who have signed the RE-12 do not become clients of the Brokerage. This means the Brokerage represents the Seller in a non-agency relationship. The most significant practical difference is that there is no exclusivity agreement in the RE-12 while there is in the RE-16. Under an RE-12, a Brokerage only receives compensation from the Seller for a Buyer they personally procure to buy the house; whereas under the RE-16, the exclusivity language states the Brokerage will get paid by the Seller no matter who brings the Buyer. The RE-12 is typically used when a Brokerage represents a Buyer and locates a property whose Seller is not currently represented by another Brokerage.

It is important to note that there are many legal complexities when trying to recover a brokerage fee under an RE-16 when the listing brokerage did not procure the Buyer (either personally or through an MLS). This response does not attempt to address these complexities and Brokers should consult their own legal counsel before endeavoring to collect under such circumstances.

Do both the RE-10 and RE-20 need to be signed by both parties?

QUESTION: Broker questions how to properly use the RE-10 and/or the RE-20 when a Buyer wants to terminate based on an unsatisfactory inspection. Should the agents be sending over both when they have a Buyer that wants to terminate? If a Seller does not sign one and/or either, where does that leave the earnest money?

RESPONSE: The RE-10 is the proper form to use when terminating based on an inspection. Section 3 states:

> TERMINATION PROVISION: BUYER deems the results of the inspection of the Property to be unsatisfactory. As a result, BUYER hereby terminates this Agreement and the Earnest Money shall be returned to BUYER. BUYER and SELLER agree to release brokers and their associates from any claims, actions and demands by reason of releasing and disbursing of said earnest money deposit.

This language was recently added to the RE-10 to accomplish what the RE-20 does, which is twofold: release the earnest money back to the Buyer and release the brokerage from any liabilities for doing so.

It is not uncommon for a Buyer to send over the RE-10 with notice to terminate, or the RE-20, and not get a response or signature back from the Seller. Without the Seller signing either one of these forms, the brokerages are not getting the release from liability. If a Seller does not sign the document and disputes the release of the Earnest Money, the responsible broker has three options regarding disbursing the Earnest Money per Idaho law:

> (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 it is best practice to have both the RE-10 and RE-20 signed by both parties, as each release the brokerages from certain liabilities. However, it is not always simple to obtain the Seller's signature, in which case Broker can rely on the disputed earnest money language in the contract and above to decide how best to deal with the earnest money.

MISCELLANEOUS

How does the 2016 rental legislation affect current CC&Rs that prohibit homeowners from renting out their properties?

QUESTION: Agent questions the legality of a particular term in a homeowner association's Covenants, Conditions and Restrictions which prohibits renting the property in light of Idaho Code § 55-115, which was enacted during the 2016 legislation.

RESPONSE: Idaho Code § 55-115 was amended this year to add the following language:

> (3) No homeowner's association may add, amend or enforce any covenant, condition or restriction in such a way that limits or prohibits the rental, for any amount of time, of any property, land or

> structure thereon within the jurisdiction of the homeowner's association, unless expressly agreed to in writing at the time of such addition or amendment by the owner of the affected property. Nothing in this section shall be construed to prevent the enforcement of valid covenants, conditions or restrictions limiting a property owner's right to transfer his interest in land or the structures thereon so long as that covenant, condition or restriction applied to the property at the time the homeowner acquired his interest in the property.

This law was passed by the legislature, signed by the Governor and went into effect on March 24, 2016.

This legislation and the revisions to this particular Idaho statute appear to be designed to prevent any homeowner's association from adding rental prohibitions to any new or existing CC&Rs. However, the addition of the word "enforce" in this statute may severely limit the enforcement of current CC&Rs that ban rentals unless specifically agreed to by the owner of the affected property. It should be noted that this statute also makes reference to exemptions for valid CC&Rs currently in place when an individual purchases his interest in the property.

Given that this is new and untested law the Hotline cannot comment on exactly how the application will play out over time.

Can a Seller refuse to accept an offer just because they do not like the Buyer?

QUESTION: Broker questions if a Seller can refuse to accept a Buyer's offer or does a Seller have an obligation to consider every offer that comes in?

RESPONSE: Seller can refuse to sell the property to anyone he or she wants, so long as Seller is not discriminating based on race, color, national origin, religion, sex, disability and, in most circumstances, age, as these classifications are protected by the Fair Housing Act.

If a husband is transferring his sole and separate property, does the wife need to sign any of the transaction documents?

QUESTION: Broker questions if one spouse is transferring his or her sole and separate property, is the other spouse required to sign any transaction documents or the deed?

RESPONSE: No. In accordance with Idaho's community property laws, any property acquired during a marriage is presumed to be community property, however if a husband or wife owned property prior to marriage or received property as a gift or an inheritance during marriage, said real property may be that spouse's separate property. Separate property does not require the signatures of the non-owning spouse.

Nevertheless, the rules of community property are complex and separate property may very easily become community property during a marriage, therefore caution is warranted. If a Broker

can obtain both the husband and wife's signatures on the Representation Agreement and any Purchase and Sale Agreements it may potentially eliminate any problems down the line. In addition, Broker should expect that a title company will require a quit claim deed from the non-owning spouse, even if the real property is legally the separate property of the other spouse. While this is not founded in Idaho law, it is based upon a title company's desire to be absolutely sure the wife has no claim to the property at issue.

Who can enforce the CC&Rs?

QUESTION: Agent questions who can enforce CC&Rs if there is no Homeowners Association.

RESPONSE: In the event there is no HOA, covenants will be governed under contract law as if they are a contract between all landowners in the subdivision. The Supreme Court of Idaho has stated the following:

> [C]ovenants may be enforced by one other than a party to them where the original parties intended that the restrictions should benefit the land of the person claiming the right of enforcement.
>
> *Sun Valley Ctr. for Arts & Humanities, Inc. v. Sun Valley Co.*, 107 Idaho 411, 413 (1984).

Further, most CC&Rs typically have language allowing for any individual land owner of the subdivision to enforce the covenants regardless of the existence of a HOA.