The Hotline Top Questions

THE LEGAL HOTLINE

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

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WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes

The responses contained in the 2013 "Hotline Top Questions" are based on the law in effect at the time, and the IAR forms as printed in 2013. 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 2014 legislative session. In addition, IAR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2013 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which may reflect the 2014 legislative changes to the law.

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AGENCY

Can Agent list property if Seller does not hold the title?

QUESTION: Agent has been contacted by a potential Seller to list a number of pre-sale new construction properties. However, the Agent has been contacted by the builder, who is not listed on title, but who is under contract with the developer to purchase the lots. Agent questions if she may list the properties when the Seller does not actually hold the title to the lots.

RESPONSE: The Idaho Real Estate Commission has indicated that it permits licensed agents to market and have clients enter into binding contracts for real property in which the Seller possesses only "equitable title." This means that a Seller may list a property that they are contracted to buy, prior to actually purchasing the property. Additionally, The Hotline is unaware of any Idaho statute or case law that expressly prohibits a potential Seller from entering into a contract for the sale of property in which the seller holds "equitable title." With complete disclosure to all parties, it may be possible to market and sell properties under "equitable title" and still remain in compliance with Idaho law.

Given the information provided to the Hotline, it is likely that the builder of the structures has "equitable title" of the property, in that he may be in a pending transaction with the developer to purchase the lots. If this is indeed the case, then the Seller and the Seller's Agent may market and procure a Buyer for the property, contingent upon the Seller obtaining fee simple title in the future.

However, it should be emphasized that until the builder of the property closes on the first transaction with the developer and the deed is delivered to him, he will not be able to legally convey the property to any other party. Agents should take caution to ensure that full disclosure has been made to all parties that the Seller possesses "equitable title" and will be unable to pass clear title to the Buyer until the Seller closes the first transaction.

Do personal transactions need to be conducted through the brokerage?

QUESTION: An agent inquired about buying and selling personal properties both by themselves, with their spouse, and through a company. Agent also inquired whether there were any restrictions as to simultaneous closings, pocket listings, or selling by owner. Agent questions which of these types of transactions must be conducted through her brokerage.

RESPONSE: Idaho Code § 54-2055 Licensees Dealing with Their Own Property states in relevant part that:

> (2) "A licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or

> any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.
>
> (3) "Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed." (Emphasis added)

According to this statute, a licensed agent must disclose their status and conduct transactions through their brokerage on all personal transactions, even if the property is not listed.

The Idaho Real Estate Commission (IREC) issued Guideline #24 that addresses the applicability of the aforementioned statute. In short, the Guideline states that all real estate transactions in which the licensee, in her personal name, has an ownership interest must be conducted through her brokerage. However, if the property is being bought or sold by a business entity, in which the licensee owns an interest, said transaction, is not required to be conducted through the licensee's brokerage.

In this instance, the licensee is interested in buying and selling personal properties, most likely in order to "flip" the property for a profit. If the licensee or their spouse wants to buy or sell property personally, the transaction should be processed through the brokerage which the agent is licensed. However, if a company (which does not hold a real estate license), with whom either licensee or spouse is associated, were to buy or sell property, the transaction would not need to go through the brokerage. Personal transactions are not required to be listed with MLS and can be sold by owner. However, that does not change the requirement that the transaction be processed by the brokerage.

How does a brokerage co-list with another brokerage?

QUESTION: Agent has a friend that owns property in Salmon, Idaho. The friend has already engaged a brokerage in Salmon that has listed the property for over a year now. In an attempt to broaden the advertisement base for the property, the friend approached agent to see if she was able to list the property on other MLSs. Agent contacted the Salmon brokerage and negotiated terms for commission splits and allowing agent to list the property on the other MLSs. However, agent would like to know if she needs a representation agreement with her friend or if there is some type of co-listing agreement she could enter into with the Salmon brokerage.

RESPONSE: Idaho Code 54-2054(2) deals with real estate licensees' ability to split commissions with other licensees, and states in relevant part as follows:

Fee-splitting with unlicensed persons prohibited. Unless otherwise allowed by statute or rule, a real estate broker, associate broker or salesperson licensed in the state of Idaho shall not pay any part or share of a commission, fee or compensation received in the licensee's capacity as such in a regulated real estate transaction to any who is not actively licensed as a real estate broker in Idaho or in another state or jurisdiction. The Idaho broker making the payment to another licensed person is responsible for verifying the active licensed status of the receiving broker.

Applying the facts given to the Hotline, it appears that agent has entered into a written contractual relationship with the Salmon brokerage for a commission split and permission to list the property under Agent's brokerage. However, it is assumed that the friend already entered into an exclusive representation agreement with the Salmon brokerage. It would therefore be inappropriate for agent to enter into another representation agreement with the friend. Nevertheless, as agent is an active licensee in the state of Idaho, it is permissible to split the fee between the Salmon brokerage and the agent.

Please note that the Hotline is unaware of local MLS rules and regulations. Agent is encouraged to check her local MLS rules and regulations to ensure that her activities of listing her friend's property on her MLSs can be done without a representation agreement. Other than Idaho Code § 54-2054(4), which prohibits interference with another brokerage's agreement, the Hotline is unaware of any Idaho statue or case law that would prohibit agent from listing the friend's property on other MLSs without a representation agreement.

Agent may wish to consult private legal counsel concerning her rights and obligations regarding both her commission split agreement and her friend's representation agreement.

Can an agent bring clients from an old brokerage?

QUESTION: Broker has a new agent who had clients sign a buyer representative agreement at old brokerage and put a zero on the cancellation fee provision for if clients decided to go to another agent or brokerage. Broker wants to know if it is acceptable for the clients to follow the agent to her brokerage because the cancellation section states zero.

RESPONSE: Idaho Code § 54-2056 (5) states in relevant part:

> (5) Property of the broker. Upon termination of the business relationship as a sales associate licensed under a broker, the sales associate shall immediately turn over to the broker all listing information and listing contracts, keys, purchase and sale agreements and similar contracts, buyer brokerage information and contracts, and other property belonging to the broker. A sales associate shall not engage in any practice or conduct, directly or indirectly, which encourages, entices or induces clients of the broker to terminate any legal business relationship with the broker unless he first obtains written permission of the broker.
>
> Idaho Code § 54-2054 (4) states in relevant part:
> (4) Interference with real estate brokerage agreement prohibited. It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client. Communicating a company's relocation policy or benefits to a transferring employee or consumer shall not be considered a violation of this subsection so long as the communication does not

> involve advice or encouragement on how to terminate or amend an existing contractual relationship between a broker and client.

Given the facts provided to the Hotline, the Broker has a new agent coming to her brokerage and wants to know if Agent's clients can follow her since they signed a buyer representative agreement at the old brokerage with zero cancellation fees. However, client representation agreements are with the brokerage and not the Agent. Per the above quoted statutes, it is unlawful for Agent to encourage clients to cancel their representation agreements. Unless the old broker gives written permission for the clients to be released from the old agreements, Agent should perform no act that could be interpreted as encouraging the clients to cancel or breach their brokerage representation agreements.

Should an agent represent a dealer in options?

QUESTION: Realtor questions whether he can represent an investor who plans to sell a property when the investor does not own the property but simply has an option. Realtors should be very cautious when representing an investor participating in this type of transaction.

RESPONSE: Realtor's potential customer would likely be considered a "dealer in options" which is defined in Idaho Code §54-2004(19) as:

> "Dealer in options" means any person, firm, partnership, association or corporation who shall directly or indirectly take, obtain or use options to purchase, exchange, lease option or lease purchase real property or any interest therein for another or others whether or not the options shall be in his or its name and whether or not title to the property shall pass through the name of the person, firm, partnership, association or corporation in connection with the purchase, sale, exchange, lease option or lease purchase of the real property, or interest therein.

The Idaho Real Estate Commission has been critical of investors engaging in this type of activity and has issued a formal guideline which details some of the common pitfalls. A copy of the Idaho Real Estate Commission Guideline #18 is attached hereto.

Further, Idaho Code §54-2050(1)(e) requires Broker seller representation agreements to contain "The signature of the owner of the real estate or the owner's legal, appointed and duly qualified representative, and the date of such signature." It does not appear that Broker can achieve this signature in the circumstances described to the Hotline.

In addition, Realtors should also check with the rules of the local multiple listing services as many have strict requirements pertaining to listing property not owned by the seller. In any event, Realtors should always disclose in any advertising and/or conversations regarding the property that his customer does not in fact own the property.

Can a Broker Representation Agreement state that seller must renew with brokerage after the listing has expired?

QUESTION: Agent wanted to know if her office listing agreement language was illegal when it states that the seller must renew with the Agent after the listing has expired, cancelled, or withdrawn or the seller will have to pay a fee.

RESPONSE: Idaho Code § 54-2050 (3) states in relevant part:

> Brokerage representation agreements
> (3) Prohibited provisions and exceptions -- Automatic renewal clauses. No buyer or seller representation agreement shall contain a provision requiring the party signing the agreement to notify the broker of the party's intention to cancel the agreement after the definite expiration date, unless the representation agreement states that it is completely nonexclusive and it contains no financial obligation, fee or commission due from the party signing the agreement.

In this instance, Agent asked if the office listing agreement language was illegal when requiring sellers to sign an agreement containing a clause that makes the seller pay a fee if the listing agreement is withdrawn, expired, or cancelled. As stated above, Idaho Code states no buyer or seller representation agreement shall contain a provision requiring the party signing the agreement to notify the broker of the party's intention to cancel the agreement after the expiration date. Due to the fact that the listing agreement at issue requires seller to renew, or pay a penalty, after the expiration date, the listing agreement is likely illegal and would need to be removed in order to be in compliance with the above Idaho Code.

Can an agent sign with a client who has an expired agreement with another brokerage?

QUESTION: Agent represents Seller in a real estate transaction. The Buyer has an expired Buyer Representation Agreement with Agent. Since the representation agreement has expired, Buyer wanted to enter into a new representation agreement with the Listing Agent. Agent completed and closed the transaction between Seller and Buyer. Subsequent to closure, Buyer's prior Agent contacted the Listing Agent stating that he had no legal right to represent Buyer. Listing Agent would like to know if his subsequent representation of Buyer was in violation of Idaho license law.

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

> (4) Interference with real estate brokerage agreement prohibited. It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client. Communicating a company's relocation policy or benefits to a transferring employee or consumer shall not be considered a violation of this subsection so long as the communication does not

> involve advice or encouragement on how to terminate or amend an existing contractual relationship between a broker and client. (Underline Added).

Given the facts provided to the Hotline, Agent and Buyer entered into a contractual agreement following the expiration of Buyer's initial Buyer Representation Agreement with the other Agent. Buyer's first Agent is demanding that said action was in violation of Idaho law, as he believes there was contractual inference. However, it is deemed interference only when the agreement still exists. As Buyer has indicated, the Buyer Representation Agreement had expired. Since Buyer made this information known to Seller's Agent and brokerage, it is not likely that the Listing Agent has unlawfully interfered with a previously made contractual agreement.

Can an agent write their own Representation Agreement?

QUESTION: Agent has an out-of-state customer who is moving to Idaho and wants to retain Agent's services. However, Customer is apprehensive about the language and length of the RE-14 Buyer Representation Agreement. Customer has asked Agent to write an alternative, less complex agreement to establish the relationship. Agent questions if it is lawful for him to write an alternative agreement.

RESPONSE: Idaho Code § 54-2050(2) states in relevant part:

> Buyer representation agreements. Each buyer representation agreement, whether exclusive or nonexclusive, must contain the following provisions:
> (a) Conspicuous and definite beginning and expiration dates;
> (b) All financial obligations of the buyer or prospective buyer, if any, including, but not limited to, fees or commissions;
> (c) The manner in which any fee or commission will be paid to the broker; and
> (d) Appropriate signatures and their dates.

The above-quoted language states the minimum requirements for a buyer representation agreement in Idaho. The RE-14 Buyer Representation Agreement contains all conditions required by law in addition to the exclusive right to represent Buyer. However, given the facts provided to the Hotline, Customer does not want to utilize the RE-14 form and has requested Agent to draft a less complex agreement.

It is imperative to note that a licensed real estate agent is not likely a licensed Idaho attorney and therefore is not permitted to draft contractual agreements. If Agent and Customer wish to have an alternative representation agreement, they may wish to seek private legal counsel.

Also, there is an alternative to the RE-14 Buyer Representation Agreement. The RE-15 Compensation Agreement with Buyer form contains all necessary provisions for a contractual relationship between Customer and Agent under Idaho Code, yet is less complex and does not provide for the exclusive right to represent Customer. Instead, the RE-15 simply establishes an

agreement between Customer and Agent that compensation will be provided. Therefore, an RE-15 allows Customer and Agent to form a contractual agreement in which Agent is still able to receive compensation for his work.

Is it necessary to sign the RE-41?

QUESTION: Agent is representing a buyer in a real estate transaction. The brokerage representing the seller is requesting an RE-41 Agency Disclosure form, because the buyer is using a HUD Purchase Contract. The agent has established and signed a buyer representation agreement. Agent would like to know the precise requirements for a RE-41and if signing this contract is necessary.

RESPONSE: Idaho Code § 54-2051(4) outlines specific requirements for a valid offer to purchase, which are stated as follows:

> (4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:
> (a) All terms and conditions of the real estate transaction as directed by the buyer or seller;
> (b) The actual form and amount of the consideration received as earnest money;
> (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;
> (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
> (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;
> (f) All appropriate signatures; and
> (g) A legal description of the property.
> (5) All changes made to any offer to purchase or other real estate purchase agreement shall be initialed and dated by the parties to the transaction.

Since a HUD Purchase Contract is being utilized instead of an RE-21 Purchase and Sale Agreement, which contains all the aforementioned requirements, there is a need to utilize and sign a RE-41 to supplement the terms of the HUD agreement. As a HUD Purchase Contract does not likely have all the statutory requirements for a valid offer under Idaho Law, it is necessary to use the RE-41 to supplement the terms of the HUD contract to make it a valid offer.

COMMISSIONS & FEES

Can an online company request a referral fee?

QUESTION: Broker has an agent who is being contacted by an online company based out of California demanding referral compensation. The California company alleges that since an individual submitted a form online, which permits the company to contact agent, the company is now legally entitled to a referral fee. Broker would like to know if this is a valid, binding contract and if she should pay the referral fee to the company.

RESPONSE: Idaho Code §54-2054(8) states in relevant part:

> (8) After-the-fact referral fees prohibited. It shall be unlawful for any person to solicit or request a referral fee or similar payment from a licensed Idaho real estate broker or sales associate, for the referral of a buyer or seller in connection with a regulated real estate transaction, unless the person seeking the referral fee has reasonable cause. "Reasonable cause" shall not exist unless:
> (a) The person seeking the referral fee has a written contractual relationship with the Idaho real estate broker for a referral fee or similar payment; and
> (b) The contractual relationship providing for the referral fee exists at the time the buyer or seller purportedly referred by such person signs a written agreement with the Idaho broker for the listing of the real estate or for representation by the broker, or the buyer signs an offer to purchase the real estate involved in the transaction.

Given the facts provided to the Hotline, there was no written contractual agreement between the online company and the agent and/or brokerage. In fact, Broker asserted that there has never been any agreement between Broker and this California company, particularly in regards to referral fees.

Therefore, Idaho Law deems that the California company's request for referral fees is potentially unlawful. Barring some written agreement between Broker and the company, Broker is likely under no obligation to pay a referral fee to the company.

Can an agent make a commission for finding rental property?

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

RESPONSE: Agent's only contractual relationship is with her out-of-state clients. Unlike when a property is listed for sale on the MLS, where the listing brokerage offers to share commissions with a cooperating brokerage, Agent is searching for rental properties that are not

likely listed on an MLS. Therefore, Agent's only contractual right to commissions is with her clients. Only if a property owner were to agree to pay Agent's commissions would the owner be obligated for said commissions.

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

Should commissions be paid to an inactive agent?

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

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

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

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

Moreover, both agents likely have a commission agreement with the broker, as commissions must be paid through the broker. However, because Agent currently maintains an active license, Agent is likely able to establish an agreement with Broker so that it is still possible for Agent to receive commission splits even with an inactive license. This commission agreement should be with Agent's broker and not the other agents.

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

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

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

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

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

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

Can an agent be paid a commission for introducing a seller and buyer but not assisting in the transaction?

QUESTION: Agent introduced Buyer to the owners of a manufactured home park. Buyer eventually purchased a manufactured home without Agent's further assistance. However, the owners of the manufactured home park want to pay Agent $2,500 for bringing Buyer to the owners. Agent would like to know if it is appropriate to accept the $2,500 and if so is Agent required to split the compensation with her broker.

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

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

Furthermore, Idaho Code § 54-2004(35)(a) defines "Real estate broker":

> Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others…

Given the facts provided to the Hotline, Agent received $2,500 from a manufactured homes park owner for introducing Buyer to the park. Manufactured homes are considered personal property until they become affixed to real property. Idaho law only requires a real estate license when dealing with real property. In this case, because the manufactured home is not

attached to real property, Agent was likely not in violation of Idaho law and may be able to accept the $2,500. Furthermore, Agent is likely not required to split the $2,500 with her broker because fees are only required to be paid through a broker for the performance of any act requiring a real estate license. In this instance, introducing Buyer to a manufactured home does not likely require a real estate license. Therefore, Agent may accept the fee from the owners and is not likely required to split it with the brokerage.

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

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

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

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

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

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

CONTRACTS

Does partial performance satisfy obligations of a contract?

QUESTION: Agent questions whether "partial performance" satisfies obligations in a real estate contract. The example given by Agent was if they had an inspection contingency list and only half of the items were fixed.

RESPONSE: RE-10 Inspection Contingency Response states:

> If the buyer requests repairs, **the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing**, as set forth in the Purchase and Sale Agreement. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement. (Emphasis modified.)

If only "partial performance" has occurred, then the seller has not satisfied his obligation because all items were not fixed by the seller.

Can an anonymous buyer execute a contract?

QUESTION: Agent represents Buyer and would like to know if it is legal to put the Buyer on the contract anonymously.

RESPONSE: Idaho Code § 54-2051 (4) states in relevant part:

> (4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:
> (a) All terms and conditions of the real estate transaction as directed by the buyer or seller;
> (b) The actual form and amount of the consideration received as earnest money;
> (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;
> (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
> (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;

(f) All appropriate signatures; and
(g) A legal description of the property.

In this instance, Broker asked if it was legal to list Buyer as an anonymous person. As stated above, Idaho Code requires that the contract has all appropriate signatures, which likely requires that the buyer be named on the offer. However, the Buyer can list the name of an LLC or trust account as a Buyer instead of his individual name. Buyer may wish to consult private legal counsel concerning his rights and obligations when submitting an offer to purchase real property in Idaho.

Can a party be forced to perform under the contract?

QUESTION: Agent represents buyer who received a counter offer from a seller. The acceptance deadline on the counter offer was 12:00 P.M., but seller's Agent did not even deliver the counter offer until 12:04 P.M. The buyers accepted the counter offer and delivered the fully executed agreement to seller's Agent at 2:30 P.M. the same day. The seller's Agent then told the buyer's Agent that they had already sold the property to another buyer. Buyer's Agent wants to know if the buyers can force seller to perform under the contract.

RESPONSE: Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.2d 291, 294 (2006). "The inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement due to the uniqueness of land." In addition, the Idaho Supreme Court has also stated, "the remedy [of specific performance] is equally available to both vendors and purchasers, and additionally, the appropriateness of specific performance as relief in a particular case lies within the discretion of the trial court." *Perron v. Hale*, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985).

Applying the case law cited above, it seems as if both buyers and sellers may bring an action for specific performance. However, an action for specific performance will only be successful in an instance where the buyer or seller can show the uniqueness of the property and that other remedies would be inadequate. For example, a seller might be entitled to specific performance if he developed real property in compliance with a buyer's specific directions, and then buyer failed to perform under the contract. See *Perron v. Hale* cited above. On the other hand, a buyer might be successful in an action for specific performance when the buyer contracts to buy a specific and unique piece of real property. See *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 1 P.3d 292 (2000).

Given current Idaho case law, both buyers and sellers can bring a specific performance cause of action against the other. However, such cases are difficult to prevail upon, as courts will generally look to contractual damages first. Only if there is no proper contractual damage may a court impose the equitable damage of specific performance.

Is a contract valid if closing date has passed but the sale did not occur?

QUESTION: Buyer and Seller have entered into a real estate contract with a specific closing date. Forty-five (45) days into the contract, the Seller became concerned because the appraisal had not been ordered. As a result, the Seller entered into a back-up agreement, which is contingent upon the first transaction being cancelled or failing to close. The first Buyer has now requested that the Seller sign an extension to the contract, which Seller refused because back-up agreement is substantially better for the Seller. Agent questions if Seller is required to give the first Buyer an opportunity to close even though the closing date has passed and transaction did not occur.

RESPONSE: The RE-21 Purchase and Sale Agreement states:

> 35. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) _____.

Given the facts provided to the Hotline, Buyer and Seller have a signed purchase and sale agreement establishing a fixed date and time closing will occur. During the process, Seller became troubled by Buyer's delay in ordering an appraisal. For this reason, Seller obtained back-up agreement which was contingent upon failure to close or the cancellation of the first contract. First Buyer requested Seller is extend the closing date. However, Seller objected as she is not obligated to sign an addendum. Therefore, in the absence of an addendum to extend the closing date, the Purchase and Sale Agreement becomes voidable after the closing date has lapsed. It is likely that Seller may now sign the back-up agreement and close with second Buyer.

Are there any risks to using electronic signatures?

QUESTION: Broker is receiving contracts with e-signatures without supplementary attachments and/or documentation to prove the individual who signed electronically actually provided the signature. Broker is concerned that there is no documentation or e-signature service legally identifying the Buyer with the provided signature and disclosure form. To ensure brokerage had information to connect the action with the process, Broker requested Buyer resend the disclosure form in an email stating signatures were made on the attached disclosure and listing contract. Broker would like to know if this is an appropriate action to validate electronic signatures and if there are additional risks in accepting them.

RESPONSE: Idaho Code § 28-50-102(8) states:

> "Electronic signature" means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Further, Idaho Code § 28-50-107 states in relevant part:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

Additionally, Idaho Code § 28-50-105(b) states:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

According to I.C. § 28-50-102(8), an electronic signature is a sound, symbol or process that a person uses to execute a contract. I.C. § 28-50-107 provides that a contract or record cannot be denied legal enforceability because it was signed electronically, and that electronic signatures satisfies Idaho law. Finally, I.C. § 28-50-105(b) states that an electronic signature is only effective if the parties agree to conduct the transaction electronically.

Given the information provided to the Hotline, Idaho law grants electronic signatures the same legal status as written signatures. However, the parties must agree to conduct a transaction by electronic means in order for an electronic signature to be acceptable. Therefore, electronic signatures on Idaho Association of REALTOR® ("IAR") forms, as well as on any other contracts or forms requiring signatures in Idaho, are valid as IAR Purchase and Sale Agreements contain an agreement that the transaction be conducted electronically.

Furthermore, the Hotline is not aware of Idaho statute or case law requiring supplemental documentation be provided in order to validate electronic signatures. In this instance, it is likely not necessary for brokerage to request verification of electronically signing contracts and forms.

Is a text message an appropriate way to renew a lease agreement?

QUESTION: Agent has a client who leased a property for a year and signed a contract with the landlord. After the lease was up, he received a text message from the landlord stating that he would renew the lease for another year. Agent wants to know if the text message is a legal extension for the lease.

RESPONSE: Idaho Code § 9-505 states in relevant part:

> Certain agreements to be in writing. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> 4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Given the facts provided to the Hotline, Agent has a client who leased a property for a year and signed a contract with the landlord. The landlord then sent a text message to the tenant stating that he will renew the lease for another year. Agent wants to know if the text message is a legal extension for the lease. In this situation, it would be up to the Court to determine if the text message would hold up as a written agreement since the only writing is an unsigned text message. The Court will have to consider whether the text message is a valid written extension even though it is not signed by landlord, since leases for a term of longer than one year must be in writing and signed by the landlord.

If lender approval is contingent on seller paying closing costs yet seller will not agree to that, does the contract become void or did someone default?

QUESTION: Agent represents Buyer. Buyer signed an RE-21 Purchase and Sale Agreement, which was subsequently accepted by Seller. Initially, Buyer did not request coverage for closing costs. However, Buyer's lender has since demanded that Buyer obtain coverage for closing costs or financing will be revoked. Seller has refused to cover closing costs and requested receipt of earnest money if Buyer defaults on the purchase. Agent questions whether Seller has a right to the earnest money since Buyer has been forced to terminate the contract due to a failure to obtain financing.

RESPONSE: The language in the RE-21 states in relevant part:

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

The contract, considered as a whole, dictates the rights and remedies of the parties. The parties must perform each term of the contract in good faith. In this case, it is unknown to the Hotline whether the Buyer has exercised good faith efforts to obtain alternate means of financing to cover closing costs. However, if a good faith attempt has been made but Buyer is unable to secure financing, the contingency is not met and the agreement is void. Therefore, the Buyer may be entitled to a return of the Earnest Money if Seller will not cover the closing costs and

lender subsequently refuses to fund the transaction. However, if the Buyer did not make a good faith attempt to obtain financing and another lender would have funded without closing costs being covered, the other terms of the contract still control and Seller may be able to find Buyer in default and will be entitled to any remedies provided for in the contract.

Can a contract be assigned if no box has been checked?

QUESTION: Buyer A and Seller executed an RE-21 Purchase and Sale Agreement. Buyer A wishes to assign the contract to Buyer B. However, section 37 of the RE-21 Assignment did not indicate whether the contract may or may not be assigned. Therefore, Broker questions whether the contract may be assigned to Buyer B by Buyer A if neither box for may or may not be sold, transferred, or otherwise assigned has been marked.

RESPONSE: Idaho Law establishes that contracts are freely assignable unless the contract states otherwise. In this instance, a purchase and sale agreement exists between Buyer A and Seller. However, the agreement does not indicate that it may not be assigned. Therefore, given the facts that it is not specified otherwise within the contract or through an addendum that the property cannot be assigned, Buyer A may likely assign the contract to Buyer B.

Can only a portion of a contract be assigned?

QUESTION: Buyer A signed a purchase and sale agreement for two parcels of land, one vacant and one with a home. However, Buyer A only wants to keep the vacant land and assign the home portion of the contract to Buyer B by utilizing the RE-29 Assignment of Buyer's Interest form. Agent would like to know if Buyer A can lawfully assign a portion of the contract to Buyer B.

RESPONSE: Idaho law establishes that contracts are freely assignable unless the contract states otherwise. In this instance, the purchase and sale agreement states that it is assignable. Buyer A only wants to purchase the vacant lot and assign the purchase of the home to Buyer B. However, a contract can only be assignable in its entirety, and in this case the sale and purchase of the land and home is listed under one contract. Therefore, Buyer A cannot purchase only the lot and assign the remaining portion of the contract to Buyer B to purchase the home.

Alternatively, Buyer A and Seller can close on the transaction in which Buyer A purchases both the land and home. Following the closing between Buyer A and Seller, Buyer A can then enter into a contractual relationship with Buyer B in which Buyer B would purchase the home and Buyer A would maintain ownership of the parcel of land. Since contracts can only be assigned in full, simultaneous closing is a potential remedy for both buyers.

Can a buyer or seller forgo signing the RE-21?

QUESTION: Agent is representing the buyer. The broker of the seller has advised its client not to sign the final page of the Purchase and Sale Agreement in response to buyer's counteroffer. The seller's broker states that a signature on the first page of the Counteroffer

Agreement is sufficient to create a binding contract. The agent would like to know if this advisement is accurate and a correct manner to proceed with the counteroffer transaction.

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 of 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 incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with provisions of the Counter Offer. Since the counter offer incorporates all terms of the final accepted offer by parties, the buyer and seller signing only the counter offer likely creates a binding contract, which includes terms from the original Purchase and Sale Agreement. Although it is possible for the parties to also sign the original RE-21 subject to the counter offer, such as practice is likely not necessary to create a binding contract between the parties. Therefore, seller's broker's statement that only the counter offer need be signed by both parties is likely correct.

Can a buyer or seller change the date of closing after an RE-10 has been submitted?

QUESTION: Associate broker represents buyer in a transaction governed by Idaho Association of REALTORS® Form 21, the Purchase and Sale Agreement. Upon completion of buyer's inspection, a list of 18 items to correct was provided to seller. Seller responded proposing an addendum which addressed some of the items to be corrected, but also changed the closing date and other terms of the already executed Purchase and Sale Agreement. Associate broker questions whether seller has the legal right to propose changes to the Purchase and Sale Agreement, beyond the items listed for correction on buyer's list.

RESPONSE: At the time of executing the Purchase and Sale Agreement, the parties had a valid binding contract conditioned on the inspection terms enumerated in Section 10. After an inspection, the buyer had a right to demand that unsatisfactory items be corrected, and had the right to walk away if they were not corrected. When seller proposed an addendum with terms outside the inspection contingency items, the seller was essentially asking to amend the Purchase and Sale Agreement. Buyer had the right to reject the additional proposed terms and force seller to proceed to closing, or had the right to agree with seller's newly proposed terms.

In answer to associate broker's direct question: yes, any party to a transaction may ask for the terms to be changed at any time, however the other party is under no legal obligation to agree. Merely by having one party ask to change a contract does not render the contract any less effective.

Do the parties still have a contract if the seller accepted an offer from buyer after buyer had asked to terminate the contract?

QUESTION: Buyer and seller enter into purchase and sale agreement for property and buyer had the inspection done and provided written notice of disapproved items to seller in the strict time period. Seller responded initially that seller wouldn't fix any of the disapproved items. Eventually, buyer and seller negotiated that seller would give some credit at closing in lieu of fixing disapproved items. However, there was a disagreement as to the amount of credit, which caused the buyer to attempt to terminate the contract. In response, the seller accepted buyer's credit amount within the timeframe given for the parties to agree. Agent questions whether buyer's termination is effective or still in contract with seller.

RESPONSE: RE-21 Section 10 (C 3) states:

> "If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ____ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYER in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ____ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with the transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**" (Emphasis added)

Even though buyer sent over termination to seller, the parties were able to come to an agreement to the amount to be credited for items to be corrected in time. Buyer likely doesn't have a right to terminate during the inspection agreement timeframe and it is likely the buyer is still under contract with the seller.

DISCLOSURE

When does the RE-25 need to be delivered?

QUESTION: Broker questions when a party has to deliver the RE-25 Seller's Property Condition Disclosure Form and if the form was properly delivered when an Agent posts it on the MLS.

RESPONSE: Idaho Code § 55-2509 states:

> 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.

Idaho Code § 55-2510 states:

> 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. For the purposes of the delivery requirements of this section, the delivery of a property disclosure form to a prospective co-transferee of residential real property or his or her agent shall be deemed considered delivered to other prospective transferees unless otherwise provided by contract.

According to the Idaho Codes stated above, a signed and dated copy of the completed RE-25 must be provided to the buyer within ten (10) days of acceptance of an offer. The delivery of form RE-25 must be delivered by person, ordinary mail, certified mail, or by fax. The posting of form RE-25 on the MLS is not likely a proper form of delivery.

Can a contract be terminated based on the property disclosure form after the parties have signed the contract?

QUESTION: Agent represents a buyer who has a contract with a seller that was accepted by both parties. The Property Disclosure Form was not available at the time of acceptance and when buyer received the form, felt that the inspection was unacceptable. Agent is questioning if buyer can now cancel transaction and get earnest money returned.

RESPONSE: Idaho Code §55-2515 states in relevant part:

> 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. (Emphasis added).

According to the statute quoted above, the buyer has three business days to rescind the agreement based on specific disclosures in the Property Disclosure Form. The rescission must be delivered to the seller stating that the disclosure was unacceptable and cite to specific disapproved disclosures. The buyer may then get his earnest money back and have no further obligations under the purchase and sale agreement.

Does a homicide that occurred on the property need to be disclosed?

QUESTION: Agent represents a Seller whose is aware of a homicide that occurred in the home. Agent questions whether he is required to disclose the homicide to potential buyers.

RESPONSE: Idaho Code § 55-2801, et seq. governs "psychologically impacted" property. That section states that:

> …'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 . . . [t]hat 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.

The act further states that "[n]o cause of action shall arise against an owner of real property or a representative of the owner for a failure to disclose to the transferee of the real property or a

representative of the transferee that the real property was psychologically impacted." Idaho Code § 55-2802.

Finally, the act states that:

> In the event that a purchaser who is in the process of making a bona fide offer advises the owner's representative in writing that knowledge of whether the property may be psychologically impacted is an important factor in the purchaser's decision to purchase the property, the owner's representative shall make inquiry of the owner and, with the consent of the owner and subject to and consistent with the applicable laws of privacy, shall report any findings to the purchaser. If the owner refuses disclosure, the owner's representative shall advise the purchaser or the purchaser's representative that the information will not be disclosed. Idaho Code § 55-2803.

Agent should discuss with Seller whether they wish to disclose the homicide to the general public and only disclose the information if the Seller consents. If any potential buyers specifically state in writing that "knowledge of whether the property may be psychologically impacted is an important factor in the purchaser's decision to purchase the property," Agent should again seek consent from Seller before disclosing the homicide. Idaho Code § 55-2803. If Seller refuses to disclose, Agent should notify the potential buyer that such information will not be disclosed. *Id.*

Does it need to be disclosed if methamphetamine production occurred on the property?

QUESTION: Agent represents an owner of a property which may have been used for the production of methamphetamines in the past. The agent understands in Utah that if the property has been remediated in the prescribed manner, disclosure to potential buyers is no longer necessary. The agent questions whether Idaho requires disclosure of such issues, and how remediation may affect disclosure requirements.

RESPONSE: Idaho Code § 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)).

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 methan1phetamines, that fact would likely have a "significant affect" on the desirability or value of the property. As such, it may be considered

an "adverse material fact" that Agent may a duty to disclose to potential buyers.

If appropriate remediation occurs, such as certified meth lab cleanup that will eradicate the property of any dangerous chemicals, the past drug production may no longer be considered an adverse material fact affecting the property and might not have to be disclosed. However, the Hotline is unaware of any Idaho statute or case law that directly addresses whether methamphetamine production property remediation obviates Agent's duties of disclosure. Unless Agent possesses direct evidence showing that the property has been remediated, it is likely that Agent should disclose the adverse material fact of methamphetamine production.

Is a seller exempt from filling out the RE-25 if they have not lived in the property in the last year?

QUESTION: The Agent questions whether a seller is exempt from completing and producing to the buyer the IAR RE-25 Seller's Property Condition Disclosure Form if the Seller has not lived in the home for one (1) year or more.

RESPONSE: Idaho Code Section 55-2505 exempts certain Sellers from completing a Seller's Property Condition Disclosure Form, such as newly constructed property that has not been previously inhabited. However there is no exemption for Sellers who have simply not lived in the property for one year or more. The exact exemptions referring to length of time the Seller may have lived in the home read as follows:

> (13) A transfer to a transferee who has occupied the property as a personal residence for one (1) or more years immediately prior to the transfer;
> (14) A transfer from a transferor who has both not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise.

Therefore, the fact that the Seller did not live in the home as their primary residence for one year prior to the sale does not exempt a Seller from completing a Seller's Property Condition Disclosure unless the property was also acquired by the Seller through inheritance or devise.

Is a bankruptcy trustee exempt from filling out the Property Disclosure Form?

QUESTION: Agent is representing a bankruptcy trustee who is selling a home from the bankruptcy estate. The trustee has no knowledge of the property. For this reason, agent would like to know how to complete the RE-25 Seller's Property Condition Disclosure Form.

RESPONSE: Given the information provided to the Hotline, a trustee is selling the real property from the bankruptcy estate. According to Idaho Code §55-2505(1), a transfer by a trustee in bankruptcy is a stated exemption from the Property Condition Disclosure Act. Therefore, the trustee need only check the applicable exemption on the first page of the RE-25

Seller's Property Condition Disclosure Form and sign the bottom of the first page to complete the form. As the trustee appears to be exempt from the Property Condition Disclosure Act, the trustee need not fill out the remaining portion of the RE-25.

Do ashes that have been buried on the property need to be disclosed?

QUESTION: Agent is representing the seller. The seller disclosed to agent that her property contains the buried ashes of a deceased relative. Agent would like to know if said information should be disclosed to buyers and/or included on a property disclosure form.

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

> The form must be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances. (Emphasis Added).

The Property Condition Disclosure Act requires sellers of residential property to disclose of material matters relating to the physical condition of the property. Having a relative's ashes buried somewhere on the property is not likely to be considered a matter affecting the physical condition of the property. Therefore, it is not likely necessary for seller to disclose the fact that a relative's ashes are located on the property.

Moreover, the fact that a relative's ashes are located on real property potentially places the property within the definition of psychologically impacted property. Idaho Code § 55-2801 states in relevant part:

> ..."[P]sychologically 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…

Given the fact that the only impact that can be imagined from having a relative's ashes buried on the property would be the suspicion of ghosts or other unproven anomalies. Idaho Code provides that a seller is not required to disclose facts related to psychologically impacted property. Therefore, it is not likely that seller needs to disclose the fact that a relative's ashes are buried on the property.

Are sellers of inherited property exempt from filling out the RE-25?

QUESTION: Seller is in the process of selling inherited property. Agent would like to know if Seller is exempt from completing the RE-25 Seller's Property Condition Disclosure

Form. If so, is it appropriate for Seller to select the specified exemption box on the first page of the RE-25 and sign the bottom of the form.

RESPONSE: Idaho Code §55-2505 states all exemptions to the Property Condition Disclosure Act. In particular, I.C. §55-2505(14) states as follows:

> (14) A transfer from a transferor who both has not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise

Given the facts provided to the Hotline, the Seller has inherited property to which it has not been a resident of for one or more years prior to inheritance. Since Seller has both not occupied the property as personal resident for one or more years and acquired the property through inheritance, Seller is likely exempted from the Property Condition Disclosure Act. As Seller is likely exempted from the Act, there is no need to complete the entirety of the RE-25 Seller's Property Condition Disclosure Form. However, Seller should check the applicable exemption on the first page on the RE-25 and sign at the bottom of the page to certify that it is in fact exempt from the Property Disclosure Act.

Does a short sale that has never been occupied fall under the "New Construction" exemption?

QUESTION: Agent represents a seller who bought a property through a short sale that was constructed in 2007 and never occupied. Seller also never lived in property but fixed items discovered upon getting an inspection of the property. Agent wants to know if seller falls under the new construction exemption on the property disclosure form.

RESPONSE: Idaho Code §55-2505 (12) outlines the exemptions to the Idaho Property Condition Disclosure Act, which states in relevant part:

> A transfer that involved newly constructed residential real property that previously has not been inhabited, except that disclosure of annexation and city service status shall be declared by the sellers of such newly constructed residential real property in accordance with the provisions of section 55-2508, Idaho Code;

Since the seller was not the person who constructed the home and the ownership transferred on more than one occasion, the new construction exemption is likely lost. The new construction exemption is intended to apply only to a person who builds a home and then promptly sells the home to its first resident. The current seller purchased the home long after it was constructed. The seller will likely need to fill out the property disclosure form and needs to disclose everything they know about the property, including what was found during the seller's inspection when he purchased the home.

Is the buyer's identity an adverse material fact?

QUESTION: Agent questions whether she has a duty to disclose a buyer's actual identity to a seller when the buyer wants to remain anonymous and dealing with adverse material fact.

RESPONSE: Idaho Code § 54-2083 (1) states:

> "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.

According to the Idaho Codes stated above, adverse material fact does not likely include the buyer's identity. Since Agent's duty to disclose only includes adverse material facts, Agent does not likely owe a duty to a seller to disclose the actual identity of a buyer.

Is a seller responsible if mold has been discovered after closing?

QUESTION: Agent represented a Seller who recently sold their property, which was inspected by the buyer's inspector and was found to be satisfactory. After closing, the buyer claimed to notice an odor, and upon further investigation discovered mold. Agent questions which party is responsible for the costs of the repair.

RESPONSE: Idaho Code § 55-2507 discusses a Seller's responsibility to disclose information about a property to a potential Buyer and states in pertinent part:

> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) *That the statement is not a substitute for any inspections*.
> (5) That the transferor is familiar with the particular residential real property and *each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.* (Emphasis added.)

According to I.C. § 55-2507(4), disclosure statements are not a substitute for a professional inspection. However, I.C. 55-2507(5) states that all disclosures should be performed in good faith.

Given the information provided to the Hotline, if the Seller was aware of the mold, Seller may have breached its duty to disclose facts regarding the property in good faith to the Buyer. However, the Buyer had the property inspected in which the mold was not discovered, and Seller disclosures are not to be used as a substitute for inspection. Additionally, Seller only owes a duty to disclose information the Seller knew of about the property. If Seller truly was unaware of the mold, then Seller would have no duty to disclose.

If a seller inherits just a portion of a property, are they exempt from the Property Disclosure?

QUESTION: Seller is in the process of selling property he co-owned with his mother. Seller's mother recently passed away and Seller inherited the mother's portion of the property. Agent would like to know if Seller is exempt from the Property Condition Disclosure Act.

RESPONSE: Idaho Code §55-2505 states all exemptions to the Property Condition Disclosure Act. In particular, I.C. §55-2505(14) states as follows:

> A transfer from a transferor who both has not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise

Given the facts provided to the Hotline, the Seller owned half of the property while his mother owned the other half and resided in the property. Seller acquired the remainder of the property when his mother passed away. Although Seller did not occupy the property as a personal residence, Seller already was a co-owner of the property, likely as tenants in common, prior to inheriting his mother's interest in the property. Therefore, Seller is not likely exempt from the Act for the above-quoted reason. Since Seller is not exempt, Seller should complete the RE-25 Seller's Property Condition Disclosure form and make disclosures of all material facts known about the property.

DUTIES TO CLIENT & CUSTOMER

Are concessions considered confidential client information?

QUESTION: Broker would like to know if seller concessions are regarded as part of the sales price or if concessions are confidential client information.

RESPONSE: Idaho Code § 54-2083(6)(d) states:

> (6) "Confidential client information" means information gained from or about a client that:
> (d) The client would not be personally obligated to disclose to another party to the transaction…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.

Generally, concessions are synonymous with reductions to the selling price and are agreed upon by both Buyer and Seller. Based on Idaho Code § 54-2083(6)(d), information generally disseminated in the marketplace is not confidential client information nor is a sold price of real property confidential client information. Since the concessions are known by both

Buyer and Seller they are not likely regarded as confidential client information. Additionally, because concessions are most often included in the closing costs they are likely reflected in the sold price of real property, which is also not confidential client information. Therefore, given the facts provided to the Hotline, Broker would likely not be violating client information by disclosing seller concessions.

Can an agent request something from old client on behalf of a title company?

QUESTION: Agent represented a Seller in a recently closed real estate transaction. At time of closing, the Buyer was to pay an additional $20,000 to a company for the placement of a tenant. However, the title company made a mistake and released the $20,000 to the Seller. Upon discovering the mistake, the title company had the Agent request that the Seller return the $20,000 that was not intended to be released to the Seller, as it was contractually stated that the title company was to release it to the third-party company. Agent now questions if he had any right to request the money back from Seller, as the Agent was representing Seller at the time.

RESPONSE: Idaho Code § 54-2094 states:

> Representation not fiduciary in nature. While this act is intended to abrogate the common law of agency as it applies to regulated real estate transactions, nothing in this act shall prohibit a brokerage from entering into a written agreement with a buyer or seller which creates an agency relationship in which the duties and obligations are greater than those provided in this act. However, unless greater duties are specifically agreed to in writing between the brokerage and a represented client, the duties and obligations owed to a represented client in a regulated real estate transaction are not fiduciary in nature and are not subject to equitable remedies for breach of fiduciary duty.

According to I.C. § 54-2094, an agency relationship that is created between an agent and client is not fiduciary in nature. This allows a licensed real estate agent to represent the interests of multiple parties in a real estate transaction, as they are not contractually obligated to be specifically and wholly responsible for the interest of one party.

Further, Idaho Code § 54-2086 states in relevant part:

> Duties to a customer. (1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are non-agents and owe the following legal duties and obligations:
> (a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;
> (b) To perform these acts with honesty, good faith, reasonable skill and care;

> (c) To properly account for moneys or property placed in the care and responsibility of the brokerage;
> (d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee…

According to I.C. § 54-2086, if the Buyer was not represented by Agent's brokerage or agent, that Buyer remains a customer and the brokerage and Agent still have a duty to the customer. This may mean that Agent had a duty to assist in the recovery of the $20,000 that was mistakenly released to the Seller, as the Buyer would be considered a customer. When performing these duties, a licensee must do so with honesty, good faith, and reasonable skill and care.

Additionally, the Idaho Supreme Court considered the application of the aforementioned statute in *Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 22 P.3d 105 (2001). In *Nordling*, the agent representing the seller failed to disclose the fact that the listed property was subject to a rule, which involved invalid discrimination under the Federal FHA. Although the buyer was represented by another brokerage, the Court held that all prospective buyers/sellers are either clients or customers. Additionally, it did not matter that the rule was invalid, but rather the agent should have been concerned with the rule's existence. Therefore, the Court ruled that the agent owed a duty to disclose the adverse fact to all prospective buyers, as they were customers of agent regardless of the fact that the buyers were represented by another agent.

The Idaho Supreme Court ruling in *Nordling* provides that an agent has a duty to any prospective buyer or seller regardless of whether they are represented by another brokerage. As such, it is likely that the Agent had a duty to the Buyer to request the return of the improperly distributed funds.

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

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

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

> (6) "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code…

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

EARNEST MONEY

When can the earnest money be legally collected?

QUESTION: Agent is in a dispute with another brokerage regarding the timing for collection of earnest money on a lot being platted and developed. Agent believes earnest money cannot be legally collected until the plat is approved and recorded. Seller's brokerage believes earnest money can be collected and deposited at any time as long as both parties have signed the purchase and sale agreement. Agent would like to know the correct procedure to collect and deposit earnest money.

RESPONSE: Stated in relevant part on the RE-24 Vacant Land Purchase and Sale Agreement in Section 3(A) page 1:

> $_____ **EARNEST MONEY**: BUYER hereby deposits _____ DOLLARS as Earnest Money evidenced by: □cash □personal check □cashier's check □note (due date): _____ and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account □upon receipt or □upon acceptance by BUYER and SELLER or □other_____ and shall be help by: □Listing Broker □Selling Broker □other _____ for the benefit of the parties hereto.

Given the facts provided to the Hotline, Agent represents a Buyer purchasing a parcel of land that has yet to be formally platted. Because the land has not yet been platted, Agent believes that Buyer is not required to deposit earnest money until a final plat has been recorded.

The Hotline is unaware of any Idaho statute or case law requiring that an earnest money deposit should only be deposited after a final plat has been recorded. The RE-24 Vacant Land Purchase and Sale Agreement, as quoted above, specifies between the parties' intent as to when the earnest money shall be deposited. Therefore, Buyer's earnest money should likely be deposited based on the time frame stated in the Purchase and Sale Agreement.

Can earnest money be deposited in an out-of-state account?

QUESTION: It has been requested that Agent deposit earnest money into an out-of-state account. Agent questions whether this is a lawful practice in Idaho, and if so, what record and documentation is required.

RESPONSE: Idaho Code § 54-2041 states in relevant part:

> …For purposes of this section, moneys or property shall not be considered entrusted to the broker or to any licensee representing the broker when the parties to the transaction have instructed the broker or its licensees, in writing, to transfer such moneys or property to a third party, including, but not limited to, a title, an escrow or a trust company if upon transfer, the broker or its licensees have no right to exercise control over the safekeeping or disposition of said moneys or property.
>
> A licensed real estate broker shall not be responsible for depositing moneys into the broker's real estate trust account, nor responsible for creating a real estate trust account…when the parties to the transaction have instructed the broker or its licensees, in writing, to transfer such moneys to a third party, including, but not limited to, a title, an escrow or a trust company. Provided however, a broker shall be responsible for maintaining a record of the time and date that said moneys or property was transferred from the broker to a third party.

Given the facts provided to the Hotline, it has been requested of Agent to deposit earnest money into an account outside of Idaho. Based on the above-quoted language, which states the requirements for an Idaho broker to transfer funds to third parties, Agent is most likely able to deposit the earnest money into a third party out-of-state account. However, it is imperative that funds transfer to a third party is approved, in writing, by both parties to the transaction. Furthermore, it is important that Agent and its brokerage retain records of the transfer to the third party, including the date and time moneys were deposited.

What happens if a transaction fails due to financing, yet the New Loan Proceeds Section was left blank on the RE-21?

QUESTION: Transaction involves a buyer who made an offer on a condominium and on the RE-21, purchase to sell contract they had checked the not all cash offer box (3B) but left the terms of the loan area (3C) blank. The buyer received a counter offer from the seller 10 days later stating that the property would remain active on the MLS until a loan was secured by buyer from a lender and the buyer accepted the counter offer. Buyer was not qualified for the condominium loan, and therefore the transaction was unable to move forward. Buyer is requesting the earnest money back due to the failure to obtain financing. Seller is requesting the earnest money to cover some of the costs and damages they have incurred due to the transaction

failure. Both Brokers involved in the transaction contacted the Hotline and are questioning whether buyer should get full earnest money back.

RESPONSE: Initially the question presented appears simple. The RE-21 contains clear language as to what happens to the earnest money if a buyer is unable to obtain financing: it goes back to the buyer (see RE-21, page 1, line 36). However, the RE-21 is also clear as to what happens to the earnest money if it is an all cash offer and the buyer doesn't close: the seller keeps the earnest money (See RE-21 paragraph 29).

However, this initial clarity fades due to the facts of this circumstance which make it unclear and difficult to provide a simple resolution. The way the RE-21 was filled out could create an issue. Notably there were blanks left in the "New Loan Proceeds" section yet there was a checkbox indicating this is not an all cash offer. In reviewing the Purchase and Sale Agreement, it would appear to indicate the parties intended Section 3(C) to apply. This is further evidenced by the terms of the counter offer which repeatedly reference the buyer's lender. Yet Section 3(C) was not filled out leading to confusion and/or ambiguity. The applicable Idaho Code on disputed earnest money usually assists the Broker allowing him or her to rely on the Purchase and Sale Agreement:

> 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.

Yet as stated above, one can easily read both sides into the Purchase and Sale Agreement as parts were left blank. Therefore if Broker does not intend to rely on a written document, another aspect of Idaho Law provides assistance, at least to the Broker. Idaho Code § 54-2047(3) states:

> (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.

Further, I.C. § 54-2047(1) 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.

The Broker has the authority to disburse the earnest money to a party relying on the terms of the purchase and sale agreement. However, as both parties have made a demand for the earnest money, the Broker has a responsibility to notify the parties, in writing, of any actions taken. Further, if the Broker does not feel comfortable in disbursing the funds on his or her own accord, the funds may be held until the court orders them to be released to one of the parties. If Broker intends to do this he or she shall notify the parties in writing.

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

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

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

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

Are buyers entitled to their earnest money if they failed to disclose a contingency of the loan?

QUESTION: Agent represents seller. Buyer of real estate property acquired a loan that was contingent upon buyer selling their first home. The buyer's loan contingency was not disclosed to the seller and seller's agent. The transaction was not completed because lender would not finance the transaction. Agent would like to know if seller was in violation of the RE-21 because they did not make their loan contingency known on the financial portion of the RE-21.

RESPONSE: RE-21 Section C states:

> …In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request…

The loan contingency relates to the financing agreement between the buyer and the financial lender; there is no requirement that the buyer must disclose the terms of a financing agreement to the seller or seller's agent. Therefore, given the facts provided to the Hotline, as long as buyer exercised good faith efforts to sell their first home in order to obtain the loan, yet were unable to sell it, they are not likely to be held in breach of the purchase and sale agreement. If the buyer is unable to obtain financing after using good faith efforts, buyer may be permitted to withdraw from the transaction and receive their earnest money.

Is there any claim to the earnest money once the inspection contingency has been released?

QUESTION: Agent represents sellers who have received an offer on a property, and the parties have filled out and signed all appropriate forms. Now the buyer is saying they are not satisfied with the location of the washer and dryer and would like them to be moved or they want their earnest money back. Buyer never filled out section 2 in the RE-10 stating that they want this done. The buyer checked section 1, which states that they accept the property condition and removal of inspection contingency. Are they now entitled to their Earnest Money?

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

> 3). If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ___ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYERS in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ___ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**

Given the facts presented to the Hotline, and assuming that the relocation of appliances was something that could be addressed in an inspection, the buyers did not include the washer and dryer on the list in section 2 of the RE-10. RE-10 Section 2 states in relevant part:

> Excepting only those items specifically set for below, BUYER hereby elects to proceed with the transaction and hereby waives the right to further inspection of the property… If the buyer requests repairs, the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement… BUYER shall not unreasonably withhold acceptance of such service, repair, or replacement.

Assuming both parties signed the RE-10 and accepted the property condition, the Purchase and Sale Agreement is legally binding and the buyer has agreed to continue with the transaction, and therefore is not entitled to the Earnest Money. However, the Legal Hotline does not resolve disputes between buyers and sellers, and Broker may wish to contact private legal counsel to determine each party's rights and responsibilities.

FORMS

Can a party rely on the terms of the original RE-21 even though there have been several addendums?

QUESTION: Buyer has an agreement with a building contractor who has repeatedly changed the date of closing. The original contract stated the closing date to be June 15, 2013. The second addendum made to the original contract deemed earnest money to be non-refundable. The final addendum stated the closing date to be July 5, 2013. Agent would like to know if Buyer can take action against contractor's changed deadlines by utilizing the original contract, instead of adhering to final addendum.

RESPONSE: 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 Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this Addendum shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

Given the facts, there have been numerous addendums added to the original purchase and sale agreement. The addendums have established that the earnest money is non-refundable and the closing date has been moved from June 15, 2013 to July 5, 2013. Furthermore, it has been indicated that the contractor wishes to submit another addendum extending the closing date to July 15, 2013. Agent has expressed Buyer's dissatisfaction because of the repeatedly changed deadlines. Although Buyer wishes to take action against the contractor by enforcing the original closing date of June 15, 2013, Buyer will likely be unable to do so since Buyer agreed to later closing dates in subsequent addendums. Therefore, the initial purchase and sale agreement establishing the closing date of June 15, 2013 is superseded by the final addendum, signed by both parties, establishing the closing date as July 5, 2013.

What does the "Fuel in Tank" Section of the RE-21 mean?

QUESTION: Agent represents the buyer. Agent is in dispute with selling party over the interpretation of the RE-21. The agent would like to understand the application and meaning of checking the "seller" box for "Fuel in Tank" in Section 17, page 4.

RESPONSE: It is the intent of the "Fuel in Box" checkbox to indicate the party responsible for the cost of any fuel remaining in a fuel tank on the seller's property. If the seller box is checked, seller would be responsible for the cost of said fuel. As it is likely that seller previously paid for the fuel, seller would not likely be entitled to a reimbursement for the cost of the remaining fuel.

According to the RE-21 when do the repairs following the inspection need to be completed?

QUESTION: Paragraph 3 of Section 10C states that items should be "corrected by the seller within ___ business days (five [5] if left blank) of receipt of seller's response." Caller questions if this means that all of the items listed need to be corrected within 5 business days?

RESPONSE: No. The language in the RE-21 states in relevant part:

> If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ___ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYERS in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ___ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**

The agreement between the two parties is that of notice as to the items to be corrected, not of completion. The number of business days refers to the time in which both parties need to agree, in writing, as to which items are to be corrected. The completion of the items is expected to be ready prior to closing, as stated in RE-10. It reads as follows:

> If the buyer requests repairs, the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement.

If the seller agrees to correct the items that the buyer has listed on RE-10, they must be finished prior to closing. The buyer can have the listed items re-inspected, and if the buyer finds the inspection to be unsatisfactory, they can terminate the agreement.

When does the inspection time period begin?

QUESTION: Agent represents a buyer in a short sale. An addendum for the inspection contingency was written by the buyer's agent, but it did not get signed by both parties and returned until well after the time frame for the inspection contingency was up. Does this mean

the buyer cannot get their inspection completed, or does the time period start once both parties have signed the agreement?

RESPONSE: The RE-21 Inspection Contingency section states in relevant part:

> (A). **BUYER chooses** □to have inspection □not to have inspection. If BUYER chooses not to have inspection, skip Section 10C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at **BUYER'S expense**. BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

The timeframe established above is triggered by "acceptance." In Idaho, "acceptance" does not occur until the offeror, in this case the buyer, receives notice of acceptance. It is relevant to note that Section 41 of RE-21 states:

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

Broker should require agent to fill out this section of the Purchase and Sale Agreement. It can be helpful in determining exact dates of acceptance.

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

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

RESPONSE: Paragraph 41 of the RE-21 states:

> **41. ACCEPTANCE**: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) ☐A.M. ☐P.M. If acceptance offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within

> _____ calendar days (three [3] if left blank) by BUYER initialing HERE _____. **If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER**. (Emphasis added.)

Buyer is able to proceed with an accepted offer subsequent to the allotted time for acceptance if they so choose. When negotiating the contract, the parties may agree on a specific amount of time allowing the Buyer to approve of a late acceptance, or the time will be 3 calendar days if left blank. If the Buyer decides to move forward within the allotted time, the initialed copy must *immediately* be sent to the Seller.

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

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

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

What is the importance of how addendums and counters are numbered?

QUESTION: Agent questions the importance of how addendums and counter offers are numbered. Agent represents the buyer, and he had written an addendum to the Purchase and Sale Agreement and called it "Addendum #1" and then received "Counter Offer #2" from the listing agent. Should the listing agent have used the addendum form?

RESPONSE: Yes. Given the facts presented to the Hotline, it appears the listing agent should be using the Addendum form (RE-11) because the Counter Offer Form (RE-13) is typically used before (or at the same time) the Purchase and Sale Agreement is executed and typically alters the price terms. However, the most important part of both RE-11 and RE-13 is the date and time in which the parties sign it. Once an addendum or counter offer is signed by both the buyer and the seller, it is made an integral part of the Purchase and Sale Agreement, and the number at the top does not typically matter.

Should the first page of the RE-25 be signed if the seller is not exempt?

QUESTION: Agent would like to know if a Seller is NOT exempt from completing the RE-25 Seller's Property Condition Disclosure form, whether they should sign the first page of the form.

RESPONSE: The RE-25 states at the bottom of page one, before the signature lines as follows:

> **If the referenced property herein is exempt from the Seller Property Condition Disclosure Act, Idaho Code section 55-2501 et seq., for any of the aforementioned reasons, Seller is not obligated to complete the remainder of this disclosure form in any manner. Seller certifies that he/she is exempt from the Seller's disclosure by checking the applicable box above and signing this form on the line(s) below.** (Emphasis added)

The signature lines on page one of the RE-25 are for those who are certifying they are exempt from the Seller Property Disclosure Act for any of the reasons mentioned on page one of the form. The first page should only be signed by those who are claiming to be exempt. Sellers who are not exempt should not sign the first page, but complete and initial each following page, then sign the last page to indicate the statements preceding are true.

What does the "release of brokerage" clause in the RE-51 entail?

QUESTION: Agent's client had its closing date postponed for a few months. However, client and sellers agreed client could move into the home and pay monthly installments toward the purchase price. Agent would like to understand the application of the RE-51 Rental Agreement clause concerning the release of real estate brokerages. Agent questions whether if by the client signing the form, agent is then no longer entitled to Agent's sales commissions under the purchase and sale.

RESPONSE: Section 9 of the RE-51 Rental Agreement states:

> Landlord and Tenant release all real estate brokerages, their licensees and employees, and agree to indemnify all brokers, their licensees and employees from any and all claims arising as a result of this Agreement or the Tenants possession of the Premises.

The above quoted language refers to the rental agreement only. The Rental Agreement is not tied to the Purchase and Sale, and therefore a signature on a RE-51 would not prohibit agent from collecting commissions under the purchase and sale agreement. They are two separate contracts. It should be noted the RE-51 does not require the existence of a purchase and sale agreement in order to be valid.

What if the RE-44 states that seller will not continue to market after an offer has been made?

QUESTION: Agent represented a seller who signed a RE-44 Short Sale Addendum agreeing not to continue to market or accept offers from other buyers. There has now been a second full-price offer made on the house and the Agent wants to know whether they are allowed to present the second offer to the Bank.

RESPONSE: RE-44 Short Sale Addendum Part 3 indicates whether the Seller may, or may not, continue to market or accept offers to purchase the property. This section also advises that some creditors require that the property continue to be marketed and offers be accepted to meet their obligation. This section goes on to say:

> ..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.

While the Seller may have agreed not to market the property or accept offers, the creditor may require that they do. If the parties agreed that the seller may not continue to market the property, then later offers may only be accepted if the lender is requiring seller to market the property. Regardless of whether the seller is permitted to continue to market the property, when a second offer is made, the Agent shall give the original buyer notice of the offer and allow them at least three (3) days to match or exceed the second offer. The notice of the new offer, and the opportunity for the first buyer to use their "Right of First Refusal" should expire prior to seller accepting the second offer.

LICENSE LAW

Is it good practice to retain records for longer than IREC requires?

QUESTION: Broker asked whether it would be good practice to retain records longer due to the potential for future legal claims.

RESPONSE: Idaho Code §54-2049. Record Retention Schedules sets forth the statutory requirements for maintaining documents as follows:

> All records required in this chapter to be kept and maintained by a real estate broker, including trust account and financial records, transaction files and other records are to be kept in the broker's files according to this section. The following records must be kept by a broker for three (3) calendar years after the year in which the

> event occurred, the transaction closes, all funds were disburse, or the agreement and any written extension expired.

The statute of limitations for actions on written contracts is codified in Idaho Code §5-216 provides a five (5) year statute of limitations.

As the statute of limitations for an action on written contact is five (5) years, but brokers are only required to maintain records for three (3) years, broker may wish to retain records for longer than the statutorily required time. However, retention for five (5) plus years would be out of an abundance of caution, since most actions would be between buyer and seller and would not involve the brokerage.

Does seller have to disclose that they passed the licensing exam if they are not an active licensee?

QUESTION: Agent represents Seller. Seller has recently passed the real estate licensing exam, however does not currently hold an active license. Agent would like to know if it is required by law to disclose that Seller has passed this exam.

RESPONSE: Idaho Code § 54-2055 states:

> Licensees dealing with their own property. (1) Any actively licensed Idaho broker, sales associate, or legal business entity shall comply with this entire chapter when that licensee is buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction.
> (2) A licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.
> (3) Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed.

Given the information provided to the Hotline, Seller has recently passed the licensing exam, but is not actively licensed. Therefore, the statute would not apply to the Seller. If Seller was active per Idaho Real Estate Commission classification then it is required that the licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license.

Additionally, Agent and Seller may consider disclosing this issue regardless of whether Seller is active or not as there probably will not be any harm in doing so.

ADVERTISING/MARKETING

Can listing agent continue to market a property without terminating the contract with buyer?

QUESTION: Agent represents Buyer. Buyer and Seller have executed a purchase and sale agreement set to close in thirty (30) days. The transaction is contingent upon Buyer obtaining financing and selling his current home. However, Buyer has decided to terminate contract because it's believed the home will not sell in 30 days nor will Buyer obtain desired grant funds to finance the transaction. Buyer has signed and delivered the termination form. However, Seller refuses to sign the termination form and release earnest money to the Buyer. Seller's agent has since placed the property on the market. Buyer's agent would like to know if Seller's agent is able to market the property without terminating the contract with Buyer.

RESPONSE: Idaho law does not require both signatures on the termination form for the termination to be effective. General contract law does provide for the legal theory of *Anticipatory Repudiation* in which a promisor, prior to the time set for performance of his promise, indicates that he will not perform when the time comes. Anticipatory repudiation must be unequivocal wherein the promise of performance may be deemed rescinded and the contract is regarded as discharged.

In this instance, Buyer has provided Seller and Seller's agent with a signed termination form. Seller's agent may potentially recognize this as anticipatory repudiation as Buyer has indicated in writing that it is not intending on performing under the purchase and sale agreement. Since Buyer has given said indication of not performing, Seller's agent may be able to relist and market the property.

The Hotline does not resolve Buyer and Seller disputes. As a result, Agents, Seller and Buyer may wish to contact private legal counsel to determine the parties' rights and responsibilities under the contract.

Can Craigslist be used to advertise real estate?

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

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

> (1) Only licensees who are actively licensed in Idaho may be named by an Idaho broker in any type of advertising of Idaho real property, may advertise Idaho property in Idaho or may have a sign placed on Idaho property.
> (2) All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or

> shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.
> (3) All advertising by licensed branch offices shall contain the broker's licensed business name.
> (4) No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a distinct probability that such information will deceive the persons whom it is intended to influence.

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

Can an agent advertise under two different brokerages?

QUESTION: Broker's company recently merged with a different brokerage. Broker is in the process of changing her license to the new company. In the interim, Broker maintains listings under old company name. Broker wants to advertise in local newspaper under the new company's name. Broker is aware she cannot list property under new company's name until her license has been changed. However, she wants to know that if she may advertise the new company if she places a disclaimer on the advertisement identifying that she is currently licensed and listing property under the old company name.

RESPONSE: Idaho Code §54-2053 states in relevant part:

> All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.

Given the facts provided to the Hotline, Broker would like to advertise under two brokerage names. However to remain in compliance with Idaho Code, Broker should advertise listings under her current licensed brokerage name. Additionally, it would be improper to advertise with the new brokerage name unless it has been approved by the commission, even if Broker inserts a disclaimer. Until Broker's license reflects the new company's name and is recognized and approved by the commission, Broker should likely advertise solely under current brokerage name.

Are "For Sale" signs considered personal property?

QUESTION: Agent called stating that he represented seller and placed for sale signs on a 30 foot road easement on a highway. The adjoining property owner keeps taking his for sale signs down and states he doesn't like where they are. The adjoining property owner has not destroyed any signs, only taken them down repeatedly. Agent questions if his for sale signs are

personal property and wants to know if he can tell the adjoining property owner to leave his signs alone since they are on the easement.

RESPONSE: Idaho Administrative Code 39.03.42 (200) (1) states in relevant part:

> To help preserve the highways as constructed and provide responsible growth where allowed, any individual, business, or other entity planning to add, modify, change use, relocate, maintain, or remove an encroachment on the state highway or use highway right-of-way for any purpose other than normal travel, shall obtain a permit to use state highway right-of-way. Encroachment permits approved by the Department are required for private and public approaches (driveways and streets), utilities and other miscellaneous encroachments.

According to the Idaho Administrative Code quoted above, the Agent must have obtained a permit to put his for sale signs on the highway easement through the Idaho Transportation Department prior to placing them on it. It is likely that the Agent needs to fill out an application for a permit before placing another for sale sign on the highway easement. Regardless, it is likely that the right to remove any signs inappropriately placed rests with the Idaho Transportation Department, not the adjoining property owner or any other private party.

Who can legally issue BPOs?

QUESTION: Agent would like to know, by law, whether or not a licensed real estate salesperson is permitted to issue a broker price opinion (BPO), or is an individual required to be a licensed appraiser or be a broker and/or associate broker in order to render BPOs?

RESPONSE: Idaho Code § 54-4105(3) of the Idaho Real Estate Appraisers Act states in relevant part:

> The provisions of this chapter shall not prohibit a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, whose license is active and in good standing, from rendering a broker's price opinion.

Based on the above quoted statute, which is an exception to the Appraiser Act, a licensed real estate salesperson cannot legally sign a broker price opinion (BPO). An individual must be a licensed broker or associate broker in order to issue and sign broker price opinions.

MISCELLANEOUS

Does the lease transfer when an investment property sells?

QUESTION: Agent represents seller of an investment property in foreclosure, where only half of the duplex is listed and would like to know if the current lease would have to be

carried over to the new buyers and respect the terms of the lease or can the tenant be evicted immediately?

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

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

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

What does the "window coverings" part of Section 5 on the RE-21 entail?

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

RESPONSE: RE-21 Section 5 states:

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

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

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

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

What are the seller's rights in a boundary line dispute?

QUESTION: Agent represents seller who is having a boundary line dispute with his neighbor who states that the seller's driveway is encroaching on his property. The driveway was built in 1942 and the current seller has lived in the property since 1995, the neighbor moved to his property in 2007. Agent would like to know if the seller can offer her property for sale with the driveway as her property.

RESPONSE: Idaho Code § 5-203 discusses adverse possession requirements:

> No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

To establish a case for adverse possession, "the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the [property]; (5) for the statutory period [which is 20 years]." *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003).

Therefore, the statutory time period requirement for adverse possession is 20 years. Due to the length of this statutory requirement, such claims are likely to be rare and difficult to prove. However, given the fact that the driveway has been in its current location since 1942, it may still be possible for seller to establish a claim for adverse possession. Agent may wish to consult private counsel regarding his rights and obligations under a claim for adverse possession.

Is there a limit on what a landlord can charge a tenant in Idaho?

QUESTION: Agent represents Renter in Kootenai County. Renter is undergoing a rental transaction. For this reason, Agent would like to know if Idaho and/or Kootenai County have a rental control ordinance.

RESPONSE: The Idaho Landlord—Tenant Guidelines state in relevant part:

> There are no federal or state rent controls or rent stabilization laws that apply in Idaho. As a result, there are no legal limitations on how much or how often a landlord can raise the rent.

Based on the above-cited guidelines, rental control ordinances do not exist in Idaho. However, the Hotline is unaware of any Kootenai County ordinances that may affect rental rates within Kootenai County. It may be beneficial for Agent and/or Renter to contact Kootenai County and/or applicable municipalities regarding ordinances that may directly affect tenants and/or impact rental agreements.

Does the security deposit get returned to the owner of the property or the tenant?

QUESTION: Agent stated that a property owner had a management contract with a property management company for one year. The property management company had a lease agreement with a tenant who signed a one year lease to rent the property and collected a security deposit at the time the lease was executed. When the one year contract expired, the property owner did not renew with the property management company. The property management company then returned the security deposit to the tenant. The Agent questions whether the security deposit should be returned to the owner of the tenant.

RESPONSE: Idaho Code §6-321 states in relevant part:

> Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement… Refunds shall be made within twenty-one (21) days if no time is fixed by agreement, and in any event, within thirty (30) days after surrender of the premises by the tenant. Any refunds in an amount less than the full amount deposited by the tenant shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit.

According to the Idaho Code stated above, the property management company may owe the affirmative duty to the tenant to return the security deposit upon the expiration of the lease. Because the lease agreement was between the property management company and tenant and not the owner and tenant, the owner likely had no right to collect the security deposit from the property management company. As the security deposit is property of tenant, unless the landlord makes a claim against it in writing, it was likely proper for the property management company to return the security deposit directly to the tenant.

Does IREC have the authority to request documents from an agent before they were licensees?

QUESTION: Agent states the Idaho Real Estate Commission ("IREC") has requested documents for a corporation and business Agent owned before becoming a licensed real estate agent. Agent wants to know if IREC has the right to ask for these documents.

RESPONSE: Idaho Code § 54-2058 (1) states in relevant part:

> Authority to investigate and discipline. (1) General authority to investigate. The commission may investigate the action of any person engaged in the business or acting in the capacity of real estate broker or salesperson in this state, **or any person believed to have acted as a real estate broker or salesperson without a license** in violation of section 54-2002, Idaho Code. Upon receipt of a written complaint from anyone who claims to have been injured or defrauded as a result of such action, or upon information received by the executive director, the executive director shall perform an investigation of the facts alleged against such real estate broker or salesperson or such unlicensed person. (Emphasis added).
>
> Idaho Code § 54-2058 (3) states in relevant part:
> (3) The commission also has the authority to investigate the action of any Idaho licensee as provided in this section. The licensee or broker shall answer all reasonable investigative questions of the commission, and **must make available, promptly upon request, any and all records to the commission at the licensee's own cost** and at the location or in the manner requested by the commission. (Emphasis added).

Given the facts provided to the Hotline, Agent has been asked by IREC to turn over documents from his construction and development corporation along with his brokerage, because IREC suspects he was acting as a real estate agent while not being licensed. IREC is able to examine any and all documents it feels is relevant to its investigation. It is the Hotline's recommendation that the Agent turn over everything requested by IREC, so that the Agent doesn't get reprimanded for non-compliance with IREC's request.