The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2017

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WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes

The responses contained in the 2017 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2017. 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 2018 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2017 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho REALTORS® "RE" forms, which may reflect the 2018 legislative changes to the law.

TABLE OF CONTENTS

TOPIC	PAGE
AGENCY/LICENSE LAW	
What are a licensee's obligations if they feel a Representation Agreement has been interfered with?	1
What are a licensee's duties if their client/customer does not disclose an adverse material fact?	2
Can brokerages have "pocket listings?"	3
COMMISSIONS AND FEES	
Another agent is demanding the commission. How should licensee proceed?	5
If a Representation Agreement expires prior to the transaction closing, would agent not be entitled to commission?	5
What is the proper way to document a commission reduction?	6
Is a Seller obligated to pay the cancellation fee if a line on the Representation Agreement is left blank?	6
Can a client/customer or agent change the terms of a Representation Agreement after closing?	6
CONTRACTS	
Would agent be entitled to a commission if Buyer purchased a property type other than what is checked on the Representation Agreement?	7
Can Seller relist property without having Buyer's signature on the RE-20?	8
Can a Buyer terminate and receive earnest money back if Seller is selling property "as is?"	8
Who pays the appraisal fee if the transaction falls apart?	9
Can Buyer terminate and receive earnest money back if one of several appraisals came in below purchase price?	10
Can a Buyer terminate a contract if they do not sell their home?	10
Can requested repairs be sent in an email, rather than a RE-10?	11
What is the best practice when assigned contracts?	11
Can Seller rescind their counter offer and accept Buyer's original offer?	12
Is a party obligated to pay the entire amount stated in the Costs Paid By section?	12
Does the inspection timeframe include the CC&Rs?	13
The parties have decided to revive an expired contract. How should it be documented?	13
What are a Seller's liabilities if they breach a contract?	14
Buyer and Seller want to execute a contract for the roof repair to survive past closing. Can they do this?	14
Do both parties' signatures on a counter offer create a binding contract?	16
What can a Buyer do if they are not satisfied with how Seller repaired requested items?	16
Is not providing the RE-10 to lender a double contract circumstance?	17
Buyer did not respond to Seller's RE-10. Where does that leave the transaction?	18
Is a contract valid if a certain contingency is no longer possible to meet?	18

DISCLOSURE	
Can a tenant fill out the RE-25 instead of the Seller?	19
Does a sex offender living in the neighborhood need to be disclosed?	19
If Seller has a Power of Attorney, is Seller exempt from RE-25 disclosures?	21
Does a disgruntled neighbor's complaints about the property need to be disclosed?	21
Is a Seller that has never occupied the property exempt from the RE-25?	16
DUTIES TO CLIENTS AND CUSTOMERS	
What are a brokerage's obligations regarding confidential information after the transaction has closed?	22
Does Brokerage need to cooperate if the Police ask to see a transaction file?	23
If the earnest money becomes nonrefundable after the inspection period, does Buyer get it back based upon other contingencies in the contract?	24
What is the appropriate box to check if Buyer delivers earnest money prior to the date stated in the contract?	25
What are the responsible broker's obligations when the parties have an earnest money dispute?	25
FORMS	
When does the RE-18 go into effect?	26
Can Seller rescind their acceptance and addendum prior to Buyer responding?	27
What is the proper way to use the RE-23?	27
What is the proper way to use the Late Acceptance clause?	28
Are the Additional Contingencies listed in the RE-24 separate from the inspection contingencies?	29
Should agents be filling out blank day lines or should they rely on the default stated after the blank line?	29
What constitutes "notice" in the RE-18?	29
Can Seller object to Buyer assigning the contract?	30
Should the RE-10 be used for anything other than its stated purpose?	31
MISCELLANEOUS	
Does Seller or Seller's Power of Attorney have the authority to control the transaction?	31
Can on property be split into two transactions?	32
Does Buyer need to show proof of funds in a rent to own situation?	32
Is there any way to stop a foreclosure sale?	32
Is there any recourse if a neighbor interferes with a transaction?	33

AGENCY/LICENSE LAW

What are a licensee's obligations if they feel a Representation Agreement has been interfered with?

QUESTION: Brokerage had a valid exclusive Representation Agreement with a client to sell a piece of commercial property. After expending many hours over several months attempting to sell her client's real property, Broker's client was contacted by another brokerage who she believes induced her client to terminate her exclusive Representation Agreement. Broker questions if the Representation Agreement is a legally binding contract and if there is any law in Idaho preventing interference with contracts. Broker also questions if there are REALTOR® standards which relate to this type of activity.

RESPONSE: The standard Idaho REALTOR® Form RE-16 titled Seller Representation Agreement (Exclusive Right to Represent), when properly executed, is a valid and legally binding contract. In addition, the state of Idaho is one of the jurisdictions that allows recovery of damages pursuant to tortious interference with a contract. In Idaho, the framework for a case of tortious interference is as follows:

> A *prima facie* case of tortious interference with contract requires a plaintiff to prove:
> (a) the existence of a contract; (b) knowledge of the contract on the part of the defendant; (c) intentional interference causing a breach of the contract; and (d) injury to plaintiff resulting from the breach. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 283–84 (hereinafter "*Bliss*") (citing *Barlow v. Int'l Harvester Co.*, 95 Idaho 881, 893 (1974)).
>
> *Rocky Mountain Med. Mgmt., LLC v. LHP Hosp. Grp., Inc.*, No. 4:13-CV-00064-EJL, 2013 WL 5469890, at *6 (D. Idaho Sept. 30, 2013).

While these cases are at times hard to prove due to the causation element, under the right circumstances, a victim of tortious interference is certainly entitled to recovery under Idaho law.

Broker should consult brokerage's legal counsel to determine if it is appropriate to pursue its client and/or the brokerage who may or may not have interfered with the exclusive right of representation.

In answer to Broker's second question regarding REALTOR® ethical standards, the *Code of Ethics of Standards of Practice of the National Association of REALTORS®* does have language dealing with this type of circumstance:

> REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other Realtors® have with clients.
>
> Article 16, *Code of Ethics.*

The Code of Ethics also provides certain standards of practice interpreting Article 16, which could be applicable to Broker's situation, specifically:

> REALTORS® shall not solicit buyer/tenant agreements from buyers/tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a REALTOR®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the REALTOR® may contact the buyer/tenant to secure such information and may discuss the terms upon which the REALTOR® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement.
>
> Standard of Practice 16-5, *Code of Ethics*.
>
> When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement.
>
> Standard of Practice 16-6, *Code of Ethics*.

If Broker believes that another REALTOR® has violated the Code of Ethics, Broker can call her local REALTOR® Association who will advise her on the procedures for filings an ethics complaint. The Hotline does not determine or offer advice as to whether or not any particular circumstance rises to an ethics violation. Ultimately, whether or not there has been an ethical violation will be determined by a panel of REALTORS® after hearing all the facts of any given circumstance.

What are a licensee's duties if their client/customer does not disclose an adverse material fact?

QUESTION: Broker called the Hotline wondering what a licensee's duties are if they have a client or customer who has decided not to disclose an adverse material fact.

RESPONSE: A licensee's obligations to maintain confidential client information do not extend to creating a privilege in criminal matters. Idaho Code § 54-2087(6) states:

> To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:
> (a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;

(b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;
(c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client information obtained during the first representation cannot be given to the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;
(d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings. (Emphasis added).

Further, fraudulent behavior is exempted from the definition of confidential client information:

"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. 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.

Idaho Code § 54-2083(6). (Emphasis added).

Can brokerages have "pocket listings?"

QUESTION: Broker has encountered circumstances where other brokerages in her market area are taking so-called "pocket listings" and/or advertising properties as "coming soon." Broker questions if other brokerages should be using these types of listings to give the listing brokerage a better chance to act as dual agent on a transaction.

RESPONSE: No. Any brokerage that engages in this type of activity to increase their odds of acting as a dual agent is in violation of Idaho License Law and the REALTOR® Code of Ethics. Attached to this response is a guideline published by the Idaho Real Estate Commission addressing coming-soon listings. This guideline provides a very good outline of how a brokerage can run afoul of Idaho law in utilizing these types of listings. In addition to the IREC guideline,

brokers who are REALTORS® are bound by the NAR Code of Ethics, and the very first article states:

> When representing a buyer, seller, landlord, tenant, or other client as an agent, Realtors® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve Realtors® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, Realtors® remain obligated to treat all parties honestly.
>
> NAR Code of Ethics Article I.

If a listing brokerage is stalling or delaying publishing a listing without an otherwise legitimate cause, even by one day, that brokerage has placed its interests above those of its client.

Further, brokers and agents who are participants or subscribers of multiple listing services can also be violating the rules and regulations pertaining to the MLS if they engage in this type of activity. All brokers should be aware that even if properties are not published in the MLS, they are still required to be filed with the MLS within a certain time of taking the listing. Virtually all MLS's require a certification signed by the seller instructing a broker not to publish a property within the MLS.

More specifically, the Brokers who practice within the Sun Valley MLS area should be aware that the Sun Valley MLS employs the following rules:

> Listings of real or personal property … which are listed subject to a real estate broker's license, and are located within the territorial jurisdiction of the multiple listing service, and are taken by participants on any legally valid marketing agreement shall be delivered to the multiple listing service within two (2) business days after all necessary signatures of seller(s) have been obtained.
>
> Sun Valley MLS Rules and Regulations, Section 1

The rules go on to specifically state:

> If the seller refuses to permit the listing to be disseminated by the service, the participant may then take the listing (office exclusive) and such listing shall be filed with the service but not disseminated to the participants. Filing of the listing should be accompanied by certification signed by the seller that he does not desire the listing to be disseminated by the service.
>
> Sun Valley MLS Rules and Regulations, Section 1.3

Brokers who take coming soon or pocket listings need to exercise extreme caution and ensure there is a legitimate reason for this type of listing to only create this type of listing with the seller's written consent.

COMMISSIONS & FEES

Another agent is demanding the commission. How should licensee proceed?

QUESTION: Broker entered into a Representation Agreement with Buyer only to find out another Broker is claiming Buyer had a previous Representation Agreement with him, and is demanding payment. Broker questions what to do to ensure the transaction stays on track and closes.

RESPONSE: Broker should advise Buyer that the closing agency can hold the Buyer's share of commissions in escrow until the two Brokers work out who is owed the commission. Broker is advised that the REALTOR® arbitration program may be available to resolve this type of dispute and Broker should contact Broker's local REALTOR® Board for more information on that program.

If Buyer questions her legal responsibility to pay under the other Representation Agreement, Broker should take care to not to provide Buyer legal advice. All Brokers involved should take care not to let the commission dispute interfere with closing.

If a Representation Agreement expires prior to the transaction closing, would agent not be entitled to commission?

QUESTION: Broker represents Buyer. Buyer is currently under contract to purchase a property that was entered into during the term of the Buyer Representation (RE-14) Agreement. Buyer is now trying to argue that the Representation Agreement has expired and therefore he does not have to pay a commission to the Broker. Broker questions if this is correct.

RESPONSE: Given the facts presented to the Hotline, Buyer and Broker's Representation Agreement has expired, but the Purchase and Sale Agreement was entered into during the term of the Agreement. Beginning on Line 142, the RE-14 states in relevant part:

> This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within ___ calendar days (ninety [90] if left blank) after this Agreement expires or is terminated.

Given that the contract was entered into during the original term of the Representation Agreement and that the Buyer is buying a property shown by the Broker within 90 days of the expiration of the Representation Agreement, the above cited language ensures that the brokerage will receive compensation. Further, if the property was listed in a MLS, MLS rules dictate that the brokerage who procured a purchaser ready, willing and able to purchase the property will receive compensation regardless of what the Representation Agreement states.

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What is the proper way to document a commission reduction?

QUESTION: Agent called the Hotline to question how an agent, in this case the Buyer's agent, should document a reduction in their commission.

RESPONSE: The best practice for a Buyer's agent to change their commission would be to use the Broker Agreement Addendum (RE-16A) and fill out the appropriate section relating to the Brokerage Fee. Another option the agent has is to agree with Brokerage's client to rescind the Representation Agreement (RE-14) that is currently in effect and create a new one with the new fee reflected.

Note that certain MLS's have rules and regulations regarding commission payments. Due to the varied rules throughout the State, the Hotline does not normally comment on MLS rules and regulations. Brokers are encouraged to review the same in their applicable jurisdictions.

Is a Seller obligated to pay the cancellation fee if a line on the Representation Agreement is left blank?

QUESTION: Broker had a Representation Agreement (RE-16) with a client. Client decided to work with a different brokerage and terminated the RE-16. The Agreement stated that Seller is to pay brokerage a 1% cancellation fee if Seller terminates prior to the contract expiration date. Broker questions if Seller is liable for the cancellation fee if the second line in Section 6(E) was left blank when the Agreement was executed.

RESPONSE: Section 6(E) of the RE-16 states:

> This is a contract for a specific term. In the event SELLER breaches this representation agreement by terminating it prior to its expiration, said termination shall be deemed to be wrongful interference which prevented Broker from performing Broker's duties hereunder and as a special condition of this agreement SELLER shall be liable to Broker for a cancellation fee equal to _____% of the PRICE enumerated in Section 4 above **or** $_____. This cancellation fee is only available if Broker is not compensated under Sections 6A or 6B above. (Emphasis added).

According to the facts presented to the Hotline, the contract in question stated that Seller would pay 1% of the purchase price and the other line was left blank. Agents have two options when filling out this section, either write in a percentage of the purchase price or a dollar amount. If both lines were filled out it would create an ambiguity. Seller agreed to pay 1% of the purchase price in the event of a termination when Seller signed the RE-16.

Can a client/customer or agent change the terms of a Representation Agreement after closing?

QUESTION: Broker has two agents who co-listed a property. The transaction has closed, and now one of the agents is allegedly attempting to amend their Representation

Agreement. Broker questions if she has the ability to disburse commissions based on the Representation Agreement, regardless of an agent's or client's demands or requests to change the terms of a Representation Agreement.

RESPONSE: A Representation Agreement is a legal contract between the Seller and the Broker, not the individual agent. The standard State form reads as follows:

> SELLER retains _____ Broker of _____ as SELLER'S exclusive Broker to sell, lease, or exchange the property described in Section 2 below, during the term of this agreement and on any additional terms hereafter set forth.

Given the facts presented to the Hotline, the Seller and the two agents executed a RE-16 that stated Seller would pay the Brokerage a certain percentage of the purchase price upon the successful closing of the transaction. The Seller and Brokerage are in a legally binding contract and Seller and/or an agent working the transaction cannot unilaterally change the already agreed upon fee without the Brokerage agreeing to it in writing.

Broker's split of the commission between the co-listing agents is a matter of internal Brokerage policy. A client cannot control internal payments within the Brokerage and an agent cannot alter a contract that is between the Brokerage and client.

CONTRACTS

Would agent be entitled to a commission if Buyer purchased a property type other than what is checked on the Representation Agreement?

QUESTION: Agent represented the Buyer. The Buyer Representation Agreement stated that agent would help Buyer find a "Residential" property, according to the box that was checked. Buyer ended up purchasing a vacant lot which Buyer plans to build a house on. Agent believes she should represent the Buyer during the build, and get a commission for the new construction because the executed Buyer Representation Agreement states the contract is for "Residential" property. Agent's Broker called the Hotline to question whether or not the Buyer Representation Agreement would still be in effect during the construction of Buyer's home.

RESPONSE: It is unlikely that the Buyer Representation Agreement in question would still be in effect after the vacant lot transaction closed. Although Buyer and Agent executed a contract for residential property. The RE-14 Section 1 states in relevant part:

> BUYER retains _____ Broker of _____ as exclusive Buyer Broker (hereinafter referred to as Broker), where the BUYER is represented by one Broker only for time herein set forth and for the express purpose of Representing BUYER in the purchase, lease, or optioning of real property.

And further, Section 2 states:

> **TERM OF AGREEMENT:** This BUYER Representation Agreement (herein after referred to as Agreement) is in force from date_____ and will expire at 11:59 p.m. on date_____, or upon closing of escrow of such property purchased through this agreement whichever is sooner.

Regardless of which box was checked, the above stated language would likely mean the Agreement ends when any transaction closes whereby the Selling brokerage gets paid. Further, an agent typically needs to work out a separate agreement with the builder or property owner if they want to be compensated for overseeing a new construction project. Supervising the construction of a home is technically not a regulated real estate transaction. This can be different if the property purchased is pre-sold new construction.

Can Seller relist property without having Buyer's signature on the RE-20?

QUESTION: Broker represents the Seller. Seller wants to terminate because Buyer has allegedly used fraudulent documents throughout the transaction, including forged lender approval letters and NSF checks. Broker questions what to do if they are unable to get Buyer's signature on the RE-20 and questions if Seller can demand the earnest money even though no earnest money was actually deposited.

RESPONSE: Having both Buyer and Seller signatures on the RE-20 is best practice, but it is not required. The purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may assert. Broker's file should reflect that she sent the RE-20 with Seller's signature to the Buyer's agent or other suitable documentation sufficient to notify Buyer of Seller's termination. Broker can relist the property and should direct client to private legal counsel or to the small claims court to resolve the earnest money dispute.

Can a Buyer terminate and receive earnest money back if Seller is selling property "as is?"

QUESTION: Broker represents Buyer on a For Sale by Owner property. Seller did not want to do any repairs, so Buyer's agent wrote into the contract in Other Terms and Conditions (RE-21 Section 4) that the property was being sold as is and that the inspection was just for Buyer's information. Buyer wants to terminate based on an unsatisfactory inspection and now the parties are in dispute over the earnest money. Broker questions if the agent's language created an ambiguity.

RESPONSE: Black's Law Dictionary defines ambiguity as:

> Doubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, esp. by reason of doubleness of interpretation.
>
> Black's Law Dictionary 97 (10th ed. 2014).

Given the facts presented to the Hotline, Seller and Buyer had two different interpretations as to what the "as is" language meant. Seller believed it meant Buyer cannot terminate based on an

unsatisfactory inspection and Buyer thought it meant Seller was not going to do any repairs but that Buyer could still walk away with earnest money if the inspection was unsatisfactory. The language that the agent used combined with the "boiler plate" inspection language in the RE-21 probably was not clear and thus created an ambiguity. It is always best practice to make additional terms as specific as possible, and to always detail exactly what is to happen to the earnest money if either party terminates. This circumstance was compounded by agent not using an Addendum, which states that the Addendum terms will supersede the Purchase and Sale Agreement.

However, the Hotline does not get involved in disputes between the Buyer and Seller. Given that the parties have disputed earnest money, the responsible broker has the following options:

> DISPUTED EARNEST MONEY. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and
> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.
>
> Idaho Code § 54-2047.

Who pays the appraisal fee if the transaction falls apart?

QUESTION: Broker represents Seller. Seller was under contract and had agreed to pay for the lender required appraisal. The property did not meet the necessary appraisal value and therefore Buyer did not get financing. The parties executed a RE-20 and terminated the contract. The appraisal fee was never paid and Broker questions if Seller is still responsible for this fee.

RESPONSE: The RE-20 states in relevant part:

> The undersigned BUYER and SELLER agree that the above real estate Contract WILL NOT be completed and hereby mutually release each other from all further obligations to buy, sell or exchange under the Contract and all related documents, and **from all claims, actions, and demands which each**

> **may have against the other by reason of said Contract**. It is the intent of this agreement that all rights and obligations arising out of said Contract are null and void. BUYER and SELLER further agree to release brokers and their associates from any claims, actions and demands.

The parties agreed to release each other from the contractual obligations, making all the terms of the Purchase and Sale Agreement null and void. Thus, it is unlikely that any party or entity could legally require payment of the appraisal fee from Seller.

Can Buyer terminate and receive earnest money back if one of several appraisals came in below purchase price?

QUESTION: Broker represents Buyer. Buyer has had several appraisals completed, all have come in at different numbers. Some came in below the purchase price, others came in at or above the purchase price. Buyer wants to know if the contract can be canceled and earnest money returned based on the finance contingency in the contract.

RESPONSE: The financing contingency section (Section 3) of the RE-21 states in relevant part:

> **If an appraisal is required by lender, the PROPERTY must appraise at not less than purchase price** or BUYER'S Earnest Money shall be returned at BUYER'S request.

Given the facts presented to the Hotline, lender required an appraisal of the property. Buyer elected to have several appraisals, two of which came back equal to or greater than the contract purchase price. Therefore, Buyer is likely not able to back out of the contract based on the financing contingency.

However, if Buyer wants to dispute the appraisal values that came in above the contract purchase price, he would have to hire private legal counsel to do so. The Hotline does not get involved in Buyer and Seller disputes. Real estate licensees cannot inform clients of their legal rights. Broker should instruct client to retain competent legal counsel in this complex appraisal value matter.

Can a Buyer terminate a contract if they do not sell their home?

QUESTION: Broker represents Buyer. The contract in question states that the offer is contingent upon the successful close of Buyer's commercial property on or before June 30, 2017. Broker questions if Seller has the right to cancel the Purchase and sale Agreement on July 1, 2017 if the Buyer's property does not close.

RESPONSE: The contingency language referenced above would give either party the right to cancel the contract on July 1st if the Buyer's commercial property does not close. The parties should execute an addendum to extend that contingency date if they want to continue with the transaction.

Can requested repairs be sent in an email, rather than a RE-10?

QUESTION: Brokerage represents the Buyer. Buyer conducted inspections and Buyer's agent emailed the Seller's agent a written list of requested repairs within the strict time period. The Buyer's actual signed RE-10 was delivered to Seller past the inspection timeframe. Broker questions if the requested repairs need to be delivered on a signed RE-10 or if an email is sufficient.

RESPONSE: The Purchase and Sale Agreement (RE-21) Section 10(A) states in relevant part:

> Unless otherwise addressed, 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 contract only states that the Buyer must submit written notice to Seller. An email would almost always constitute written notice. Best practice is to use the RE-10, but it is not required. If Buyer's agent emailed the Seller a list of requested repairs within the strict time period, the parties would likely still be under contract.

What is the best practice when assigning contracts?

QUESTION: Broker represents the Seller. Seller has an existing lease to purchase contract with Buyer 1. Buyer 2 wants to purchase Buyer 1's interest and take over the contract. Broker questions if the original contract needs to be terminated and a new contract between Buyer 2 and Seller be executed.

RESPONSE: The original Purchase and Sale Agreement should not be terminated because Buyer 2 is "assuming" or taking over that contract. The Assignment of Buyer's Rights Form (RE-29) was created for this exact purpose. This form states:

> ANY ASSIGNMENT HEREUNDER DOES NOT ALTER THE TERMS OF THE PURCHASE AND SALE AGREEMENT BETWEEN THE BUYER AND SELLER AND/OR EARNEST MONEY DEPOSITED.

Further, it states:

> Assignor acknowledges that this assignment to Assignee does not relieve Assignor of his/her obligations to the Seller under the Purchase and Sale Agreement executed by Assignor and Seller. In an instance where Assignee fails to perform under the Purchase and Sale Agreement, Seller's legal recourse, if any, may remain against Assignor. Assignee acknowledges that Assignor will have the right to pursue all lawful remedies against Assignee in the event that Assignee defaults in its performance under the assigned Purchase and Sale Agreement.

Buyer 1 and Buyer 2 would need to execute the RE-29 in order to assign the original contract to Buyer 2. Once the RE-29 has been signed, Buyer 2 steps into the shoes of Buyer 1 and assumes the responsibilities and obligations under the original contract; therefore, there would be no need for a new contract between Buyer 2 and Seller.

Can Seller rescind their counter offer and accept Buyer's original offer?

QUESTION: Broker represents Buyer. Buyer tendered an offer to Seller; Seller responded by signing the RE-21 but checked the box that the acceptance was subject to the attached counter offer. Buyer rejected the terms of the counter offer. If Seller were to rescind the counter offer and accept the terms of the Buyer's original offer, would the parties be in a legally binding contract?

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

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

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

Is a party obligated to pay the entire amount stated in the Costs Paid By section?

QUESTION: Broker called to question how the 2017 forms change in the Costs Paid By Section (Section 17) of the Purchase and Sale Agreement modifies Seller's responsibilities to pay closing costs.

RESPONSE: While the 2017 version of the forms contained a change to this section, the more material change was in 2015. The previous version of the Costs Paid By Section read as follows:

> Upon closing SELLER agrees to pay up to EITHER _____% (N/A if left blank) of the purchase price OR $_____ (N/A if left blank) of

> lender-approved BUYER'S closing costs, lender fees, and prepaid costs which includes but is not limited to those items in BUYER columns marked below.

The current 2017 version states:

> Upon closing SELLER agrees to pay ☐_____% of the purchase price OR ☐$_____ (dollar amount) (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees, and prepaid costs which include but are not limited to those items in BUYER columns marked below. This concession can also be used for any other expense not related to financing at the BUYER's discretion.

In the current version if this section is filled out, Seller contractually agreed to pay the entire amount listed in either of the blank lines, even if the closing costs end up being less than the amount listed. For example, if Seller agrees to pay 3% of the purchase price of Buyer's fees and costs but those costs only equal 2% of the purchase price, Seller would still be responsible for an additional 1% of Buyer's other expenses. The removal of the words "up to" in 2015 eliminated Seller's right to pay less than the full amount stated. The addition of line 238 in 2017 clarified that.

The Hotline does not get involved in disputes between Buyer and Seller. Brokers on both sides of the transaction may want to advise their clients to seek independent legal counsel if there is a dispute over what was contractually agreed to regarding closing costs or expenses.

Does the inspection timeframe include the CC&Rs?

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

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

The parties have decided to revive an expired contract. How should it be documented?

QUESTION: Broker called to ask what the proper procedure would be if one party terminates a contract but the parties continue to negotiate after the termination and decide to go back under contract. The example given to the Hotline was if a Buyer were to complete

inspections and send a RE-10 to the Seller, Seller returns a RE-10 only agreeing to fix some of the items requested, and then Buyer terminates because they were not in agreement. Seller later agrees to repair all of the originally requested items. Buyer would like to accept the offer. How should this be documented?

RESPONSE: If the Buyer terminated, the contract is no longer valid. Best practices would be to enter into a new Purchase and Sale Agreement; however, at times there are practical considerations where that is not preferred. If the parties agree to revive the contract that was previously terminated, a new agreement could be executed by Buyer and Seller that memorializes all parties' intent to revive the previous contract where it left off.

Further, while the RE-10 is not intended to go back and forth multiple times until all parties come to an agreement, another way to avoid having to execute a document reviving the contract would be to have the Buyer and Seller agree to a longer negotiation period before the inspection timeframe is complete, that way they would still be under contract while they are negotiating the repairs. In order to do this, the parties should document it in writing before the deadlines expire.

What are a Seller's liabilities if they breach a contract?

QUESTION: Broker represents Seller. Seller might want to terminate the contract he is currently under, and Broker wants to know what liabilities Seller could face.

RESPONSE: If a Seller defaults on a valid Purchase and Sale Agreement, Section 29 of the RE-21 will control. It states in relevant part:

> If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, appraisals, credit report fees, inspection fees, brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.

As stated above, the Seller is responsible for more than just returning the earnest money to the Buyer. If the Seller defaults, Seller is responsible for the costs incurred before the contract was terminated, likely including brokerage fees per Section D of the Seller's Representation Agreement.

Buyer and Seller want to execute a contract for the roof repair to survive past closing. Can they do this?

QUESTION: Broker represents the Buyer. The parties want to close before a roof repair is completed and they want to execute an addendum that will survive past the closing date. How can they accomplish this? Broker also questions if a separate agreement between Buyer and Seller outside of the Purchase and Sale Agreement could be considered a double contract.

RESPONSE: Broker is correct to question if an addendum to the Purchase and Sale Agreement can surviving after closing. The RE-21 and any addendums typically merge into the deed under the merger doctrine summarized as follows:

> [T]he acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement.
>
> *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 378 (1966)

But there are exceptions:

> Where it is clear that the parties did not intend for a provision in a real estate contract to merge with a subsequently executed warranty deed, that provision shall not be deemed merged. As stated in the American Law Reports:
>
> > In all cases where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, it will be decisive. If not so expressed, the question is open to other evidence; and in the absence of any proof on the subject there is no presumption that either party, in giving or accepting a conveyance, intended to give up the benefit of covenants of which the conveyance was not a performance or satisfaction.... It is clear that the rule of merger does not apply where the plain intent of the parties is that a covenant in a contract should not be merged in the subsequently executed deed.
>
> *Fuller v. Dave Callister*, 150 Idaho 848, 854 (2011).

Best practice and to make the issue crystal clear, the parties should execute a separate agreement that details the roof repair. This is especially true since the roof repair is tied to warranty work and the Seller will be paying if the warranty claim is denied. Broker should advise client to seek private legal counsel to draft this document.

Further, a double contract is defined as:

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

> application is not made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.
>
> Idaho Code § 54-2004(23).

So long as the parties make the lender aware of the roof repair agreement, the additional contract between the parties cannot be considered a double contract.

Do both parties' signatures on a counter offer create a binding contract?

QUESTION: Agent represents the Seller. Given the facts presented to the Hotline, both parties apparently signed Counter Offers # 1-4, but the Seller has not signed the Purchase and Sale Agreement (RE-21). Buyer believes they are under contract but the Seller does not. Is the acceptance of the counter offers enough to have a binding contract?

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

> The parties accept **all** of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes… (Emphasis added).

Based on the above quoted language, the RE-13 Counter Offer incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with the provisions of the Counter Offer and signifies a "meeting of the minds." Since the Counter Offers incorporated all of the non-conflicting terms of the Purchase and Sale Agreement, the Buyer and Seller signing only the Counter Offers likely created a binding agreement between the parties, which includes the original terms of the Purchase and Sale Agreement.

Further, Agent should be aware that once a Counter Offer has been signed by both parties, any changes made to the Purchase and Sale Agreement after acceptance should be completed with an Addendum (RE-11), rather than a Counter Offer. According to the facts at hand, after Counter #1 was signed by both parties, Counter Offers # 2-4 would technically be Addendums. Agent should not instruct client to sign a Counter Offer unless they agree to all of the terms listed in said offer.

What can a Buyer do if they are not satisfied with how Seller repaired requested items?

QUESTION: Broker called the Hotline to question what a Buyer can do if they do not approve of the way Seller has completed the agreed upon RE-10 repairs.

RESPONSE: The RE-10 states in relevant part:

> SELLER will service, repair or replace, in a good and workmanlike manner, the following items on or in the property _____ business days (ten [10] if left blank) from final acceptance of this notice by all parties. 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.

The above cited language allows for Buyer to reinspect the condition of the repairs completed by Seller. If Buyer objects to the condition of the repairs, it must not be unreasonable. The term "unreasonable" would have to be determined on a case by case basis. If a Buyer feels that repairs have not been completed in a good and workmanlike manner, Broker should advise Buyer to seek legal counsel to help determine their rights and responsibilities.

Is not providing the RE-10 to lender a double contract circumstance?

QUESTION: Broker has experienced a few different lenders in the area who choose not to review the RE-10 and instead want the Buyer and Seller to settle any credits or payments for repairs outside closing. She questions if this would be a double contract.

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

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

A double contract is defined as follows:

> "Double contract" means two (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one (1) of which is not made known to the prospective loan underwriter or the loan guarantor, to enable the buyer to obtain a larger loan than the true sales price would allow, or to enable the buyer to qualify for a loan tht he or she otherwise could not obtain. An agreement or loan application is not made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.
>
> Idaho Code § 54-2004(23).

Given the facts presented to the Hotline, the lender is aware that the Buyer and Seller are going to settle the repairs and/or credits to Buyer outside of the transaction, so it would not fall under the definition of a double contract. Buyers and Sellers should absolutely always get proof in writing that the lender knew about the agreement and consented to it.

Buyer did not respond to Seller's RE-10. Where does that leave the transaction?

QUESTION: Broker represents Seller. Buyer sent a RE-10 with a list of requested repairs. Seller responded with a RE-10 that offered a credit, rather than agreeing to do the repairs. Buyer did not respond within the time period specified. Broker questions if the parties have agreed to move forward with the transaction as is since Buyer did not respond.

RESPONSE: The RE-21 Section 10(B) states in relevant part:

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

Given the facts presented to the Hotline, the Seller responded to Buyer's RE-10 requested repairs with an offer to credit the Buyer at closing, rather than complete the repairs. This would appear to be a written manifestation of Seller "not agreeing to correct BUYER's items," thus Section 10(B)(5) would apply. The Buyer did not respond to Seller's offer. The language cited above in Section 10(B)(5) states that if Buyer does not respond, Buyer has elected to proceed with the transaction without repairs or corrections, "other than for items which SELLER has otherwise agreed in writing to repair or correct." In this circumstance, there were no items which Seller agreed to repair or correct. There is nothing in paragraph 10(B)(5) that says a Seller must honor proposed reductions.

However, occasionally, equitable principles prevail in Court. Given that Seller agreed to reduce the purchase price, a Court could interpret that as an agreement to do some repairs under 10(B)(5). However, since the contract is vague in this regard, it would always be best practices for a Buyer to actively agree to Seller's concessions in writing to evidence the requisite meeting of the minds.

Is a contract valid if a certain contingency is no longer possible to meet?

QUESTION: Agent represents the Buyer. Buyer made an offer on Lot 1, owned by Seller 1, that was contingent upon Buyer purchasing Lot 2 from Seller 2. Seller 1 purchased Lot 2 from Seller 2 and offered to sell it to Buyer. Buyer's agent questions if they are still under contract for Lot 1 if meeting the contingency is no longer possible.

RESPONSE: According to the facts presented to the Hotline, the contract specifically stated that the sale was contingent upon Buyer getting Lot 2 from Seller 2 and identified Seller 2 by name. This language created a condition precedent otherwise known as a contingency. Idaho law summarizes:

> A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due. A condition precedent may be expressed in the parties' agreement. When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract. Where a party is the cause of the failure of a condition precedent, he cannot take advantage of the failure. Where a party has control over the happening of a condition precedent he must make a reasonable effort to cause the condition to happen.
>
> *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128 (2005). Internal citations omitted.

Seller 1 purchased Lot 2 from Seller 2. The contingency can no longer be met because Seller 2 no longer owns Lot 2. If the contingency cannot be met, Buyer can cancel the contract.

DISCLOSURE

Can a tenant fill out the RE-25 instead of Seller?

QUESTION: Broker represents the Seller. Seller has never lived in the property. Buyer's agent requested that the tenant fill out the property disclosure form. Broker has never heard of a tenant filling out the RE-25 so she called to see if it is something the Buyer can request.

RESPONSE: The RE-25 states:

> Section 55-2501, et seq., Idaho Code, requires **SELLERS** of residential real property to complete a property condition disclosure form and deliver a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) calendar days of transferor's acceptance of transferee's offer.

Only the Seller of the property is required to complete a property condition disclosure. Tenants are not subject to the terms of the contract between the Buyer and Seller and should not be filling out anything pertinent to the real property transaction.

It is also important to note that although Seller has never lived in the property, Seller is likely still required to fill out the RE-25. Owners of investment properties are not exempt from the disclosures and Seller will need to complete the RE-25 to the best of his or her ability.

Does a sex offender living in the neighborhood need to be disclosed?

QUESTION: Broker called to question whether or not a Seller and/or licensee need to disclose if they have knowledge of sex offenders living in the neighborhood or nearby.

RESPONSE: Idaho Code states:

> No 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. (Emphasis added).

Idaho Code § 55-2801 defines psychologically impacted real property as:

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

Given the above stated language, knowledge of a neighboring sex offender would not have to be disclosed.

This particular statute also discusses what steps to take if a potential Buyer specifically asks Seller and/or agent if they have knowledge of any nearby sex offenders:

> 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.

If Seller has a Power of Attorney, is Seller exempt from RE-25 disclosures?

QUESTION: Broker represents Seller who is in her nineties and suffers mild dementia. Her children have power of attorney. Broker questions if this means Seller is now exempt from filling out the RE-25.

RESPONSE: No, a power of attorney does not relieve Seller of Seller's duty to disclose. Seller would still be obligated to complete the RE-25. When someone has been given power of attorney they are acting in place of the principal, in this case the Seller, so they must conduct the transaction as if they were the Seller and the Seller does not fall under any of the statutory exemptions so they must fill out an RE-25. The children should sit down with their mother and ask her the questions listed in the RE-25 and fill it out to the best of their ability.

Does a disgruntled neighbor's complaints about the property need to be disclosed?

QUESTION: Broker called the Hotline to question whether or not a neighbor complaining about tree roots growing onto their property needs to be disclosed.

RESPONSE: Under Idaho law, licensees are required to disclose any "adverse material facts" known about the property. Idaho Code § 54-2083(1) defines an adverse material fact as:

> "Adverse material fact" means a fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.

The Hotline cannot determine what an adverse material fact is because it has to be done on a case by case basis. Brokers are required to decide for themselves whether or not any particular fact would rise to the level of an "adverse material fact" as defined by Idaho Code.

Under Idaho's property disclosure law (Idaho Code § 55-2501 *et. seq.*), Sellers of "residential real property" have an obligation to disclose various information to Buyers. This includes but is not limited to answering the question enumerated in Idaho Code § 55-2508(9) which states: "Any other problems, including legal, physical or other not listed above that you know concerning the property." In addition, Idaho Code § 55-2514 also states:

> CHAPTER DOES NOT RELIEVE SELLER OR HIS AGENT OF OBLIGATION TO DISCLOSE OTHER INFORMATION. Specification of items of information that must be disclosed in the property disclosure form as prescribed under sections 55-2506 and 55-2507, Idaho Code, does not limit and shall not be construed as limiting any obligation to disclose an item of information that is created by any other section of the Idaho Code or the common law of the state of Idaho. The disclosure requirements of this chapter do not bar and shall not be construed as barring the application of any legal equitable defense that a transferor of

> residential real property may assert in a civil action commenced against the transferor by a prospective or actual transferee of the property.

The Hotline does not advise Sellers or Buyers as to their legal obligations and recommends each retain its own legal counsel to provide legal advice, especially when it comes to mandatory disclosures. All Brokerages should do the same.

DUTIES

What are a brokerage's obligations regarding confidential information after the transaction has closed?

QUESTION: Brokerage represented both the Buyer and Seller in a closed transaction. Broker called the Hotline because Seller's attorney has contacted the Brokerage and requested that they provide documents pertinent to the transaction because the parties are now involved in litigation. Broker questions the Brokerage's obligations when it comes to providing documents, especially in light of their obligation to guard confidential client information.

RESPONSE: Idaho Code defines confidential client information as:

> "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. 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.
>
> Idaho Code § 54-2083(6).

Further, a licensee's duties to maintain confidential client information is outlined in Idaho Code § 54-2087(6). It states:

> To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:
> (a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;

> (b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;
> (c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client information obtained during the first representation cannot be given to the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;
> **(d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings.** (Emphasis added).

Confidential client communication is to be protected by the Brokerage; however, the information is not privileged and therefore may be obtained through litigation if production is compelled via subpoena. The only exemptions to a subpoena are governed by the Idaho Rules of Evidence:

> Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:
> (1) Refuse to be a witness;
> (2) Refuse to disclose any matter;
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.
>
> Idaho Rules of Evidence Rule 501.

If Brokerage does not feel comfortable disclosing confidential client communications requested by attorney, the Brokerage is within its rights not to do so. Brokerage can ask the requesting party to obtain a subpoena compelling the production. Brokerage should consult with Brokerage legal counsel if it is served with a subpoena.

Does Brokerage need to cooperate if the Police ask to see a transaction file?

QUESTION: Brokerage represents Buyer. Buyer allegedly engaged in fraudulent activity during a transaction, including using forged lender approval letters and NSF checks. The police are now involved and Broker questions his obligations to keep information confidential during an investigation.

RESPONSE: A licensee's obligations to maintain confidential client information do not extend to creating a privilege in criminal matters. Idaho Code § 54-2087(6) states:

> To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:

> (a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;
> (b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;
> (c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client information obtained during the first representation cannot be given to the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;
> **(d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings.** (Emphasis added).

Further, fraudulent behavior is exempted from the definition of confidential client information:

> "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. 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.
>
> Idaho Code § 54-2083(6). (Emphasis added).

If the earnest money becomes nonrefundable after the inspection period, does Buyer get it back based upon other contingencies in the contract?

QUESTION: Broker called with a question regarding nonrefundable earnest money. She has seen a recent increase in addendums that make earnest money nonrefundable after the inspection period. Would a Buyer still be able to get their earnest money back if the house does

not appraise at or above purchase price, or would the nonrefundable addendum supersede the refund language in the finance contingency section?

RESPONSE: If both Buyer and Seller execute an addendum that states Buyer's earnest money becomes nonrefundable after the inspection period, it becomes nonrefundable, and the Buyer is likely not entitled to a return of the earnest money based upon other contingencies in the contract. The Addendum form (RE-11) contains language that specifically states that any terms in the addendum supersede those in the Purchase and Sale Agreement.

However, if the Buyer is using a FHA or VA loan to purchase the property, Buyer may be entitled to their earnest money back if the property does not appraise at or above the purchase price due to federally mandated rules that cannot be amended by a Buyer or Seller.

It is also important to note the distinction between receiving earnest money back and still having the contingency to allow a Buyer to cancel a Purchase and Sale Agreement. A simple clause stating earnest money becomes non-refundable will not alter the Buyer's right to cancel the contract based upon a contingency in the contract.

What is the appropriate box to check if Buyer delivers earnest money prior to the date stated in the contract?

QUESTION: In utilizing the new clause allowing delivery of earnest money after acceptance, Broker inquires as to the appropriate check boxes and language to use which will properly account for a Buyer delivering earnest money prior to the date stated in the Purchase and Sale Agreement and prior to acceptance.

RESPONSE: If the Purchase and Sale Agreement was completed checking the box "upon receipt," then Broker's obligation would be to deposit any early earnest money checks immediately upon receipt. If Seller does not accept the Purchase and Sale Agreement, the brokerage would then have to issue a check back to Buyer out of the brokerage trust account. In the alternative, the brokerage can use the "other" check box and include language similar to "earnest money to be deposited upon receipt and acceptance." Utilizing this alternate language would allow brokerage to receive an earnest money check early but not deposit it until such time as Seller accepted the Purchase and Sale Agreement. If Seller never accepts, brokerage could then return the undeposited check back to the Buyer. Broker should take care to still document receipt of the check in their ledger per IREC guidelines.

What are the responsible broker's obligations when the parties have an earnest money dispute?

QUESTION: Broker represents Buyer on an all cash offer. During the final walkthrough, Buyer decided not to go through with the transaction and terminated the contract. Both parties feel they are entitled to the earnest money. Broker is acting as the responsible broker and questions what to do with the earnest money.

RESPONSE: The Hotline does not get involved in disputes between the Buyer and Seller. According to the facts presented to the Hotline, Broker is acting as responsible broker in this transaction. The responsible broker has the following options in an earnest money dispute:

> DISPUTED EARNEST MONEY. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and
> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.
>
> Idaho Code § 54-2047.

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

FORMS

When does the RE-18 go into effect?

QUESTION: Broker called the Hotline to question when the RE-18 goes into effect, is it the date the Seller notifies the Buyer they moved into first position, or is it the date the Buyer acknowledges Seller's notice?

RESPONSE: The RE-18 is executed between a Seller and a Buyer in back-up position. Section 3 states:

> **NOTICE:** If the Offer in First Position fails to close, or if SELLER obtains knowledge that the Offer in First Position has been terminated, SELLER shall give written notice to BACK-UP BUYER within 7 calendar days of obtaining knowledge that the Offer in First Position will not close.

Further, the RE-18 Section 7 states:

> The timing of the parties' performance obligations under this Agreement, with the exception of paragraph 5 above, including time periods for

> inspection contingencies, covenants and other obligations shall not commence until SELLER delivers the written Notice referred to in paragraph 3 above.

Pursuant to the terms agreed to between the parties, the Purchase and Sale Agreement between Seller and back-up Buyer becomes binding upon Seller's notice to Buyer. All timelines in the Purchase and Sale Agreement would begin upon Seller's notice. No Buyer acknowledgment is required.

Can Seller rescind their acceptance and addendum prior to Buyer responding?

QUESTION: Broker represents Buyer. Buyer tendered an offer to Seller; Seller responded by signing the RE-21 but checked the box that the acceptance was subject to the attached addendum. Before the Buyer could respond to the addendum, Seller informed Buyer they were rescinding their acceptance, the proposed addendum and are taking another offer. Does Seller have the right to do this?

RESPONSE: In Idaho, offers are revocable at any time prior to acceptance. It is likely that Seller successfully withdrew their offer prior to Buyer accepting it. In Idaho, a tender of a counter offer that adds a new term or changes a term of the original offer constitutes rejection of the original offer in its entirety:

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

Given the facts presented to the Hotline, Seller's signature was subject to the attached addendum, which constituted a rejection of the original offer and therefore Seller was likely able to rescind their "new offer." The Buyer disputes that the addendum provided by Seller actually changed any terms. If that were the case, it may not be a "new offer," in which case Seller could not revoke it. However, the Hotline does not get involved in disputes between Buyers and Sellers. Brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

What is the proper way to use the RE-32?

QUESTION: Broker represents Buyer. Buyer submitted an offer, Seller responded to multiple potential buyers on a Multiple Counter Offer form (RE-32) that instructed all buyers to submit their highest and best offers. Broker's Buyer responded with their highest and best offer on a Counter Offer form (RE-13). Seller accepted said counter and Broker questions whether or

not Seller needs to sign the Final Acceptance Section of the original RE-32 in order to create a binding contract.

RESPONSE: Given the facts presented to the Hotline, it is not likely that Seller needs to sign that particular section of the RE-32 because it appears as though the form was used incorrectly in this case. The Seller's RE-32 just stated that all Buyers need to respond with their highest offers, it did not list any specific terms and therefore was not technically a counter offer. If the parties have a Counter Offer (RE-13) signed and accepted by both the Buyer and Seller, the parties have a legally binding contract.

The Multiple Counter Offer (RE-32) is intended to be used as follows: The Seller has presumably received offers from multiple Buyers. Seller uses the RE-32 to counter all offers with specific terms modifying the original offers. For example, if a Buyer's RE-21 states a purchase price of $340,000 and an earnest money deposit of $4,000, then Seller's RE-32 might state "Buyer will purchase the property for $350,000 and deposit $5,000 in earnest money." Seller then signs the form on Line 49. If the Buyer accepts this counter offer, they would sign Buyer's Acceptance (Line 53) and return it to the Seller but it is not a binding contract yet. It only becomes binding if Seller signs the form a second time under Final Acceptance Section (Line 62). This is done intentionally to prevent Seller from two regular Counter Offers being accepted at the same time and thus creating two legally binding contracts.

What is the proper way to use the Late Acceptance clause?

QUESTION: Broker called the Hotline regarding the proper use of the Late Acceptance clause in the Purchase and Sale Agreement (RE-21).

RESPONSE: The Purchase and Sale Agreement has a Section regarding Acceptance deadlines. It states:

> 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.

Pursuant to contract law, an expired offer can no longer be accepted. Therefore, a clause was added to allow an opportunity to revive an expired offer through the mutual consent of all parties. Lines 445-447 of the RE-21 state:

> 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 (_____)(_____) Date _____.
> If BUYER timely approves of SELLER's late acceptance, an initialed copy of this page shall be immediately delivered to SELLER.

This late acceptance section is to be used in the event that a Seller wants to accept an offer after the deadline listed in Section 42 of Buyer's offer. Seller would then submit the signed offer back to the Buyer, in which case the Buyer then can accept Seller's signature by initialing the Late

Acceptance section, or choose not to revive the expired offer. The contract is only binding on the parties if Buyer initials this section or otherwise signifies his or her acceptance.

Are the Additional Contingencies listed in the RE-24 separate from the inspection contingencies?

QUESTION: Broker questions the Additional Contingencies and Costs Section 25 of the Vacant Land Purchase and Sale Agreement (RE-24) and whether or not these contingencies are separate from the inspection contingencies listed in Section 6 of the contract. If a Buyer releases its inspection contingency pursuant to Section 6, does Buyer also release the other contingencies listed in Section 25?

RESPONSE: The two contingency sections are treated as separate and distinct from one another. The inspection contingency referenced in Section 6 is called the "Buyer's Inspection Contingency" and is released after a Buyer performs the general inspections referenced in that section. The contingencies referenced in Section 25 are titled "Additional Contingencies" and are provided because these types of inspections typically take longer to complete than the usual general inspections referenced in Section 6.

Should agents be filling out the blank day lines or should they rely on the default stated after the blank line?

QUESTION: Broker has noticed that many agents, including Brokers, are not filling out the number of days for a certain time period because they are relying on the default days listed directly after the blank line (for example, "BUYER shall, within ___ business days (five [5] if left blank)…). Broker wonders if this is the correct way to fill out the forms. She also questions the proper way to amend any agreements originally drafted with the blank line method.

RESPONSE: Best practices are to always fill out the blank lines with the number of days intended for that time period. However, the Idaho REALTOR® Forms added the default number of days for each strict time period in the event something was overlooked. Agents should always address each timeline option with clients when preparing an offer. Then, even if the default timeline is adequate, place a number on the line. This will clearly evidence the parties had a deliberative meeting of the minds.

In the event the parties want to amend a line that was left blank, the Addendum (RE-11) can be utilized to make this change.

What constitutes "notice" in the RE-18?

QUESTION: Broker called the Hotline with a question regarding the term "notice" as used in the RE 18 and what constitutes notice. Broker further questioned who is required to be put on notice in order to begin the actions that are triggered by said notice – the brokerage, the agent for the party being 'noticed,' or the Buyer?

RESPONSE: The term "notice" is not defined in the Idaho REALTOR® Forms; however, Black's Law Dictionary, a standard commonly used by courts, defines giving and receiving notice as:

> A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when: (a) it comes to his attention; or (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.
>
> Black's Law Dictionary 1062 (6th ed. 1990).

As to whom the notice should go to, in most typical real estate transactions the Buyer has appointed Buyer's Broker to act as Buyer's agent to receive any and all communication on Buyer's behalf. The law governing principals and agents will imply that all communications given to Buyer's Broker (or Broker's agents) are legally received by the Buyer.

Can Seller object to Buyer assigning the contract?

QUESTION: Broker questions whether a Seller can object to Buyer assigning a contract to another Buyer.

RESPONSE: Section 38 of the Purchase and Sale Agreement (RE-21) states:

> ASSIGNMENT: This Agreement and any rights or interests created herein ☐ may ☐ may not be sold, transferred, or otherwise assigned.

If the "may" box is checked at the time of acceptance by both parties, the Buyer can transfer his or her interest in the contract to another Buyer, and Seller cannot object to the assignment. The Assignment of Buyer's Interest (RE-29) is designed to assist Buyers in assigning their interests. It is executed between Buyer 1 and Buyer 2.

It is important to note that an assignment does not completely release Buyer 1 from the terms of the Purchase and Sale Agreement. The RE-29 summarizes the law:

> Assignor acknowledges that this assignment to Assignee does not relieve Assignor of his/her obligations to the Seller under the Purchase and Sale Agreement executed by Assignor and Seller. In an instance where Assignee fails to perform under the Purchase and Sale Agreement, Seller's legal recourse, if any, may remain against Assignor. Assignee acknowledges that Assignor will have the right to pursue all lawful remedies against Assignee in the event that Assignee defaults in its performance under the assigned Purchase and Sale Agreement.

If Buyer 2 defaults, Buyer 1 could be liable for any damages caused by Buyer 2 defaulting under the terms of the Agreement.

Should the RE-10 be used for anything other than its stated purpose?

QUESTION: Brokerage represents both Buyer and Seller. Buyer needed more time to complete inspections, so Buyer's agent used the RE-10 to request an extension of time. Seller's agent told Buyer's agent that Seller likely would not have an issue with the extension, but Seller is unable to sign the RE-10 before it expires. Buyer's agent then used another RE-10 to terminate. Broker questions if the first RE-10 would be considered valid, and thus irrevocable, since it was only used to request an extension of time.

RESPONSE: The Purchase and Sale Agreement (RE-21) Section 10 states in relevant part:

> 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 RE-10 submitted by Buyer after the inspections are complete should contain either written notice of disapproved items or written notice of termination. Given the facts presented to the Hotline, the first RE-10 submitted by Buyer would not be considered a correct use of the form and should have been completed on an Addendum (RE-11). The RE-10 that requested an extension of time would not likely constitute the "written notice" required in the Purchase and Sale Agreement. Thus, the following RE-10 that terminated based on unsatisfactory inspections would be valid.

MISCELLANEOUS

Does Seller or Seller's Power of Attorney have the authority to control the transaction?

QUESTION: Broker represents a deeded owner who retained brokerage to list a parcel of residential property. At some point during the transaction, deeded owner's son presented Broker with a power of attorney which he believes trumps deeded owner's legal rights to sell the property. Broker questions who has the legal authority to control the transaction.

RESPONSE: In Idaho, a power of attorney issued by one individual (the principal) to another (the agent) does not limit, remove or take away any power of the principal. Rather, it simply allows the agent to act in the principal's place. A power of attorney does not give the agent the ability to contradict or disagree with the principal's instructions.

According to the facts presented to the Hotline, Broker has the legal obligation to follow instructions from the deeded owner/principal, even if those instructions are contradicted by the agent, and even if the agent disagrees with what the principal has instructed. In addition, if the agent is refusing to follow the instructions of the principal or the principle's real estate broker, then it may be helpful to have the principal revoke the power of attorney altogether. Broker

should advise principal to retain legal counsel to effectuate the termination and advise her of her legal rights. Further, if the agent occupies the real estate and does not allow proper access to the real estate at issue, agent could be found to be interfering with a valid legal contact.

In addition to the above, the facts conveyed to the Hotline indicate the power of attorney was executed at or around the time the deeded owner purchased the real estate in 2014. The power of attorney also includes language indicating it is for the specific purchase of the real estate. According to Idaho Code a power of attorney for a specific purpose will terminate when "the purpose of the power of attorney is accomplished." I.C. 15-12-110. It appears that the power of attorney has expired pursuant to its own terms.

Can one property be split into two transactions?

QUESTION: Broker represents both the Buyer and Seller. In order to get financing, Buyer's lender wants the property split up into two different transactions, one for the real property and another for the bare land. Broker questions if this can be done and the best way to accomplish it to ensure that both transactions close.

RESPONSE: This could be accomplished using language that makes both contracts conditional on the successful closing of the other transaction. Given that Broker is a dual agent and that this is a complex matter, best practice would be for Broker to instruct clients to hire competent legal counsel to draft the specific language needed for these transactions.

Does Buyer need to show proof of funds in a rent to own situation?

QUESTION: Broker represents the Seller. Buyer is a renter and is under a rent to own contract with the Seller. Buyer is claiming that he does not have to show proof of funds because it is a rent to own situation. Broker questions if this is accurate.

RESPONSE: Assuming the parties used a Purchase and Sale Agreement (RE-21), Section C(3) states in relevant part:

> **LOAN APPLICATION**: BUYER ☐has applied **OR** ☐shall apply for such loan(s). Within ____ business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with **a written confirmation showing lender approval of credit report, income verification, debt ratios, and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting**.

The Hotline does not know the specific terms of the rent to own document, but there is no language in the Purchase and Sale Agreement that exempts a Buyer from showing proof of funds simply because it is a rent to own contract. However, the Hotline does not get involved in disputes between Buyers and Sellers. Broker may wish to advise client to seek private legal counsel in this matter.

Is there any way to stop a foreclosure sale?

QUESTION: Broker had a client whose home was in foreclosure, prior to the foreclosure sale they found a buyer and went under contract. For one reason or another the bank did not stop the foreclosure process and the property was sold at a foreclosure sale. Broker questions the proper way to advise client and if there is anything that can be done.

RESPONSE: Whether or not the bank had the obligation to postpone the sale will be dependent upon the facts and circumstances unique to each bank loan and each foreclosure process. If the bank did have a legal obligation that was not performed then the Seller and Buyer to the transaction, and perhaps the successful bidder at the foreclosure sale may have legal recourse against the bank. In addition, depending on the type of loan the Seller had with the bank there may be an opportunity for Seller to redeem the property even after the foreclosure sale. Under any circumstance Broker should advise Seller to seek independent legal counsel to advise them of their rights. Broker should also keep Buyer's agent informed as to exactly what happened as it would in all likelihood constitute an adverse material fact which would require disclosure. As always Broker should remind clients that Brokerage cannot offer legal advice.

Is there any recourse if a neighbor interferes with a transaction?

QUESTION: Brokerage represents the Seller. They have an accepted offer and are nearing the closing date. The Seller and a neighbor have had previous problems regarding the cost of repairing a shared sewer pipe. This information was disclosed to the Buyer. Buyer elected to proceed with the transaction. Now, the neighbor has allegedly sent letters to Seller, Agent, Buyer and the title company informing them that she plans to take legal action to resolve the sewer issue. The parties have now extended the closing date in order to address the matter. Broker questions how to proceed and whether or not the brokerage would have any ability to recover its commission if the neighbor improperly causes the transaction to fail.

RESPONSE: Broker's agent was correct to disclose the previous dispute with the neighbor. A licensee always has the duty to disclose any adverse material fact known about the property. Given that the neighbor has threatened to take legal action, Agent should advise client to seek independent legal counsel.

As to the commission, Brokerage's contract is with the Seller. Pursuant to the terms of the standard representation contract, Broker is entitled to its commission if Brokerage "procures a purchaser ready, willing and able" to purchase the property. Once that happens, Brokerage is typically entitled to a commission. Contractually speaking, because Broker did not have a contract with anyone but Seller, Seller would typically have to pay Broker, then pursue the neighbor to recover the damages caused by neighbor's wrongful interference.

There are other non-contractual causes of action where under the right facts and circumstances, Brokerage could pursue the neighbor directly. However, due to the complexity of these causes of action and theories of recovery, Brokerage would need to consult its legal counsel to analyze the Brokerage's legal rights under this circumstance, as such complexities are beyond the scope of the Hotline services.