The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2018

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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 2018 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2018. 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 2019 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2018 "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 2019 legislative changes to the law.

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AGENCY/LICENSE LAW

What are a licensee's obligations if someone approaches them who is currently being represented by another brokerage?

QUESTION: Brokerage represents the Seller. A Buyer contacted the Broker after seeing their sign in the yard. Broker showed the property to the Buyer, and subsequently wrote up an offer and a Representation Agreement (RE-14). Buyer knowingly executed both the RE-21 and the RE-14. The Purchase and Sale Agreement was not successful. A new offer came in from a different brokerage who was claiming to represent the same Buyer. Broker questions if the Representation Agreement is a legally binding contract. Secondly, Broker also questions what a licensee's obligations are if a Buyer/Seller contacts a brokerage but is currently being represented by another brokerage.

RESPONSE: The standard Idaho REALTOR® Form RE-14 titled Buyer Representation Agreement (Exclusive Right to Represent), when knowingly and properly executed, is a valid legally binding contract. The Compensation of Broker Section (Section 14) details the various ways the brokerage can be compensated. Line 142 specifically states:

> 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, if the property acquired or leased by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term or extension of the term of this Agreement.

Given the facts presented to the Hotline, Buyer's Representation Agreement with the brokerage is still active, but even if it expired Brokerage #1 still "submitted" the property to Buyer in writing. If Buyer enters into the Purchase and Sale Agreement during the term of the Representation Agreement, Broker would likely still be entitled to the commission. If Buyer signed with another brokerage, that brokerage may also be entitled to a commission.

In answer to Broker's second question regarding how to proceed if a REALTOR® is contacted by a client who is currently being exclusively represented by someone else, 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.*

Idaho law also has similar language about interfering with business contracts. 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.

If Seller entrusted agent with the keys to the property, can agent give keys to Buyer after closing?

QUESTION: Broker recently had a station wherein Seller rented the property from Buyer after closing. Seller had given Broker the keys to the property to gain access for showing and other purposes. After closing, Buyer demanded that Broker give Buyer the keys because he now owns the property. She questions what her obligations are in this situation.

RESPONSE: Idaho law considers keys entrusted property. Idaho Code § 54-2041 states:

> (1) A licensed Idaho real estate broker shall be responsible for all moneys or property entrusted to that broker or to any licensee representing the broker…
> …
> (5) The real estate broker shall remain fully responsible and accountable for all entrusted moneys and property until a full accounting has been given to the parties involved.

Seller entrusted Broker with the keys (property) when they were given to her, therefore Seller must give Broker permission to give the keys to the Buyer, otherwise Broker could be liable for using the keys in a manner inconsistent with the trust relationship.

If two brokerages believe they have a Representation Agreement with the same Buyer, what is the best way for agents to resolve the dispute over the commission without holding up the sale?

QUESTION: Broker represents Seller. A Buyer contacted the brokerage to see the property. The brokerage ended up writing an offer for Buyer as a customer and now they are under contract. An agent from a different brokerage has contacted Broker and informed him that she has a Representation Agreement with the Buyer and is demanding payment. Buyer alleges he did not know he had a Representation Agreement with this agent. Broker questions what to do to ensure the transaction stays on track and closes.

RESPONSE: Broker may instruct the closing agency to hold the Buyer's share of commissions in escrow until the two brokerages 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 his 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.

What is the best way to document a co-listing?

QUESTION: Broker called the Hotline to question what forms should be used when two brokerages are going to co-list a property. Do both brokerages need to execute a Seller Representation Agreement (RE-16) with Seller?

RESPONSE: The RE-16 is not technically designed with co-listings in mind. The Broker Agreement Addendum (RE-16A) has a section that refers to a Co-Agent or Broker. One brokerage could execute the RE-16 with the Seller and then use the RE-16A to add the second brokerage. Lines 30 through 32 of the RE-16A state:

> The representation shall be a **co-listing** agreement with the following Brokerages _____ and _____, each Brokerage having the right to represent Buyer and/or Seller exclusive of all other Brokers.
> **(Note: If utilizing this option all Brokers must sign this agreement).**

The above cited section was added to make co-listings easier for brokerages, but occasionally a more detailed contract is required in which case it would be best practiced to have legal counsel create a transaction specific contract. Using the RE-16A would legally create a contract between all parties but to be certain that regulatory requirements are met, Broker may wish to check with IREC to see how they would like a co-listing documented for audit purposes.

COMMISSIONS & FEES

Can the commission amount be changed from what was indicated in the MLS on a RE-21?

QUESTION: Broker represents Buyer. In section 4 of the Purchase and Sale Agreement ("RE-21"), Broker added 0.5% commission over and above what was listed in the MLS to be paid to its brokerage. Broker questions if this practice is permitted.

RESPONSE: There is no direct prohibition against listing additional commissions in the RE-21. However, the practice is unusual. The RE-21 is a contract between the Buyer and Seller. Buyers and sellers can agree to whatever terms they choose, including a term to pay additional monies to a specified party. However, if an additional commission is listed in the RE-21, the Broker cannot directly enforce the agreement and collect the commission because the Broker is not a party to that contract. Instead, the Broker would have to enforce the contract through its client and/or through assignment or as a third-party beneficiary.

It is important to keep in mind that all other laws, rules and regulations regarding commissions have to be followed in addition to listing it in the RE-21 (i.e. commissions must be paid through the broker, full disclosure to all parties, fully executed representation agreement with client, etc.…). Further, the Hotline does not constitute the final authority on regulatory issues. Broker may want to review this practice with IREC for compliance.

If a property is not listed in the MLS and the Seller will not be paying the Buyer's agent a commission, does the listing agent need to disclose this information to any potential Buyers?

QUESTION: Broker represents Seller. The executed RE-16 states that the property shall not be listed in the Multiple Listing Service and that Seller will not be paying a commission to a Buyer's agent. They have received an offer and Broker questions if he needs to disclose this fact to the agent that represents the Buyer.

RESPONSE: Best practices would be for Broker to immediately disclose to the Buyer's agent the unique terms of the RE-16 with Seller so that Buyer and Buyer's agent are aware there will be no commission shared with a Buyer's brokerage.

The Legal Hotline cannot comment on specific MLS policies and therefore does not opine as to any MLS rules or regulations that may be implicated in this process.

CONTRACTS

Do Buyer and Seller signatures on a counter offer but not the RE-21 legally bind the parties?

QUESTION: Broker represents Buyer. Buyer sent offer to Seller and the parties negotiated with counter offers. The parties have executed a counter offer, but Seller has not yet delivered the executed RE-21. Broker questions if they have a binding contract without the RE-21.

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

> To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. **All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by the Counter Offer shall remain the same.**

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

Can a Buyer make on offer on a lot that does not yet have a legal description?

QUESTION: Broker represents Buyer who would like to make an offer on a lot in a subdivision that has not yet been formally recorded. Broker questions if they are able to make an offer on a property without a legal description.

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

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

Further, the Idaho Supreme Court has ruled:

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

If an offer to purchase or an accepted Purchase and Sale Agreement does not contain all of the above items, including a true and accurate legal description of the property, the contract is likely void.

Can Buyer terminate the contract if the property appraises below purchase price?

QUESTION: Agent represents Seller. The property appraised below purchase price. Seller asked for a copy of the appraisal. Buyer provided a copy and immediately terminated the contract. Agent questions if Buyer has the right to immediately terminate the Purchase and Sale Agreement.

RESPONSE: No. 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 **unless SELLER, at SELLER'S sole discretion, agrees to reduce the purchase price to meet the appraised value. SELLER shall be entitled to a copy of the appraisal and shall have 24 hours from receipt thereof to notify BUYER of any price reduction.** (Emphasis added).

Given the facts presented to the Hotline, Buyer terminated before 24 hours had passed. According to the language stated above, Buyer would need to give the Seller the full 24 hours to respond prior to termination.

Can Seller request proof of funds from a Buyer when Seller is financing the transaction?

QUESTION: Broker represents Seller. Buyer offered to purchase the property if Seller financed the transaction, which Seller accepted. Seller now feels that Buyer may not have the funds to go through with the transaction and has requested proof of sufficient funds. Buyer's agent argues that it is too late for Seller to request these items. Broker questions if this is correct.

RESPONSE: The RE-21 Financial Terms Section states:

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

> written confirmation of lender approval and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld.

Buyer should have provided Seller the documents listed above within 10 days, or however many days were entered in the blank line. If Buyer did not do this, Seller would have the option of terminating the agreement, but it had to be done within the strict time period allotted. Given the facts presented to the Hotline, Seller did not terminate the agreement within 3 days. It is unlikely that Seller can now request Buyer to provide those items at this point in the transaction.

Broker also informed the Hotline that the parties never executed a RE-17 and have not agreed on any terms regarding Seller financing the transaction. A court analyzing a contract that does not include any specific financial terms would have to determine if financial terms constituted "an essential term of the agreement." If the court finds it is and it is missing, then the parties may have trouble enforcing the contract. If the court finds that it is not, then it does not matter if it is in the contract or not and the parties would be obligated to perform under the contract.

What happens if the closing date falls on a legal holiday?

QUESTION: All parties entered into a Purchase and Sale Agreement which contained the Idaho REALTOR® standard form language "Closing shall be no later than _____." One of the parties filled February 19, 2018 in the blank and all parties signed the contract. Broker notes this day is a legal holiday and notes the existence of certain language pertaining to holidays in Sections 26 and 27 of the RE-21 (which define business days and calendar days). Broker questions whether the parties have an obligation to close on Friday, February 16th or Tuesday, February 20th.

RESPONSE: Section 35 of the RE-21 states:

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

The contract as filled in by the parties creates binding language that states "The closing shall be no later than February 19, 2019." The contract also places duties on the parties which are to be performed "on or before the closing date." While there is other language in the RE-21 referring to holidays and the interpretation of "business days," that section is not applicable to Section 35. Section 35 does not use the term "business days" or "calendar days," therefore it would be inappropriate to rely on either Section 26 or 27 when attempting to interpret when the parties must close. The fact of the matter is no interpretation is required. The contract clearly states that closing "shall be no later than February 19, 2018." There are no ambiguities in the contract, nor is it impossible for the parties to perform obligations stated in the contract. Specifically, the words "on or before" provide all parties with some leeway if the stated date should fall on a weekend or holiday. Pursuant to the contract, the parties could close on any date up to or

including February 19th. If there is something preventing the parties from closing "on" February 19th, then it is up to the parties to make sure that they fulfill their obligation by closing "before" February 19th. Best practices would be to never state a weekend or holiday in the blank.

What are first Buyer's obligations if the parties have agreed to use a Right to Continue to Market (RE-27) and a second offer comes in?

QUESTION: Broker represents the Buyer in a transaction that may include the use of a Right to Continue to Market (RE-27) addendum. Broker questions what is required of a first Buyer who is notified of a second Buyer making an offer. Specifically, can the first Buyer who is under contract on the sale of Buyer's other property meet the obligation stated in the addendum?

RESPONSE: Probably not. The Right to Continue to Market (RE-27) is designed to allow the Seller to continue to accept offers subsequent to accepting an initial offer; typically because the initial offer has at least one concerning contingency. The concerning contingency must be stated in the RE-27. If a second offer comes in that Seller finds more acceptable Seller must notify the initial Buyer that he would like to accept the second offer and cancel, or "bump," the initial contract. The initial Buyer then has 72 hours to waive or remove Buyer's contingencies or Buyer will lose his contract with Seller. If Buyer does choose to waive or remove the contingencies, then the addendum states:

> Buyer agrees to provide SELLER within _____ business days (two [2] if left blank) from waiver or removal of contingencies of this agreement by all parties' written confirmation of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement.

If the initial Buyer is relying on proceeds from the sale of another property, Buyer likely cannot provide the "written confirmation of sufficient funds" contemplated in the addendum, even though his other property is under contract. This is because a contract to buy a property is just that, a contract. It is not actual possession of the proceeds from the sale of the property. Contracts to purchase fall apart for many reasons, and often at the last minute. Brokers should take care not to remove contingencies that were placed in a contract in the first place to protect their clients. If a Buyer needs to sell another property to purchase a subsequent one then the purchase agreement should always contain a specific contingency clause allowing Buyer to cancel if the other property does not close.

Is a contract enforceable if Buyer cannot sell their home until after the contract closing date?

QUESTION: Buyer and Seller entered into a contract and signed RE-27 requiring Buyer to close on home on or before September 20, 2018. Buyer has contracted to sell his home but will not close until September 26, 2018. Broker questions whether the contract between Buyer and Seller is unenforceable because Buyer will not be able to close on the date specified by the RE-27.

RESPONSE: The contract is probably enforceable. "For a contract to exist, a distinct understanding that is common to both parties is necessary." *Wandering Trails, LLC v. Big Bite*

Excavation, Inc., 156 Idaho 586, 592, 329 P.3d 368, 374 (2014). "An enforceable contract must be complete, definite, and certain in all of the contract's material terms." *Id*. Failure to adhere to non-material terms does not constitute material breach. A material breach "touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Hull v. Giesler*, 156 Idaho 765, 774, 331 P.3d 507, 516 (2014). There is no material breach of contract where a party substantially performs." *Id*. Based on the information provided to the Hotline, Buyer closed on his home six days after the date listed in the RE-27 and well before the second closing. Although late, Buyer substantially performed his or her obligations pursuant to the contract between Buyer and Seller because Buyer was able to close on his home prior to the transaction between Buyer and Seller closing. Therefore, it is unlikely a material breach occurred and the contract between Buyer and Seller is still enforceable.

Can a Buyer refuse to sign closing documents until Seller is out of the home?

QUESTION: Approximately a week before closing Buyer has stated that he will refuse to sign any closing documents unless Seller is out of the home before he signs. Buyer believes that once Buyer signs the documents "it is his property." Broker questions if Buyer has the legal right to insist upon this under the standard terms of the RE-21.

RESPONSE: No, the Buyer cannot make this demand. Nothing in the standard RE-21 gives the Buyer the right to make demands upon the Seller that are not in the contract. According to the facts presented to the Hotline the parties are to sign the closing documents the day before closing and Section 37 of the RE-21 states that Buyer will be entitled to possession at 5:00 PM on the date of closing.

Pursuant to the contract the Buyer is only entitled to possession at 5:00 on the day of closing. He cannot demand the Seller be out of the premises until he has legal possession. If Buyer refuses to close he could be in breach of contract.

It appears Buyer does not completely understand the function of the closing company. The closing company has to act for both sides and cannot give Seller the proceeds without also delivering Buyer title to the property.

Can late acceptance of a contract be revoked?

QUESTION: Broker represents Seller. Seller accepted Buyer's offer after Seller's time period, so the Late Acceptance section was initialed and delivered to Buyer. Buyer now wants to renegotiate terms and Seller no longer wants to move forward with the transaction. Can Seller revoke the acceptance of the offer prior to Buyer initialing the Late Acceptance section?

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.

The language cited above indicates that the contract is not binding until the Buyer initials Seller's late acceptance. In Idaho, offers are revocable at any time prior to acceptance. It is likely that Seller could revoke their acceptance of the offer prior to Buyer "accepting" by initialing.

Further, if Buyer does not want to initial the late acceptance and decides to propose a counter offer, 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.
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> *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 43 (Ct. App. 2005).

Would the discovery of a septic tank that was not registered with the proper regulatory agency make a contract void?

QUESTION: Broker represents Buyer. The parties agreed that Seller would have the septic tank tested and pumped. During this process it was discovered that the septic tank was not registered with the proper regulatory agency. Broker questions if Seller still has the duty to test and pump the tank. Seller claims the contract is void due to this fact.

RESPONSE: A void contract is "a contract that is of no legal effect, so that there is really no contract in existence at all." Black's Law Dictionary 374 (9th ed. 2009), *Syringa Networks LLC v. Idaho Department of Admin* 159 Idaho 813 (2016). Contracts can be found void for several different reasons, the most common of which is that the contract lacks an essential element. According to the facts stated by Broker, there is no material element missing from the contract. Thus, it is more likely that the contract is "voidable" due to a misstatement by Seller which would allow Buyer to rescind the contract at Buyer's option:

> Rescission is an equitable remedy that totally abrogates the contract and restores the party to their original positions. Fraud on part of a Seller in

> inducing a purchaser to enter into a land sale contract renders the contract voidable and gives the purchaser the right to rescind.
>
> *McEnroe v. Morgan* 106 Idaho 326, 328 (App. 1984).

If the Buyer has the ability to rescind a contract, this remedy is optional at the choice of the Buyer. The Buyer may choose to proceed with the transaction regardless of the misrepresentation made by Seller. In such a case the Seller is required to perform all of its obligations under the contract. Therefore, Seller still has the obligation to test and pump the septic tank.

Do contract terms extend beyond the closing date?

QUESTION: Broker called the Hotline because she has been seeing many transactions wherein the time given for Seller to complete repairs extends past the closing date. Broker questions if this would survive past closing or if Seller would no longer be obligated to make those repairs once the transaction closed.

RESPONSE: Broker is correct to question if any terms of the Purchase and Sale Agreement can survive 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:
>
> > 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).

If it was the intent of the parties to have Seller repair the items after closing, the rule of merger would likely not apply until the repairs have been completed and approved by Buyer.

However, best practice would be to never put a deadline in a contract that is past the closing date.

Does boilerplate language in the forms supersede handwritten verbiage?

QUESTION: Broker called regarding a transaction wherein the Buyer and Seller have both signed the RE-10, but there was language added that said Buyer's inspection contingency is not removed. Would the boilerplate language of the RE-10 supersede the handwritten verbiage that states Buyer is not removing the contingency?

RESPONSE: The RE-10 states in relevant part:

> … the BUYER hereby removes the "Buyer's Inspection Contingency" as that term is defined in the Purchase and Sale Agreement.

According to the facts presented to the Hotline, the RE-10 in question stated that Buyer does not remove the inspection contingency. It appears that the contract contains an ambiguity. 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, Buyer and Seller have two different interpretations as to whether or not Buyer waived the inspection contingency. It is always best practice to make additional terms as specific as possible, and to always detail exactly what the intent of the parties is.

Does the other party need to acknowledge termination of the contract?

QUESTION: Broker questions if Seller needs to acknowledge Buyer's termination if Buyer uses the RE-10 to terminate after an unsatisfactory inspection.

RESPONSE: The RE-21 states:

> If BUYER does within the strict time period specified give to SELLER **[written notice of termination of this Agreement]** based on any unsatisfactory inspection, the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER.

According to the language stated above, Buyer terminating under the inspection contingency only has to give Seller "written notice of termination." Seller does not have to acknowledge Buyer's termination in order for the Purchase and Sale Agreement to be terminated.

Do timelines begin upon acceptance of the offer or upon delivery of the document back to the offeror?

QUESTION: Broker represents Buyer. Seller accepted the offer on April 4th but the contract was delivered back to Buyer on April 5th. Buyer had 5 days to conduct inspections. Buyer terminated due to unsatisfactory inspection on the 12th. Seller claims Buyer needed to terminate by the 11th because the offer was accepted on the 4th. Broker questions when the timelines listed in the Purchase and Sale Agreement start ticking, is it upon signature indicating acceptance of the offer or upon delivery of the document back to the offeror?

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

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

Given the facts presented to the Hotline, Seller signed Buyer's offer on April 4 but did not deliver the contract back to Buyer until April 5. Based on this sequence of events, acceptance was complete on April 5 and therefore the timelines in the RE-21 would not begin until the 6th at 8:00, the next business day. Buyer would have been within the 5-day timeframe when they terminated based on an unsatisfactory inspection.

Does a contract need a firm closing date in order to be legally binding?

QUESTION: Broker called regarding a contract that lists the closing date as 30 days after the sale of Buyer's property. Broker questions if a firm closing date is necessary in order to create a binding contract.

RESPONSE: Idaho Code 54-2051 requires specific items in a Purchase and Sale Agreement:

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

The closing date is not stated in this statute therefore it provides minimal guidance, and only through its silence. However, Idaho appellate courts have commented on the issue:

> At the outset we note that a contract for the sale of real property is not enforceable unless it is in writing. I.C. §§ 9–503, –505. A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty. For land sale contracts, the minimum requirements are typically the parties involved, the subject matter thereof, the price or consideration, a description of the property and all the essential terms of the agreement.
> …
> Because the contract in this case was subject to the statute of frauds, I.C. §§ 9–503, –505, gaps in essential terms cannot be filled by parol evidence.

> "When a written note or memorandum is sought to be introduced as evidence of an oral agreement falling within the statute of frauds, it must be specific and parol (oral) evidence is not admissible to establish essential provisions of the contract."
>
> *Lawrence v. Jones*, 124 Idaho 748, 750–51 (Ct. App. 1993) (Internal citations omitted).

However, the Courts have also said:

> The well-established law in Idaho is, "Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance." *Curzon v. Wells Cargo, Inc*., 86 Idaho 38, 43, 382 P.2d 906, 908 (1963).
>
> *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010)

Using the language stated above, a court analyzing a contract that states something less than a clear unequivocal closing date would have to determine if a closing date constitutes "an essential term of the agreement." If the court finds it is and it is missing, then the parties may have trouble enforcing the contract. If the court finds that it is not, then it does not matter if it is in the contract or not.

Would the parties to a commercial transaction be legally bound if the due diligence section of the contract was not filled out?

QUESTION: Brokerage is acting as a dual agency on a commercial property. The parties executed a RE-23 but Broker noticed that the "Due Diligence Deadline" in Section 6 had not been filled in. She questions if the parties have a legally binding agreement.

RESPONSE: Idaho Code § 54-2051 requires specific items in a Purchase and Sale Agreement:

> (4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:
> (a) All terms and conditions of the real estate transaction as directed by the buyer or seller;
> (b) The actual form and amount of the consideration received as earnest money;
> (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;

> (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
> (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;
> (f) All appropriate signatures and the dates of such signatures; and
> (g) A legal description of the property.

A due diligence deadline is not stated in this statute therefore it provides minimal guidance, and only through its silence. However, Idaho appellate courts have commented on the issue:

> At the outset we note that a contract for the sale of real property is not enforceable unless it is in writing. I.C. §§ 9–503, –505. A contract must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty. For land sale contracts, the minimum requirements are typically the parties involved, the subject matter thereof, the price or consideration, a description of the property and all the essential terms of the agreement.
> …
>
> Because the contract in this case was subject to the statute of frauds, I.C. §§ 9–503, –505, gaps in essential terms cannot be filled by parol evidence. "When a written note or memorandum is sought to be introduced as evidence of an oral agreement falling within the statute of frauds, it must be specific and parol (oral) evidence is not admissible to establish essential provisions of the contract."
>
> *Lawrence v. Jones*, 124 Idaho 748, 750–51 (Ct. App. 1993) (Internal citations omitted).

However, the Courts have also said:

> The well-established law in Idaho is, "Where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance." Curzon v. Wells Cargo, Inc., 86 Idaho 38, 43, 382 P.2d 906, 908 (1963).
>
> *Weinstein v. Prudential Prop. & Cas. Ins. Co*., 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010)

Using the language stated above, a court analyzing a RE-23 that has a blank "Due Diligence" date would have to determine if such a date constitutes "an essential term of the agreement." If the court finds it is and it is missing, then the parties may have trouble enforcing the contract. If the court finds that it is not, then it is likely that the court would read a

reasonable deadline into the contract. The RE-23 has many references back to the Due Diligence deadline and this may factor into the "material term" analysis. Best practice would be to have the parties execute an addendum that creates a clear deadline for Buyer's due diligence.

Can the RE-10 be revoked prior to acceptance?

QUESTION: Brokerage represents the Seller. Buyer presented a RE-10 to Seller. Prior to Seller responding, Buyer revoked the RE-10 and terminated the contract. Broker questions if the RE-10 can be rescinded prior to acceptance.

RESPONSE: No. The Purchase and Sale Agreement (RE-21) clearly states:

> If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, **it shall end BUYER's timeframe for inspections and is irrevocable.**
>
> RE-21 Section 10(B)(3).

When the parties executed the RE-21 it signified a meeting of the minds where all parties agreed to be bound by the terms of the contract. This includes the inspection section and all the procedures outlined therein. If Buyer gives Seller a RE-10, it ends Buyer's inspection timeframe and cannot be revoked.

DISCLOSURE

Is a road that may or may not be maintained by local government be an adverse material fact?

QUESTION: Broker has a listing in an unincorporated area of the county. The property has a road that may or may not be maintained by the local government. Does she have an obligation to disclose this information?

RESPONSE: Under Idaho law, licensees are required to disclose any "adverse material facts." 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.

Does a suspected drug house need to be disclosed?

QUESTION: Broker represents Seller. When Seller originally purchased the property, the neighbor told Seller that the home was once a "drug house." Seller checked with police and police had no record of Seller's home being a "drug house." Broker questions if the neighbor's information needs to be disclosed?

RESPONSE: No. Idaho Code § 55-2801 provides in relevant part:

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

Based on this language, psychologically impacted property does not need to be disclosed if a felony committed on the property had no effect on the physical condition of the property. Given the information provided to the Hotline, the suspicion of a home being a "drug house" would typically have no effect on the physical condition of Seller's property. Therefore, it is unlikely the information would need to be disclosed.

Further, under Idaho law, licensees are required to disclose any "adverse material facts." 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 and Sellers 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. However, based on the information provided to the Hotline, a rumor that Seller's home was a drug house that was disproved by lack of police record is unlikely to constitute a fact.

If Seller has given someone power of attorney, is Seller exempt from RE-25 disclosures?

QUESTION: Broker represents a Seller who is in a nursing home and has memory impairments. Seller's son has power of attorney. Broker questions if Seller is exempt from filling out the RE-25. If not, Broker questions how the RE-25 should be completed.

RESPONSE: Based on the facts provided to the Hotline, Seller would not fall under any of the statutory exemptions and is required to complete the *Seller's Property Condition Disclosure* ("RE-25"). If Seller has a power of attorney, the designated person would act in place of the principal, which in this case would be the Seller. The power of attorney then must conduct the transaction as if they were the Seller. Because Seller is required to complete the RE-25, the power of attorney must complete the form on behalf of the Seller. The best practice would be for the power of attorney to sit down with the Seller and ask Seller the questions listed in the RE-25 and fill out the form to the best of the power of attorney's ability.

Is a property with apartment units and retail stores exempt from the Idaho Property Disclosure Act?

QUESTION: Broker questions if a property having 3 apartment units and 2 retail store fronts is exempt from Idaho's property disclosure law.

RESPONSE: No, it is not exempt. This property would be known as what is a "combined use" property. Per the Idaho Property Disclosure Act (Idaho Code § 55-2503(b)):

> 55-2503. DEFINITIONS. As used in this chapter:
> …
> (2) "Residential real property" means real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use.

Seller is selling residential real property that has 1-4 dwelling units therefore the law requiring disclosures applies.

Can a Seller who is not exempt from the RE-25 disclosures deliver a RE-25 with each page crossed out and no disclosures made?

QUESTION: Broker represents Buyer. Buyer has entered into a Purchase and Sale Agreement with a Seller who delivered a signed RE-25 but each page had just been crossed out, no disclosures were made. Broker questions if this is an acceptable way for Seller to fill out this form and if Buyer is able to request that Seller properly fill out the form.

RESPONSE: Under Idaho law, any Seller of residential real property is required to make certain disclosures about the property. Idaho Code § 55-2506 states:

> DISCLOSURE INFORMATION. The information required in this chapter shall be set forth on the form set out in section 55-2508, Idaho Code. Alternative forms may be substituted for those set out in section 55-2508, Idaho Code, provided that alternative forms include the disclosure information as set forth in section 55-2506, Idaho Code, and the mandatory disclosure statements set forth in section 55-2507, Idaho Code. The form must be designed to permit the transferor to disclose material matters relating to the

> physical condition of the property to be transferred including, but not limited to, **the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances.** (Emphasis added).

Seller must, at the very least, address the above cited disclosures. According to the facts presented to the Hotline, Buyer is accepting the property "as is," which means that the Seller is not going to be making any repairs. Seller is still statutorily obligated to make the disclosures regarding the sewer, foundation, roof, etc. Further, Buyers are always allowed to request disclosures beyond those mandated by law. The RE-25 was designed to allow Seller to disclose the statutory items as well as those typically requested by Buyers.

Would a past fire be considered an adverse material fact?

QUESTION: Broker represents Seller. The appraisal showed that there had been a fire several years ago and the property had since been remediated and significantly remodeled. Seller disclosed the remodel. Buyer wants to terminate because Seller did not disclose the information about the fire. Broker questions if Sellers have the duty to disclose a past issue with the property if that issue has been remediated.

RESPONSE: Idaho Code § 55-2506 states:

> The information required in this chapter shall be set forth on the form set out in section 55-2508, Idaho Code. Alternative forms may be substituted for those set out in section 55-2508, Idaho Code, provided that alternative forms include the disclosure information as set forth in section 55-2506, Idaho Code, and the mandatory disclosure statements set forth in section 55-2507, Idaho Code. The form must be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances.

Sellers of residential real property have the duty to comply with the above statute and disclose conditions of the property known to Seller. According to the Broker, the fire damage was eliminated so it would not likely be a "material matter relating to the property" and therefore would not need to be disclosed.

Further, Sellers and real estate licensees have the duty to disclose any adverse material facts known about the property. An adverse material fact is defined as:

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

Idaho Code § 54-2083(1).

The Hotline does not determine adverse material facts, but if there was no damage left at the house it would be hard to argue it is an "adverse" fact.

Does a Buyer have any recourse for non-disclosure if Seller was exempt from making disclosures?

QUESTION: Broker represents Buyer. Seller was exempt from filling out a Seller's Property Condition Disclosure Form (RE-25). After the transaction closed, Buyer found out some information about the property that believes should have been disclosed. Is there any recourse against Seller for not disclosing?

RESPONSE: If a Seller falls under one of the exemptions listed in Idaho Code § 55-2505, then Seller has no legal obligation to make any disclosures regarding the property. Buyer is not likely able to hold Seller liable for failure to disclose if Seller was exempt from making disclosures in the first place.

Are timeshare properties exempt from property disclosures?

QUESTION: Broker questions if a timeshare is exempt from property disclosures.

RESPONSE: It is generally not exempt; it just is not applicable. A timeshare is not "residential real property" per Idaho Code § 55-2503(b) which states:

> 55-2503. DEFINITIONS. As used in this chapter:
> …
> (2) "Residential real property" means real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use.

Seller is not selling residential real property but rather a contract that creates a legal right to use real property. Therefore, the law requiring disclosures does not apply. However, all timeshares are created differently and the disclosure requests could be different depending on the facts of each property. Further, Broker should use caution in "selling" timeshares as the Idaho Association of REALTORS® forms were not designed for that purpose.

DUTIES

Is Broker obligated to tell Seller about a subsequent appraisal if the parties agreed to reduce the purchase price because of a previous low appraisal?

QUESTION: Broker represents Buyer who entered into a purchase contract for a stated price. Later the contract was amended, based upon an appraisal, to a lower purchase

price. Broker questions her obligations to Seller if a subsequent appraisal comes in above the amended lowered purchase price.

RESPONSE: Once the Seller and Buyer have entered into a binding contract the terms of that contract cannot be changed without mutual consent of the parties. Seller waived the right to hold out for another appraisal when they agreed to the addendum stating a lower price. Further, Broker as non-agent to Seller only owes Seller the following duties:

> 54-2086. DUTIES TO A CUSTOMER. (1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are nonagents and owe the following legal duties and obligations:
> (a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;
> (b) To perform these acts with honesty, good faith, reasonable skill and care;
> (c) To properly account for moneys or property placed in the care and responsibility of the brokerage;
> (d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee;
> (e) To disclose to the seller/customer all adverse material facts actually known or which reasonably should have been known by the licensee.
> (2) If a customer has entered into a compensation agreement or customer services agreement with the brokerage, the brokerage shall have the obligation to be available to the customer to receive and timely present all written offers and counteroffers.
> (3) The duties set forth in this section are mandatory and may not be waived or abrogated, either unilaterally or by agreement.
> (4) Nothing in this section prohibits a brokerage from charging a separate fee or commission for each service provided to the customer in the transaction.
> (5) A nonagent brokerage and its licensees owe no duty to a buyer/customer to conduct an independent inspection of the property for the benefit of that buyer/customer and owe no duty to independently verify the accuracy or completeness of any statement or representation made by the seller or any source reasonably believed by the licensee to be reliable.
> (6) A nonagent brokerage and its licensees owe no duty to a seller/customer to conduct an independent investigation of the buyer's financial condition for the benefit of that seller/customer and owe no duty to independently verify the accuracy or completeness of statements made by the buyer or any source reasonably believed by the licensee to be reliable.

Based on the facts provided to the Hotline, none of the obligations above would require Broker to notify Seller of any subsequent appraisals since they would have no bearing on the transaction as the contract was already executed. In fact, any subsequent appraisals obtained by the Buyer could be considered confidential client communication protected under I.C. § 54-2083(6).

What are a brokerage's obligations regarding confidential client information?

QUESTION: Broker represented the Buyer in a closed transaction. A police officer visited the office and requested to see the file for this Buyer. Broker asked the police officer to return with a search warrant. Now Broker questions the Brokerage's obligations when it comes to providing documents, especially in light of their obligation to guard confidential client information.

RESPONSE: It was a good idea for Broker to request a search warrant as this requires the Brokerage to turn over the documents and ensures the legitimacy of the request. As to the question about confidential information, 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 a search warrant or litigation if production is compelled via subpoena. The only exemptions 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.

Is the purchase price in an offer considered confidential information?

QUESTION: Broker represents Seller. Buyer (Offeror #1) has been making cash offers on the property, but the parties have not been able to agree on terms. A new Buyer (Offeror #2) has made a full price offer but with contingencies. Broker questions if she can call the previous Buyer's agent to let them know Seller received a full price offer to see if they want to meet or beat it.

RESPONSE: Yes, the Broker can contact Offeror #1 and inform them of Offeror #2's offer. The Buyer's Representation Agreement (RE-14) states:

> BUYER understands that an offer submitted to a seller, and the terms thereof may not be held confidential by such seller or seller's representative unless such confidentiality is otherwise agreed to by the parties.

The offer that Offeror #2 presented to Seller is not considered confidential information unless otherwise agreed to by Seller and Offeror #2.

EARNEST MONEY

Can a Seller demand that Buyer release the earnest money to Seller after all contingencies have been released?

QUESTION: Broker represents Seller. Both Buyer and Seller agreed that Buyer would release all contingencies by a certain date. That date has passed and now Seller would like Buyer to execute another document indicating the waiver and that Seller is now entitled to the Buyer's earnest money. Buyer is refusing to sign. Broker questions if Seller is entitled to the earnest money and/or if Seller can terminate the contract because of Buyer's refusal to sign.

RESPONSE: According to the facts presented to the Hotline, Buyer and Seller agreed that Buyer would release their contingencies on March 30th. Buyer's acceptance of this term is all that is needed to remove the contingencies, Seller cannot demand that Buyer execute another document. Further, if the language that the parties agreed to did not indicate that Seller gets to retain the earnest money after the removal of contingencies, Seller has no right to demand the earnest money be released to him. If Seller's intent was to retain the earnest money once contingencies were removed, it needed to be addressed in the terms of the original contract. Seller cannot force Buyer to release earnest money, and it is unlikely that Seller would be able to terminate the contract if Buyer refuses to sign the addendum Seller is requesting.

Can the parties still argue over the earnest money if they have agreed to terminate the contract using the top half of the RE-20?

QUESTION: Buyer and Seller agreed to terminate contract pursuant to RE-20. Seller would not agree to release earnest money to Buyer. Broker questions whether the different sections of the RE-20 are separate and distinct contracts.

RESPONSE: According to the facts presented to the Hotline the parties have only had a meeting of the minds that the transaction is terminated but not as to how the earnest money will be distributed. If only the top half of the 2018 version of the RE-20 was signed by both parties then that is the only part that is effective. If Buyer wants to make his signature on the RE-20 conditional upon releasing the earnest money Buyer or Buyer's agent must specifically state that to Seller before or at the time of tendering the RE-20. However, in doing so Buyer should take care to not unreasonably cloud Sellers title or prevent Seller from putting the home back on the market when Buyer clearly does not want to purchase the property.

If the lower part of the RE-20 has not been mutually executed then it appears that Buyer and Seller have a dispute over the earnest money. In such circumstances the Responsible Broker holding the Earnest Money has three options, two of which are listed in Idaho Code § 54-2047 which states:

> DISPUTED EARNEST MONEY. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:

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

If Broker decides not to use one of those options, Broker can deposit the money with the court thereby removing himself from the dispute. Broker should contact the Hotline for further instructions if he chooses to interplead the money.

PROPER FORM USE

Does Buyer have to use the RE-10 to terminate based on unsatisfactory inspection?

QUESTION: Broker represents Seller. Buyer completed inspections and decided to terminate. Buyer's agent used the RE-20 to notify Seller of the termination rather than the RE-10. Broker questions if the earnest money can be released back to Buyer without Seller's signature on the RE-20.

RESPONSE: Lines 166 and 167 of the RE-21 state:

> If BUYER does within the strict time period specified give to SELLER written notice of termination of this Agreement based on an unsatisfactory inspection, the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER.

The above language states Buyer gets their Earnest Money back if they terminate based on an unsatisfactory inspection. It does not indicate that Buyer must use the RE-10, or any specific form, the Buyer simply has to give written notice.

What is the best way to fill out the Seller Representation Agreement (RE-16) in order to receive compensation for finding renters to lease property?

QUESTION: Broker questions how to fill out a Seller Representation Agreement when the agreement is created for the purpose of Broker procuring renters to lease specified property.

RESPONSE: The RE-16 provides that a Seller retains a Broker "as SELLER'S exclusive Broker to sell, **lease**, or exchange" property. The word "lease" was included to compensate Brokers who attempt to procure a Buyer of Seller's property but instead procure a person to lease the designated property. Thus, the RE-16 is not specifically designed to compensate Brokers who are procuring renters but is used as a catch-all in the event a lease results instead of a purchase. As a consequence, many sections of the RE-16 are inapplicable to Brokers procuring renters. Because the RE-16 is not specifically designed to compensate Brokers who procure renters, it is recommended that Broker have an attorney create a specific contract for such situations.

What is the purpose of the RE-27?

QUESTION: Broker questions if, by agreeing to Buyer's waiver or removal of contingencies under the Right to Continue to Market (RE-27) Addendum, a Seller is also agreeing to waive or remove Buyer's financing contingencies.

RESPONSE: Yes. The Right to Continue to Market (RE-27) is designed to allow the Seller to continue to accept offers subsequent to accepting an initial offer; typically because the initial offer has at least one concerning contingency. The concerning contingency must be stated in the RE-27. If a second offer comes in that Seller finds more acceptable Seller must notify the initial Buyer that he would like to accept the second offer and cancel, or "bump," the initial contract. The initial Buyer then has 72 hours to waive or remove Buyer's contingencies or Buyer will lose his contract with Seller.

If Buyer waives or removes the contingencies, the Buyer is releasing all financing contingencies as well. Line 23 of the RE-27 states: "[u]pon waiver or removal of any contingency(s) specified, BUYER warrants that adequate funds needed to close will be available and that BUYER'S ability to obtain financing is not conditioned upon sale and/or closing of any property." Through this language, Buyer has forfeited Buyer's right to terminate based on financing.

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.

What is the Statement of Account in the RE-21 referring to?

QUESTION: Broker questions what the term "Statement of Account" means in the RE-21.

RESPONSE: The RE-21 contains the following language:

> **SUBDIVISION HOMEOWNER'S ASSOCIATION:** BUYER is aware that membership in a Home Owner's Association may be required and BUYER agrees to abide by the Articles of Incorporation, Bylaws and rules and regulations of the Association. BUYER is further aware that the PROPERTY may be subject to assessments levied by the Association described in full in the Declaration of Covenants, Conditions and Restrictions. BUYER has reviewed Homeowner's Association Documents: ☐Yes ☐No ☐N/A. Association fees/dues are $_____ per_____.
> ☐BUYER ☐SELLER ☐Shared Equally ☐N/A to pay Association SET UP FEE of $_____and/or
> ☐BUYER ☐SELLER ☐Shared Equally ☐N/A to pay Association PROPERTY TRANSFER FEES of $_____ and/or ☐BUYER ☐SELLER ☐Shared Equally ☐N/A to pay Association STATEMENT OF ACCOUNT FEE of $_____ at closing. Association Fees are governed by Idaho Code 55-116 and 55-1507.
>
> (Section 16).

Idaho Code § 55-116 states:

> STATEMENT OF ACCOUNT -- DISCLOSURE OF FEES. (1) A homeowner's association or its agent shall provide a property owner and the owner's agent, if any, a statement of the property owner's account not more than five (5) business days after receipt of a request by the owner or the owner's agent received by the homeowner's association's manager, president, board member, or other agent, or any combination thereof. The statement of account shall include, at a minimum, the amount of annual charges against the

property, the date when said amounts are due, and any unpaid assessments or other charges due and owing from such owner at the time of the request. The homeowner's association shall be bound by the amounts set forth within such statement of account.

(2) On or before January 1 of each year, a homeowner's association or its agent shall provide property owners within the association a disclosure of fees that will be charged to a property owner in connection with any transfer of ownership of their property. Fees imposed by a homeowner's association for the calendar year following the disclosure of fees shall not exceed the amount set forth on the annual disclosure, and no surcharge or additional fees shall be charged to any homeowner in connection with any transfer of ownership of their property. No fees may be charged for expeditiously providing a homeowner's statement of account as set forth in this section.

This section of code was passed in the 2018 Legislative session.

What is the best way to number addendums when there are addendums to multiple documents, not just the Purchase and Sale Agreement?

QUESTION: Broker called to question how to correctly number addendums when the transaction paperwork includes addendums to multiple documents.

RESPONSE: The RE-11 Addendum states: "All addendums shall be numbered sequentially." If the parties execute several addendums to the Purchase and Sale Agreement, they should be numbered Addendum #1, Addendum #2, Addendum #3, etc. However, if the parties are executing an addendum that changes any form other than the RE-21, each set of those addendums should have its own sequential numbers.

For example, if a Buyer and Seller have signed two addendums to the Purchase and Sale Agreement. Those should be numbered Addendum #1 and Addendum #2. If the parties have also entered into a RE-50 and have changed the terms of the RE-50 with an addendum. The addendum to the RE-50 would be Addendum #1.

MISCELLANEOUS

When would a business day timeline begin if documents were delivered before 8:00 a.m.?

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

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

A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of

> Idaho as found in Idaho Code §73-108. If the time in which any act required under this agreement is to be performed is based upon a business day calculation, then it shall be computed by excluding the calendar day of execution and including the last business day. The first business day shall be the first business day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.

Given the facts presented to the Hotline, the agent delivered an executed contract at 7:50 a.m. The language above states that the calendar day of execution is to be excluded. Therefore, the first business day would be the first business day after execution. As of the 2017 version of the RE-21, the calendar day of execution is always excluded regardless of when the documents are signed.

How does Seller determine if they are selling water rights?

QUESTION: Buyer and Seller entered into a standard Idaho REALTORS® RE-21 Purchase and Sale Agreement. While under contract an issue arose about whether or not Buyer was buying and if Seller was selling the water rights and/or canal company shares along with the property. Brokers for both Buyer and Seller called the Hotline seeking advice.

RESPONSE: The RE-21 includes the following standard language:

> Any and all water rights including but not limited to water systems, wells, springs, lakes, streams, ponds, rivers, ditches, ditch rights, and the like, if any, appurtenant to the PROPERTY are included in and are a part of the sale of this PROPERTY, and are not leased or encumbered, unless otherwise agreed to by the parties in writing.
>
> RE-21 Section 7.

Therefore, whether or not Buyer and Seller contracted any particular water right will be determined by an analysis of whether or not the water right was appurtenant to the property. The Idaho Supreme Court has addressed the issue of whether or not water rights are appurtenant by comparing the analysis to the test the court uses relating to easements, more specifically the Court has stated:

> The definitions of "appurtenant" and "in gross" further make it clear that the easement is appurtenant. The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached. An easement in gross is merely a personal interest in the land of another, whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. An appurtenant easement must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail. The easement in the Butler Springs area is a beneficial and useful adjunct of

> the cattle ranch, and it would be of little use apart from the operations of the ranch. Moreover, in case of doubt, the weight of authority holds that the easement should be presumed appurtenant. Accordingly, the decision of the trial court is affirmed as to the reserved easement.
>
> When deciding that a water right passes with the property to which it is appurtenant even though not mentioned in the deed, we reasoned by analogy from the law applicable to easements. In *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933), the issue was whether an attachment of real property which had an appurtenant water right created a lien on the water right when the water right was not mentioned in the writ of attachment. We held that an appurtenant water right passed with the land even though not expressly mentioned.
>
> In doing so, we reasoned by analogy from appurtenant easements, holding that water rights and easements were sufficiently similar to have the relevant law applicable to appurtenant easements apply to appurtenant water rights.
>
> This court has held, construing the *Shannon* Case [*Cooper v. Shannon*, 36 Colo. 98, 85 P. 175 (1906)], that a water right passes with the realty to which it is appurtenant unless there is intention to the contrary, and easements pass with the realty, concerning which this court has held the following: "And the general rule is that, where an easement is annexed to land, either by grant or prescription, it passes as an appurtenance with the conveyance 'of the dominant estate, although not specifically mentioned' in the deed, or even without the use of the term 'appurtenances,' 'unless expressly reserved from the operation of the grant.' "
>
> Conceding that an easement is different from a water right, water rights and appliances connected therewith have been considered, so far as the point here is concerned sufficiently similar to easements, to pass with the land though not mentioned as such or as appurtenances.
>
> *Joyce Livestock Co. v. United States*, 144 Idaho 1, 13, 156 P.3d 502, 514 (2007).

A general summary of the language stated above is that when analyzing water rights, a court will have to determine whether the right was "affixed" to the property in order to determine if it passes to the Buyer upon sale. A similar analysis would be relevant for a sale contract.

In addition to the language stated above the particular facts as relayed to the Hotline indicate the transaction involved not only water rights, but entitlement to shares of canal or ditch company. Canal and ditch companies may add a further complexity to the analysis in that they can be different than a simple water right.

Rights to water involve a very specific body of law and turn on many detailed determinations, all of which rely on the facts of each circumstance. A determination of any individual water right and whether or not it is appurtenant to the real property is outside the purview of the Legal Hotline as well as most real estate licensees.

Can a Seller continue to market the property at a lower price than the current accepted offer?

QUESTION: Broker questions if there is anything that would prevent a Seller from continuing to market the property but at a lower price, if Buyer and Seller have executed a RE-27.

RESPONSE: There is no language in the Seller's Right to Continue to Market Property (RE-27) that states Seller has to list the market on any specific terms or conditions. If Buyer agreed that Seller can continue to market the property, Seller can list it at any price and can consider all offers acceptable to Seller.

What if a Buyer is unsatisfied during the final walkthrough?

QUESTION: Broker questions what options a Buyer would have if Buyer completes the final walkthrough but is not satisfied with the condition of the property.

RESPONSE: Section 20 of the RE-21 states in relevant part:

> The second walkthrough shall be… for the purpose of satisfying BUYER that PROPERTY is in substantially the same condition as on the date this offer is made.

Based on the above cited language, if the Buyer feels that the property is not in the same condition as when the offer was made, Seller would be obligated to return the property to the condition it was in when Buyer made the offer.

How should a party sign the documents if they are acting on behalf of an entity or corporation?

QUESTION: Broker questions the legally appropriate signature on the Real Estate Purchase and Sale Agreement ("RE-21") when the Buyer or Seller is an entity or corporation or is acting as an agent on behalf of a principal.

RESPONSE: Legally, the Buyer or Seller of the property is the entity and therefore, the "Buyer" or "Seller" line on the RE-21 should state the name of the entity. The individual who will be signing the documents on behalf of the entity should put their title after or under each signature. However, a binding contract is created so long as the signatures on the signature page are present. Nevertheless, the title company may have other rules and preferences and the contract may have to be filled out according to the title company instructions.

Is an electrical conduit considered an attached fixture?

QUESTION: Broker questions whether or not some electrical work that Seller had started but not completed would be considered an attached item. Seller believes the electrical conduit is personal property, Buyers believe it should stay with the property.

RESPONSE: The RE-21 Section 5 states:

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

Given that the above language does not expressly name electrical conduit, determining whether a particular item is attached to the property has to be done on a case by case basis. For example, if an item can be easily removed without damaging the property, it is most likely not a fixture. If it cannot be removed without damaging the property, that would most likely be considered an attached fixture. However, the Hotline cannot determine whether something is or is not an attached fixture.

If there is any question about what is to be included or excluded in the purchase, it is the best practice for buyer or seller to specifically address the matter in the blank lines immediately following Section 5 of the RE-21. Brokers on both sides of this transaction should advise clients to seek private legal counsel to determine their rights and responsibilities regarding the electrical conduit.

What can a new owner do about abandoned property left by previous owner?

QUESTION: The Seller of property left personal property in the home and have made no attempts to retrieve it. Broker questions whether Idaho law requires certain treatment of abandoned property and what should be done with the property.

RESPONSE: Abandoned property is property "that which the owner has discarded or voluntarily forsaken with the intention of terminating his ownership, but without vesting ownership in any other person." *Corliss v. Wenner*, 136 Idaho 417, 421 (Idaho Ct. App. 2001). Abandonment of property involves "intentional acts by the true owner in placing the property

where another eventually finds it." *Id.* The possessor of abandoned property "acquires the right to possess the property against the entire world but the rightful owner." *Id*.

A lack of interest by Seller likely shows intent to abandon personal property left in the home. Nonetheless, it may be advisable to send a letter by certified mail to the Seller and, if possible, make personal contact that gives the Seller a reasonable time to notify the Buyer if it is their intention to re-collect the personal property. If the Seller does not respond or expresses intent not to collect the property, the Buyer will be deemed to be the possessor of the property, and will have a possessory interest in the property junior to only the interest of the original owner.

If the property is valuable, the Buyer may wish to contact private legal counsel to determine his or her rights and obligations in relation to the personal property left by the Seller.

If the bank has a deed in lieu of foreclosure but has taken no action, does Seller have any right to sell the property?

QUESTION: Daughter inherited decedent's property with a reverse mortgage. Daughter then gave the bank a deed in lieu of foreclosure. The bank has taken no action and the property has been vacant for an extended period of time. Broker questions whether daughter has any right to sell the property.

RESPONSE: No. Just like any deed, once the deed in lieu of foreclosure has been delivered to a third party, that party becomes the rightful owner of the property. Based on the facts provided to the Hotline, the daughter transferred her ownership of the property when she delivered a deed in lieu to the bank and the bank now owns the property unless the deed is rescinded. The daughter has no right to sale the property.

Can a Seller object to Buyer's choice of inspector?

QUESTION: Broker represents Seller. Seller has had past issues with a particular home inspector in the area and does not want a Buyer choosing them for the inspection. Can Seller legally refuse to allow a Buyer to work with this inspector?

RESPONSE: No, once under contract Seller cannot specifically object to Buyer's choice of inspectors. The Purchase and Sale Agreement (RE-21) states in Section 10(A):

> BUYER is strongly advised… to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire PROPERTY.

While Seller cannot object to Buyer's inspector, Broker could advise Buyer's agent that if Buyer is using an inspector Seller does not like, Seller may refuse to make any repairs that Buyer may request based upon that inspector's report.

Can the RE-10 be withheld from the lender?

QUESTION: Broker has been told by other brokers in the area that the RE-10 can be withheld from the documents provided to the lender. Broker questions if this is accurate.

RESPONSE: In most circumstances, 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 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.
>
> I.C. § 54-2004(23).

If Buyer and Seller use the RE-10 to agree to repairs and/or a reduction of the purchase price, not providing said agreement to lender would typically fall under the definition of a double contract. Best practice is to always provide all documentation to lenders in order to avoid a double contract circumstance. If the lender is made aware of the RE-10 and indicates it does not want the RE-10, then providing the document would not be necessary.