The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2019

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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 2019 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2019. 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 2020 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2019 "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 2020 legislative changes to the law.

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AGENCY/LICENSE LAW

What are a licensee's obligations when a lender says they do not want to receive a copy of the RE-10?

QUESTION: Broker indicates that lenders frequently tell agents that they do not want to see a copy of the executed RE-10. Broker questions the best way to proceed when this happens.

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 and thus be prohibited and/or fraudulent conduct. Best practice is to always provide all documentation to lenders in order to avoid a double contract circumstance. If the lender does not want to receive it, the Broker should always get that in writing as it will prove the lender knew about the RE-10, which will remove it from the definition of a double contract.

COMMISSIONS & FEES

What if another brokerage interferes with an active representation agreement?

QUESTION: Broker 1 had an active RE-16 with Seller. Broker 2 attempted to purchase the listing from Broker 1 for a referral fee. A referral fee agreement was never signed. Neither Seller nor Broker 1 terminated the RE-16 and Broker 2 ended up selling the property without

involvement of Broker 1. Broker 1 questions if Broker 1 is entitled to a commission. Broker also questions if Idaho has a law on contractual interference.

RESPONSE: The RE-16 is an exclusive right to represent and it can only be terminated if both Seller and Broker agree. Given the facts presented to the Hotline, Broker 1 did not agree to terminate the RE-16 with Seller, nor was he ever requested to by Seller. Therefore, Seller would still be bound by the terms of the RE-16 with Broker 1. The RE-16 states:

> If Broker or any person, including SELLER, procures a purchaser ready, willing and able to purchase, transfer or exchange the Property on the terms stated herein or on any other price and terms agreed to in writing, the SELLER agrees to pay a total brokerage fee of ________% of the contract or purchase price OR $____________. Of this total brokerage fee, ________% of the contract purchase price OR $______________ will be shared with the cooperating brokerage unless otherwise agreed to in writing. The fee shall be paid in cash at closing and deducted from the seller's proceeds on the settlement statement unless otherwise designated by the Broker in writing.

If the property sold, Broker would be entitled to the amount that the parties agreed upon when the RE-16 was executed.

In addition, the State of Idaho is one of the jurisdictions that allows recovery of damages pursuant to tortious interference with a contract. In Idaho, the framework for a case of tortious interference is as follows:

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

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

The Hotline does not get involved in disputes. Broker may wish to talk to brokerage's legal counsel to determine his rights in this matter.

If a Seller's Representation Agreement with another brokerage has expired, would Seller be liable to pay commission to the previous brokerage even if Seller is now represented by a different brokerage?

QUESTION: Broker has been approached by a Seller. Seller was previously listing the same property with another brokerage but the listing agreement with Brokerage 1 has expired. Broker questions if Seller will be liable to pay commission to Brokerage 1 if Seller enters into a Representation Agreement with his brokerage.

RESPONSE: Section 6(C) of the Seller Representation Agreement (RE-16) states in relevant part:

> [T]he brokerage fee is payable if the Property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged or optioned or agreed to be sold, exchanged or optioned within ____ calendar days (ninety [90] if left blank) following expiration of the term hereof to any person who has examined, been introduced to or been shown the Property during the term hereof; **unless SELLER enters into a Seller Representation Agreement to market said Property with another Broker**. (Emphasis added).

Given the facts presented to the Hotline, Seller's Representation Agreement with Brokerage 1 has expired, and Seller has now expressed interest in entering into a Seller Representation Agreement with Brokerage 2. The language cited above states that the brokerage fee is no longer payable if Seller enters into an exclusive right to represent with another brokerage. Absent extraordinary circumstances, like fraud, Brokerage 1 will not be able to claim a brokerage fee from Seller.

However, the Hotline is unaware of the provisions contained in Seller's agreement with Brokerage 1 and cannot comment on the terms therein. Broker may wish to advise Seller to retain private legal counsel to determine whether or not Brokerage 1 might have a right to its brokerage fee.

Is it appropriate for commission terms to be included in the Purchase and Sale Agreement?

QUESTION: Broker has an agent that is representing a Buyer. In their Buyer Representation Agreement, Buyer and agent agreed that $1,000 of agent's commission would go toward Buyer's closing costs. Agent included said information in the RE-21 and Broker questions if this practice is permitted.

RESPONSE: Although highly unorthodox, there is no direct prohibition against listing commissions in the RE-21. The practice is unusual because the RE-21 is a contract only between the Buyer and Seller. According to the facts presented to the Hotline, agent listed her commission reduction in the RE-21 to avoid a double contract situation. A double contract is defined as:

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

> enable the buyer to obtain a larger loan than the true sales price would allow, or to enable the buyer to qualify for a loan that he or she otherwise could not obtain. An agreement or loan application is not made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.
>
> Idaho Code § 54-2004(23).

Best practices would be for agent to memorialize the commission in the Representation Agreement or some other written document with client because it is a contract between agent and client and therefore legally enforceable. As long as a copy of the Representation Agreement or other document memorializing the agreement is sent to the lender, it would not be considered a double contract.

CONTRACTS

At what point is the additional non-refundable consideration due when the parties have executed the RE-27?

QUESTION: Broker questions at what time the additional non-refundable consideration is due when using the Seller's Right to Continue to Market Property (RE-27). Should it be tendered when Buyer initially signs the RE-27 or after Buyer removes their contingencies?

RESPONSE: Lines 29-33 of the RE-27 state:

> Notwithstanding anything elsewhere to the contrary, to be effective, **BUYER'S written waiver or removal of the contingency(s) pursuant to the addendum must be delivered together with, and within the same time period specified for delivery of BUYER'S written waiver or removal, additional non-refundable consideration** in the amount of $_____________ which shall be non-refundable except in the event of SELLER'S default. Any such additional consideration shall be applied to the purchase price at closing. (Emphasis added).

The additional non-refundable consideration is required to be tendered at the same time Buyer waives the contingencies listing in the RE-27.

Can the RE-10 be revoked?

QUESTION: Broker questions if either Buyer or Seller can rescind a RE-10 once it has been tendered.

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

> If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items/conditions, **it shall end BUYER'S timeframe for that particular inspection and is irrevocable.** BUYER shall provide to SELLER pertinent section(s) of written inspection reports upon

> request, if applicable. Upon receipt of written notice SELLER shall have business days (three [3] if left blank) in which to respond in writing**.** SELLER, at SELLER'S option, may agree to correct the items as requested by BUYER in the notice or may elect not to do so. If SELLER agrees in writing to correct the item/condition requested by BUYER, then said agreement will become a integral part of this contract. Otherwise, immediately upon a written response from SELLER that rejects BUYER'S requests, in whole or in part, **said response is irrevocable**…
>
> RE-21 Section 10(B)(3).

If Buyer gives Seller a RE-10, it ends Buyer's inspection timeframe and cannot be revoked. Further, if Seller responds with a Seller RE-10, it is considered a rejection of the Buyer's RE-10 and cannot be revoked. The RE-10 is irrevocable regardless of who tendered it. The other party must be given a chance to respond.

The Hotline does not get involved in disputes between Buyers and Sellers. Broker may wish to advise client to seek private legal counsel in this matter.

Can a Buyer terminate for any reason during the inspection period?

QUESTION: Brokers question if a Buyer can terminate the contract for any reason during the inspection period and what happens to the Earnest Money if the contract is terminated based on an unsatisfactory inspection within the timeframe stated in the contract. Brokers also question if a specific reason must be supplied by Buyer and if circumstances outside the property can be considered by Buyer during the inspection period.

RESPONSE: Under the standard terms of the RE-21, a Buyer may terminate the agreement pursuant to an inspection and receive Buyer's Earnest Money back. The RE-21 states:

> Buyer's inspection contingency allows a BUYER to conduct a general inspection of the PROPERTY which includes all aspects of the PROPERTY, including but not limited to neighborhood, conditions, zoning and use allowances, environmental conditions, applicable school districts and/or any other aspect pertaining to the PROPERTY or related to the living environment at the PROPERTY; hereinafter referred to as the Primary Inspection. Except for additional items or conditions specifically reserved in a Secondary Inspection below BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items/conditions or written notice of termination of this Agreement based on an unsatisfactory inspection. Once BUYER delivers written notice to SELLER it shall end BUYER'S timeframe for inspections other than those specifically reserved in a Secondary Inspection below and is irrevocable regardless of if it was provided prior to the deadline stated above.

RE-21, 10(B)(1).

…

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.

RE-21, 10(C)(2).

The language cited above allows the Buyer to terminate based on an "unsatisfactory inspection" and to have their earnest money returned.

The term "unsatisfactory inspection" is not defined in the contract, therefore the common interpretation of that term controls. Black's Law Dictionary defines inspection as:

> To examine; scrutinize; investigate; look into; check over; or view for the purposes of ascertaining the quality, authenticity or conditions of an item, product, document, residence, business, etc. Word has broader meaning than just looking, and means to examine carefully or critically, investigate and test officially, especially a critical investigation or scrutiny.

In addition, in 2012 the Supreme Court of Idaho reviewed similar language in a Purchase Sale Agreement and stated:

> Despite appellants' contentions, when read as a whole, the Buyer's Obligations clause expressly and unambiguously grants Buku [the Buyer] the right to refuse to close, in the event that Buku is not "fully satisfied with the condition of the property."…[This] is what is sometimes referred by real estate law practitioners as a "free look" provision, granting the Buyer the ability to decline the purchase for virtually any reason, without losing the earnest money deposit.
>
> *Buku Properties, LLC v. Clark* 153 Idaho 828.

Based upon the boiler plate language in the contract and the Supreme Court's previous interpretation of similar contracts, if challenged a court would most likely rule that the Purchase and Sale Contract can be terminated by buyer for any item or condition which is not satisfactory to buyer. However, the unsatisfactory item or condition must be based on some sort of inspection. Further, there is no requirement that inspections need to be performed by professional home inspectors and may be performed by the buyer themselves.

While Buyer has no specific obligation to state the purpose for the termination, it is reasonable to assume that some sort of purpose needs to be articulated in order to ensure that Buyer actually terminated based on an inspection. In fact, if there was a professional inspection

performed, Line 194 states "Buyer shall provide to Seller pertinent section(s) of written inspection reports upon request, if applicable."

As to Brokers' question as to whether or not factors external to the property can be considered during Buyer's inspection period, the standard RE-21 language quoted above begins with a sentence that clearly indicates external factors are part of Buyer's consideration. In fact, the contract specifically states "all aspects" and calls out "neighborhood, conditions, zoning and use allowances, environmental conditions, applicable school districts…" all of which would be living factors related to the property yet not specifically located on the property.

The Hotline does not get resolve disputes between Buyers and Sellers. Brokers may wish to advise client to seek private legal counsel in this matter.

Can the boiler plate language in the RE-10 be amended to give Seller until closing to complete repairs?

QUESTION: Broker represents Buyer. The Buyer would like to amend the language in the RE-10 to allow Seller until closing to complete the repairs. Broker questions the best way to document this change.

RESPONSE: The RE-10 language reads as follows:

> SELLER will service, repair or replace, in a good and workmanlike manner, the following items/conditions on or in the property within _____business days (ten [10] if left blank) from final acceptance of this notice by all parties. BUYER reserves the right to have **only the items which are specifically set forth in this paragraph** re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement.

Given the facts presented to the Hotline, Buyer would like to give Seller "until closing" to complete repairs. Broker should use caution when amending the above referenced language, as it ties back to certain timeframes in the Purchase and Sale Agreement (RE-21). Changing the verbiage to state that Seller will service, repair or replace the items requested "by the closing" rather than a certain amount of days from final acceptance, could affect Buyer's ability to conduct their walkthroughs designed to allow Buyer an opportunity to confirm repair. Best practice would be to amend the language to read that the repairs need to be completed ____ days before closing, allowing Buyer enough time to complete the second walkthrough prior to the transaction closing.

Can a contract be assigned if it does not specifically address assignment?

QUESTION: Broker questions whether or not a contract can be assigned if it does not specifically address assignment.

RESPONSE: Idaho Law establishes that contracts are freely assignable unless the contract states otherwise. If an executed purchase and sale agreement does not indicate whether the contract can or cannot be assigned, Buyer may likely assign the agreement to another Buyer without the consent of Seller. However, it is important to note that Buyers who assign contracts (Buyer #1) are not typically relieved of all duties under the contract and may still be held accountable by the Seller if the subsequent Buyer (Buyer #2) fails to perform.

Does the signing of a counteroffer create a legally binding contract if the RE-21 is expired?

QUESTION: Broker questions if both the Buyer and Seller sign a third counteroffer does that allow them to have a binding contract where counteroffer one and two are no longer valid, and the RE-21 has expired.

RESPONSE: RE-13 contains the language:

> 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 this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loan amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. **If original offer has expired, has been revoked and/or acceptance is late, then mutual execution of this Agreement shall constitute consent to revive and retender the original offer.** Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement. (Lines 40-45 emphasis added).

So long as the parties brought all terms from counteroffers one and two forward into counteroffer three, therefore having counteroffer three state all the terms and agreements desired by the parties, a signed third counteroffer will create a valid binding contract. The contract will consist of the purchase and sale agreement, counteroffer number three, and any signed addendums not changed or revoked through counteroffer number three.

Does the expiration of a Seller Representation Agreement affect the 90-day clause in the Brokerage Fee section?

QUESTION: Broker questions if a RE-16 listing agreement expires, does that negate the 90-day clause in section 6(C)? How can early expiration be documented?

RESPONSE: Section 6(C) of the RE-16 was designed to survive the expiration of the contract. However, it is important to note that this section only applies to "any person who has examined, or been introduced to or been shown the property during the term" of the agreement. It also does not apply if the Seller enters into a seller representation agreement with another broker.

As to Broker's question about ending the representation agreement early, Broker should use caution not to use the term "cancel" or "terminate" and should instead simply shorten the term of the agreement to accomplish the party's needs. Broker should use RE-16A and in the "other" section state: "All parties agree that the term of the original Broker Agreement shall expire immediately upon Broker and Seller's mutual execution of this document."

Is a contract valid if it contains a typographical error?

QUESTION: According to the facts conveyed by Broker: after negotiations, the Seller's agent sent a fully executed RE-21 and addendum to Buyer's agent. When received and reviewed by Buyer, a typographical error was noted in the addendum. Buyer corrected the error, initialed next to it and preceded with the transaction. At some later date, Seller's agent informed Buyer's agent that Seller was not going to honor the transaction as Seller was getting cold feet and that based on the typographical error there was never a binding contract. Broker questions if a valid contract existed despite the typographical error.

RESPONSE: Yes, if there was a meeting of minds as to all material terms, a typo will not invalidate an otherwise binding contract. Idaho Appellate Courts have commented on what constitutes an essential term in a purchase and sale agreement;

> 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).

Further, the Idaho Supreme Court has ruled;

> The general rule is that a contract is enforceable if it is "complete, definite and certain in all its material terms, or contain[s] provisions which are capable in themselves of being reduced to certainty." Giacobbi Square v. PEK Corp., 105 Idaho 346, 348, 670 P.2d 51, 53 (1983) (emphasis omitted). "[C]ourts will not hold the contracting parties to a standard of absolute certainty relative to every detail of a contract. Rather only reasonable certainty is necessary before a contract

> will be given legal effect." Barnes v. Huck, 97 Idaho 173, 178, 540 P.2d 1352, 1357 (1975) (footnote omitted).
>
> *Gen. Auto Parts Co. v. Genuine Parts Co.,* 132 Idaho 849, 857 (1999).

Whether or not a term constitutes a "material" or "essential" term is something that must be determined on a case by case basis and if challenged will be determined by a court or a jury. Neither the Broker nor the Legal Hotline can, or should, attempt to provide legal counsel to Buyers and Sellers as to what constitutes a material term. Broker should advise clients to consult their own independent legal counsel in order to determine their rights.

What happens if a Buyer submits their RE-10 after the timeframe to do so has expired?

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

RESPONSE: Section 10B(1) of the RE-21 Purchase and Sale Agreement states:

> If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this Agreement, BUYER shall conclusively be deemed to have: (a) completed all inspections… (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

Given the facts presented to the Hotline the Buyers did not give Seller written notice of disapproved items within the strict timeframe. The above language states that when this happens it is intrepreted as the Buyers decision to proceed with the transaction without repairs and without price reductions. If the Sellers wish to fix a few of the items, even though the RE-10 was not delivered on time, the written notice they give to Buyers informing them of what they will fix will not likely allow Buyer the chance to terminate. This is because Buyer's right to terminate arises out of the Inspection Section (Section 10) and once Buyer missed Buyers deadline to respond the parties are no long operating under Section 10. However, Seller should make it clear in writing that Seller's agreement to repair certain items is being done outside the Section 10 inspection provisions and is not to be considered to be reviving the inspection timeframes or altering the strict time periods in any way.

If the appraisal comes in below purchase price, does Buyer have to proceed if Seller agrees to lower the purchase price to meet the appraisal?

QUESTION: Broker questions if a Buyer must proceed with the transaction if Seller agrees to lower the purchase price after a low appraisal.

RESPONSE: Yes. 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).

According to the language referenced above, if the property appraises for less than the purchase price, Seller has 24 hours to reduce the price. If Seller does reduce the price, Buyer is obligated to continue with the transaction. If Seller decides not to reduce the price, only then Buyer can terminate the transaction and receive the Earnest Money back.

Does a Representation Agreement become void if Buyer signs with another brokerage?

QUESTION: Agent and Buyer signed a Buyer Representation Agreement on May 1. Agent later discovered that on May 3, Buyer signed another Buyer Representation Agreement with another brokerage and went under contract for a property the same day. Agent alleges that the agent from the other brokerage told him that when Buyer signed with his brokerage, the first Representation Agreement became null and void. Agent questions whether or not this is correct.

RESPONSE: No, there is no language in the IR form Buyer Representation Agreement (RE-14) that automatically cancels an existing Representation Agreement if Buyer subsequently enters into an agreement with another brokerage.

Can the timeframe section of the inspection contingency be unilaterally changed by one party?

QUESTION: Broker represents Buyer. Buyer and Seller were under contract with a RE-21. After Buyer's inspections, Buyer timely submitted the RE-10 to Seller with a list of requested repairs. Seller tendered their own RE-10 back to Buyer with the condition that Buyer had to respond by end of business day that same day or Seller would terminate and accept another offer. Broker questions if Seller has the right to make this demand.

RESPONSE: No. When Buyer and Seller executed the RE-21, they agreed to the terms in Section 10(C) which states in relevant part:

> 3). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items/conditions, it shall end BUYER'S timeframe for that particular inspection and is irrevocable. BUYER shall provide to SELLER pertinent section(s) of written inspection reports upon request, if applicable. Upon receipt of written notice SELLER shall have _____ business days (three [3] if left blank) in which to respond in writing**.** SELLER, at SELLER'S option, may agree to correct the items as requested by BUYER in the notice or may elect not to do so. If SELLER agrees in writing to correct the item/condition requested by BUYER, then said agreement will

> become a integral part of this contract. Otherwise, immediately upon a written response from SELLER that rejects BUYER'S requests, in whole or in part, said response is irrevocable and BUYER may proceed under 10(C)(4) below**.**
>
> 4). If SELLER does not agree to correct BUYER'S disapproved items/conditions within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the **BUYER has the option of either proceeding with the transaction without the SELLER being responsible for correcting the deficiencies stated in that particular notice, or giving the SELLER written notice within ____ business days** (three [3] if left blank) that BUYER will not continue with the transaction and will receive the Earnest Money back. If BUYER does not give written notice of cancellation within the strict time period specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without the repairs or corrections stated in that particular notice. BUYER electing to proceed with the transaction under BUYER'S Primary Inspection or any single inspection reserved under 10(B)(2) shall not affect BUYER'S rights regarding other inspections reserved in 10(B)(2). (Emphasis added).

The parties agreed that Buyer would have a specific number of days in which to respond to Seller's response to the RE-10. The contract terms cannot be unilaterally changed by one party to the transaction. In order to amend the agreed upon timeframe, both parties would need to execute an Addendum that shortened the time for Buyer to respond. Seller must allow Buyer the number of days agreed upon in the RE-21 to respond.

The Hotline does not get involved in disputes between Buyer and Seller. Brokers on both sides of the transaction should advise clients to seek independent legal counsel in this matter.

Is a Representation Agreement with one Seller valid when the property is actually owned by multiple people?

QUESTION: Agent has a Representation Agreement with a single Seller on a property owned by two people. One Seller verbally says she agrees to list the property but is not willing to sign any documents until they get to the closing table. Agent questions whether or not she can even list the property without getting both signatures on the Seller Representation Agreement.

RESPONSE: Legally speaking, the Seller Representation Agreement (RE-16) does not need to be signed by everyone that owns an interest in the property. Best practice is to always obtain all signatures at the outset to avoid complications later on in the transaction.

Can a Buyer force a Seller to sell the property if the appraisal comes in below purchase price?

QUESTION: If an appraisal is required and it comes back below the purchase price stated in the contract and Seller chooses not to reduce the purchase price to match the appraisal amount, does Buyer have the ability to force the Seller to continue?

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, in which case 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).

According to the language referenced above, the property cannot appraise below purchase price. If the appraisal is low, the Buyer gets their Earnest Money returned and the contract is terminated. The only way the parties can continue with the transaction is if Seller unilaterally decides to reduce the purchase price. If Seller decides not to reduce the price, the parties have no obligation to continue with the transaction. Nothing prohibits the parties from voluntarily negotiating to reduce the price, but Seller cannot be forced to do so.

Do terms from previously unaccepted counteroffers carry forward onto new counters?

QUESTION: Agent represents Buyer. Buyer submitted an offer and four different counter offers went back and forth. Counter #4 was eventually signed by both Buyer and Seller. There is now a dispute over the terms in the accepted counter offer. Agent questions if the terms from previous unsigned and unaccepted counter offers carry over when a new counter offer is proposed.

RESPONSE: No. The Counter Offer Form (RE-13) is not intended to carry over terms from previous counter offers. Each time a new counter offer is submitted it constitutes a rejection of the previous counter offer.

Given the facts presented to the Hotline, the parties have signed the Purchase and Sale Agreement and Counter #4. The terms of those documents are the only ones that become part of the contract. Counters #1-3 are not part of the contract. If the parties intend to carry over terms from previous counter offers it needs to be specifically addressed in the counter offer that is accepted by all parties.

What happens if Seller is to order the secondary inspections but does not do so within the specified timeframe?

QUESTION: If Buyer and Seller agree that Seller will order either the domestic well test and/or septic inspection test but Seller does not have the test completed and notice provided within the timeframe agreed upon in the contract, can the Buyer terminate?

RESPONSE: Section 10(B)(2) of the RE-21 states in relevant part:

> SECONDARY INSPECTION: … BUYER reserves the right to conduct the following inspections outside the Primary Inspection timeline:

☐ Domestic Well Water Potability and/or Productivity Test which shall be completed, and notice provided within ____ business days (ten [10] if left blank) from acceptance.

☐ Septic Inspection and required Pumping which shall be completed, and notice provided within ____ business days (ten [10] if left blank) from acceptance.

The language cited above states that the tests must be completed, and notice provided within a certain number of days. If the responsible party does not meet the requirements within the time specified, that could likely be considered a breach of contract.

The Hotline does not provide advice to Buyers and Sellers. Broker may wish to advise client to seek private legal counsel in this matter.

What are Seller's options if Seller believes Buyer did not act in good faith to obtain financing?

QUESTION: Broker questions the financing contingency language and what a Seller's recourse would be if they feel the Buyer did not act in good faith to obtain financing.

RESPONSE: The Purchase and Sale Agreement (RE-21) states "[i]n the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money shall be returned to BUYER." If Buyer is ultimately unable to obtain financing, Buyer is entitled to a return of their earnest money and is not obligated to continue with the transaction. However, Buyer must act in good faith. If Buyer does something during the transaction that would knowingly result in being denied financing, Buyer likely would not be acting in good faith.

The Hotline does not get involved in contractual disputes between Buyers and Sellers, nor should Brokers. Broker should advise client to seek private legal counsel to determine client's rights if a Buyer does not act in good faith to obtain financing.

When does possession take place?

QUESTION: Broker questions when possession upon closing takes place. Would Buyer have possession as soon as the documents are recorded or would it default to 5:00 that same day? Broker is also licensed in Washington where possession takes place at 9:00 p.m. on the day it records.

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

37. POSSESSION: BUYER shall be entitled to possession ☐upon closing or ☐date____________________ time _________ ☐A.M. ☐P.M.

According to the facts presented to the Hotline, the parties agreed that Buyer would take possession upon closing. Closing is defined in Section 36 of the RE-21. It states in relevant part:

CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing company 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.**

Based upon the language cited above, if the parties agree that Buyer has possession of the property upon closing, Buyer would be entitled to possession once the documents have been recorded and the sale proceeds are available to Seller.

Can a Representation Agreement be terminated due to incorrect closing cost estimates?

QUESTION: Broker questions if inexact closing cost estimates by the Broker are legal grounds for a client to cancel a representation agreement.

RESPONSE: No. According to the facts Broker presented to the Hotline, Broker advised the client that any closing cost projections were just estimates and were subject to change. The closing costs then did in fact change and were higher than originally estimated. Seller then tried to cancel the representation agreement. Based on these facts it does not appear that Broker engaged in any conduct that would constitute a breach of a contract. The Idaho Seller Representation Agreement (RE-16) is a valid legally binding contract that cannot be cancelled without mutual consent; it does not contain language that would allow a Seller to unilaterally cancel the agreement just because closing costs increased.

Is Seller in breach of contract if repairs are not completed by closing?

QUESTION: Broker represents Buyer. Buyer found mold during the inspection. Buyer and Seller agreed that Seller would remediate the mold. Buyer completed the final walkthrough on the day of closing and found that mold was still present. Broker questions if not having repairs completed by closing would be considered a breach of contract by Seller.

RESPONSE: The RE-10 Inspection Contingency Notice states:

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

If the parties agreed that Seller would remediate the mold it should have been completed within the timeframe specified in the contract. If said repairs have not been completed within the timeframe agreed to by the parties, Seller could likely be in breach of contract. However, the RE-10 also states:

BUYER shall have the right to re-inspect only the item(s) identified below to satisfy the BUYER that any agreed upon service, repair or replacement is

> acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of the service, repair or replacement. (Emphasis omitted).

Further, Section 20 of the RE-21 relates to Buyer's walk throughs. It states in relevant part:

> The SELLER grants BUYER and any representative of BUYER reasonable access to conduct two walk through inspections of the PROPERTY NOT AS A CONTINGENCY OF THE SALE, but for the following stated purposes: first walkthrough shall be within ____ business days (three [3] if left blank) after the deadline for completion of repairs agreed to as a result of the Buyer's Inspection Contingency for the purpose of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed. The second walkthrough shall be within ____ business days (three [3] if left blank) prior to close of escrow, for the purpose of satisfying BUYER that PROPERTY is in substantially the same condition as on the date this offer is made. The walk throughs stated herein are not a contingency of the sale which might allow termination, but rather for BUYER'S reasonable satisfaction. BUYER'S only recourse if unsatisfied is to notify SELLER who must correct or rectify the situation. … If BUYER does not conduct either of the walk throughs, BUYER specifically releases the SELLER and Broker(s) and their associates of any liability as to incomplete repairs and/or any changed conditions.

The walk throughs are not intended to be a contingency of the sale of the property. The first walk through is for Buyer to make sure all requested repairs have been completed, and the second is to ensure the property is in the same condition as when the offer was made. These walk throughs are intended to take place well before closing so that if Buyer finds problems with repairs, Seller has time to remediate those problems prior to the second walk through and prior to closing. Best practice is to never schedule a final walk through to take place the same day as closing.

Like Brokers, the Legal Hotline does not provide legal advice directly to Buyers or Sellers and does not resolve conflicts between them. Broker should advise client to seek independent legal counsel to determine if Seller's failure to remediate the mold is a breach of contract.

Is it a breach of contract if the signed closing documents are not received by the title company by the agreed upon closing date?

QUESTION: Broker represents Buyers. The transaction was set to close on November 8th pursuant to the terms of the contract. Seller lives abroad and had to mail the closing documents to the title company. The documents did not show up by the date and time of closing. Buyers question whether or not this is a breach of contract and if Buyers can terminate.

RESPONSE: Section 36 of the Purchase and Sale Agreement (RE-21) states in relevant part:

> On or before the closing date, BUYER and SELLER shall deposit with the closing company 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.**

If the parties agreed that closing would take place on November 8th, all documents would have to be accepted by an escrow agent on said date. However, the Hotline does not advise on, or determine, if there has been a breach of contract. Broker should advise Buyers to consult independent legal counsel to determine their rights and remedies in this matter.

Does an email satisfy the written notification requirement to object to a title report?

QUESTION: Broker represents Buyer. A driveway easement showed up on the preliminary title report and there were verbal communications about removing the easement. Within Buyer's timeframe to object to the title report, Buyer's agent emailed the listing agent about the easement. Buyer has since terminated the contract and Broker questions if the email Buyer's agent sent would constitute objection.

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

> BUYER shall have ___ business days (two [2] if left blank) after receipt of the preliminary commitment and CC&Rs, within which to object in writing to the condition of the title or CC&Rs as set forth in the documentation provided. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title and CC&Rs. If the title of said PROPERTY is not marketable, and cannot be made so within ___ business days (two [2] if left blank) after SELLER'S receipt of a written objection and statement of defect from BUYER, or if BUYER objects to the CC&Rs, then BUYER'S Earnest Money deposit shall be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any.

The above cited language does not specify how an objection must be made, only that it must be in writing. Therefore, determining whether or not a Buyer has objected must be done on a case-by-case basis. Neither the Broker nor the Legal Hotline can, or should, attempt provide legal counsel to Buyers and Sellers as to what constitutes objection. Broker should advise client to consult their own independent legal counsel in order to determine their rights.

Buyer allegedly got cold feet after the RE-10 was submitted to Seller and terminated the contract. Can a Buyer do this?

QUESTION: 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/conditions, **it shall end BUYER's timeframe for that particular inspection and is irrevocable.**

RE-21 Section 10(C)(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.

The Hotline does not get involved in disputes between Buyers and Sellers. Broker may wish to advise client to seek private legal counsel in this matter.

Can Seller dictate when Buyer is able to complete Buyer's walk throughs?

QUESTION: Buyer and Seller agreed that Buyer would have 7 business days to conduct Buyer's first walk through. Seller is not allowing Buyer access until days 6 and 7 of said time frame. Can Seller dictate when Buyer is able to complete the walk through?

RESPONSE: The contract between the Buyer and Seller states:

> 20. WALK THROUGHS: The SELLER grants BUYER and any representative of BUYER reasonable access to conduct two walk through inspections of the PROPERTY NOT AS A CONTINGENCY OF THE SALE, but for the following stated purposes: first walkthrough shall be within 7 business days (three [3] if left blank) after the deadline for completion of repairs agreed to as a result of the Buyer's Inspection Contingency for the purpose of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed.

The language above states that as of the date the contract was executed the Sellers granted the Buyer reasonable access, this does not mean that the Seller will in the future agree to grant access. Seller has already agreed and granted the access. If for some arbitrary reason Seller now denies Buyer access within the stated timeframe, Seller could be found in breach of contract in which case Buyer would have all legal remedies available, including but not limited to specific performance and recouping any additional costs incurred by Buyer as a result of the breach.

What is the purpose of Buyer's walk throughs?

QUESTION: Broker called the Hotline to determine the purpose of the first and second walk throughs.

RESPONSE: Section 20 of the RE-21 relates to Buyer's walk throughs. It states in relevant part:

> The SELLER grants BUYER and any representative of BUYER reasonable access to conduct two walk through inspections of the PROPERTY NOT AS

> A CONTINGENCY OF THE SALE, but for the following stated purposes: first walkthrough shall be within ____ business days (three [3] if left blank) after the deadline for completion of repairs agreed to as a result of the Buyer's Inspection Contingency for the purpose of satisfying BUYER that any repairs agreed to in writing by BUYER and SELLER have been completed. The second walkthrough shall be within ____ business days (three [3] if left blank) prior to close of escrow, for the purpose of satisfying BUYER that PROPERTY is in substantially the same condition as on the date this offer is made. The walk throughs stated herein are not a contingency of the sale which might allow termination, but rather for BUYER'S reasonable satisfaction. BUYER'S only recourse if unsatisfied is to notify SELLER who must correct or rectify the situation. … If BUYER does not conduct either of the walk throughs, BUYER specifically releases the SELLER and Broker(s) and their associates of any liability as to incomplete repairs and/or any changed conditions.

The walk throughs are not intended to be a contingency of the sale of the property. The first walk through is <u>only</u> for Buyer to make sure all requested repairs have been completed, and the second is to ensure the property is in the same condition as when the offer was made. These walk throughs are intended to take place well before closing so that if Buyer finds problems with repairs, Seller has time to remediate those problems prior to the second walk through and prior to closing.

Like Brokers, the Legal Hotline does not provide legal advice directly to Buyers or Sellers and does not resolve conflicts between them. Broker should advise client to seek independent legal counsel if there is a dispute.

Can the closing date on a first position offer be extended if there is also a backup buyer?

<u>QUESTION</u>: Agent questions the ability to extend the closing date on a first position offer when the transaction also has a backup buyer whose offer is subject to RE-18.

<u>RESPONSE</u>: According to the facts presented to the Hotline, Seller wishes to grant a first position buyer an extension on a previously agreed upon closing date and agent questions what the effect, if any, this will have on the back-up buyer's rights. Pursuant to the terms of the RE-18 "Back-Up Offer Addendum" the Seller and the Buyer in first position are free to change the terms of the original offer without regard to the back-up buyer. The RE-18 contains the relevant terms:

> SELLER has the right to change or amend the terms of the Offer in First Position without any consideration to this Agreement and without advising BACK-UP BUYER of said changes or amendments (RE-18 line 18-19).

The back-up Buyer's right to purchase the property do not mature unless and until "the offer in first position is terminated and/or fails to close" (RE-18 lines 22-23). According to the facts presented to the Hotline the offer in first position has not been terminated and has not failed to close, the closing date has just been renegotiated.

Further, pursuant to the RE-18 the back-up offer addendum will automatically expire when the offer in first position closes. "This Agreement shall expire and be terminated if the offer in First Position closes…" (RE-18 line 35).

DISCLOSURE

Can a Buyer terminate the contract if the general contractor disclosures were never made?

QUESTION: Broker represents Buyer in a transaction where Buyer was purchasing property from a general contractor who owned residential real property. General contractor failed to provide Buyer with the disclosures mandated by Idaho Code § 45-525 (General Contractors – Residential Real Property – Disclosures). Broker questions the remedies when a general contractor fails to make these disclosures. Broker further questions whether or not failure to make the statutory disclosures can be grounds for terminating a Purchase and Sale Agreement.

RESPONSE: Idaho Code § 45-525 states:

> General contractor information. Prior to entering into any contract in an amount exceeding two thousand dollars ($2,000) with a homeowner or residential real property purchaser to construct, alter or repair any improvements on residential real property, or with a residential real property purchaser for the purchase and sale of newly constructed property, the general contractor shall provide to the homeowner a disclosure statement setting forth the information specified in this subsection. The statement shall contain an acknowledgment of receipt to be executed by the homeowner or residential real property purchaser. The general contractor shall retain proof of receipt and shall provide a copy to the homeowner or residential real property purchaser…
>
> Idaho Code § 45-525(2).

The statute also enumerates a provision for a contractor failing to provide the disclosures:

> Failure to disclose. Failure to provide complete disclosures as required by this section to the homeowner or prospective residential real property purchaser shall constitute an unlawful and deceptive act or practice in trade or commerce under the provisions of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.
>
> Idaho Code § 45-525(4).

The Hotline does not, nor should the Broker, provide legal advice to Sellers or Buyers in relation to the applicability of Idaho Code 45-525 to any particular transaction. Brokers should advise their clients to seek independent legal counsel if they feel that a statutory disclosure has not been

provided in order to ascertain their specific remedies, including but not limited to whether or not a Purchase and Sale Agreement can be legally terminated.

Can a commercially zoned lot still be sold if the County is not issuing any building permits?

QUESTION: Broker has a commercially zoned lot listed for Seller. The county has notified them that they will not be issuing any building permits for the area and that no development can happen until they have completed various tests to the county's satisfaction. Broker questions if they are still able to sell the lot as long as this information is disclosed to the Buyer.

RESPONSE: Yes, the property can still be sold. The information from the county should be disclosed not only because it likely falls under the definition of an adverse material fact as defined by Idaho Code, but Seller should also make sure to disclose the information to potential buyers in order to reduce Seller liability.

DUTIES

Can a dual agent disclose the contract price to other potential buyers?

QUESTION: Broker questions whether or not she is able to disclose the contract price to other potential Buyers if she represents both Buyer and Seller in a transaction.

RESPONSE: Idaho Code § 54-2088 outlines dual agency representation. It states in relevant part:

> (4) All duties and obligations owed to a buyer/client or a seller/client under section 54-2087, Idaho Code, apply to limited dual agency relationships to the extent they do not unreasonably conflict with duties and obligations owed to the other client, except that:
> (a) A limited dual agent shall not disclose any of the following without express written consent of the client to whom the information pertains:
> (i) That a buyer is willing to pay more than the listing price of the property;
> (ii) That a seller is willing to accept less than the listing price for the property;
> (iii) The factors motivating the buyer to buy or the seller to sell;
> (iv) That a buyer or seller will agree to a price or financing terms other than those offered.
> (b) A limited dual agent does not have a duty of undivided loyalty to either buyer/client or seller/client, and by consenting to limited dual agency, the buyer and seller agree to those limitations.

According to the above stated language, if Seller gives Broker written consent to disclose the purchase price, Broker can make those disclosures to potential Buyers.

Can a licensee represent a Seller and only provide limited representation?

<u>QUESTION</u>: One of Broker's agents has been approached by a Seller that wants to sell her property as a FSBO but would like the brokerage's help with advertising. Seller will only pay commission if agent's efforts procure the Buyer. Broker questions if this type of representation is permitted. Broker would not be listing the property on the MLS.

<u>RESPONSE</u>: Idaho statutes require certain duties to a client and/or customer no matter who brings the Buyer. Idaho Codes §§ 54-2086 and 54-2087 outline the brokerage's duties to customers and clients. Both statutes state the following:

> The duties set forth in this section are mandatory and may not be waived or abrogated, either unilaterally or by agreement.

Regardless of the type of representation that this Seller wants, the brokerage would still be obligated to perform the duties outlined in the above referenced Idaho Code sections. In addition, brokerages typically find it very difficult to ascertain exactly what procured the Buyer which can lead to disputes over the commission.

Can the brokerage be liable for a Seller not disclosing information?

<u>QUESTION</u>: According to Broker, Seller disclosed information regarding the furnace to Broker. Broker then passed along this information to Buyer's agent. The Buyer now believes this information to be incorrect. Broker questions what his liabilities might be if a Buyer discovers something Seller did not disclose and blames Broker for not disclosing the information.

<u>RESPONSE</u>: Broker is entitled to rely on the client's representations regarding the property and is not required to confirm the information. Idaho Code § 54-2087(7) states:

> Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a **client** to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property. Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to conduct an independent investigation of either party's financial ability to complete a real estate transaction. (Emphasis added).

Further, Idaho Code § 54-2086(5) states in relevant part:

> 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. (Emphasis added).

Given the facts presented to the Hotline, the transaction has closed which means Broker is no longer representing Seller. Idaho Code § 54-2091 details the duration of an agency relationship:

> A brokerage's agency relationship and corresponding representation duties under sections 54-2082 through 54-2097, Idaho Code, shall commence on the date indicated on the written agreement between the brokerage and a buyer/client or seller/client and shall end at the earliest of:
>
> (a) Performance or completion of the representation;
> (b) Agreement by the parties;
> (c) Expiration of the agency relationship agreement.

When a property successfully closes, the brokerage's representation of the client is complete. Broker should advise all parties that this is a dispute between the Buyer and Seller and should retain private legal counsel if accusations continue to be made toward the Broker.

Is a licensee obligated to disclose if client is related to anyone within the brokerage?

QUESTION: Broker represents Seller. The original MLS listing was co-listed by an agent who was related to Seller. When the property went under contract, a different agent was representing Seller and was named on the Purchase and Sale Agreement. The agent related to Seller is now acting as a transaction coordinator who will handle the paperwork for closing. Buyer wants to terminate the contract because Seller's relationship to the transaction coordinator was not disclosed. Broker questions whether they have a duty to disclose if Buyer or Seller is related to anyone within the brokerage, not just the agent representing them.

RESPONSE: A licensee's duty to disclose is governed by the REALTOR® Code of Ethics:

> REALTORS® shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent or broker. In selling property they own, or in which they have any interest, REALTORS® shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative.
>
> • Standard of Practice 4-1
> For the protection of all parties, the disclosures required by Article 4 shall be in writing and provided by REALTORS® prior to the signing of any contract.
>
> Article 4, *Code of Ethics and Standards of Practice of the National Association of REALTORS®*. (Internal citations omitted).

Based on the language referenced above, the Idaho REALTORS® added a check box to the Purchase and Sale Agreement so that agents can easily disclose their relationship to Buyers and

Sellers if necessary. Only the agent named in the Purchase and Sale Agreement has the duty to disclose their relationship and only if it is an "immediate family member."

Further, if a REALTOR® failed to make the required disclosure, the proper remedy is to report the REALTOR® for a violation of the Code of Ethics.

The Hotline does not get involved in disputes between Buyers and Sellers. Broker may wish to advise client to seek independent legal counsel if Buyer wants to terminate the contract.

What if a Seller does not want their agent to disclose an adverse material fact?

QUESTION: Broker questions a licensee's obligations to disclose any adverse material fact known about the property when the Seller decides not to disclose the information themselves. Are agents obligated even when their client does not wish to disclose?

RESPONSE: Idaho law requires Sellers and licensees to disclose any adverse material facts known about the property. Idaho Code §§ 54-2086 and 54-2086 state a licensee's duties to clients and customers:

> To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee;
>
> Idaho Code § 54-2086(1)(d).
>
> Disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee;
>
> Idaho Code § 54-2087(4)(a).

The statutes also state:

> The duties set forth in this section are mandatory and may not be waived or abrogated, either unilaterally or by agreement.
>
> Idaho Code §§ 54-2086(3) and 54-2087(8).

Neither a licensee nor a seller has the ability to override a statutory licensing obligation. Failure to follow statutory obligations can result in a disciplinary action from the Idaho Real Estate Commission. The Hotline is not the final authority on disciplinary issues and Broker should check with the Idaho Real Estate Commission prior to making any disclosures which may be against clients' best interests.

EARNEST MONEY

Does additional earnest money still get credited back to Buyer as stated in the RE-21?

QUESTION: Broker represents Buyer. In an addendum, Buyer and Seller agreed Buyer would deposit additional Earnest Money and the contract date would be extended. Broker questions if this Earnest Money still gets credited back to the Buyer as stated in the RE-21.

RESPONSE: Without considering any specific terms of the addendum, generally speaking, yes. If the addendum refers to the additional monies as Earnest Money, it appears that it would relate back to Section 3 of the Purchase and Sale Agreement (RE-21) which states "BUYER hereby offers the above stated amount as Earnest Money which shall be credited to BUYER upon closing."

If the parties intended something contrary to happen to the additional money Buyer put down, those terms should have been specifically stated in the addendum and/or the parties could have refrained from categorizing the money as "Earnest Money."

Who is entitled to the earnest money if the contract is not contingent upon the sale of Buyer's other property, yet Buyer was ultimately unable to qualify for financing because their home did not sell?

QUESTION: Broker represents Buyer. The executed Purchase and Sale Agreement (RE-21) indicated that the offer was not contingent upon the sale, refinance and/or closing of any other property. The RE-21 also indicated that there would be cash proceeds coming from another sale and a portion was being financed. Buyer ultimately was unable to qualify for financing, probably because Buyer's current home did not sell. Buyer terminated the agreement. Broker questions if Buyer is entitled to the Earnest Money because Buyer marked that the offer was not contingent on the sale of another home.

RESPONSE: According to the facts given to the Hotline, checking the box to indicate the offer was not contingent on the sale of another property and yet also checking the box that says there are cash proceeds coming from another sale likely created an ambiguity as to whether or not Buyer was able to terminate the agreement due to the fact their other home did not sell.

What is not ambiguous, however, is that the parties also agreed that Buyer was financing a portion of the funds and that Section 3(C) applied. Section 3(C) of the RE-21 states in relevant part:

> In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER's Earnest Money shall be returned to BUYER.

In this case, the reason Buyer was not able to complete the transaction was because Buyer was unable to obtain financing, therefore it is likely that Buyer would be able to cancel the transaction and receive Earnest Money back. However, it is always best practice to clearly

indicate that the transaction is contingent on the sale of Buyer's home when applicable. If this was a cash transaction, Buyer would have been unable to cancel the transaction.

Whenever a dispute as to Earnest Money arises between Buyer and Seller, the Responsible Broker holding the Earnest Money has three options which are listed in Idaho Code § 54-2047:

> 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.

The Hotline does not determine the outcome of Earnest Money disputes. Broker may wish to advise client to seek private legal counsel in this matter.

Can the brokerage hold a Buyer's earnest money in its trust account in anticipation of further offers being made?

QUESTION: Agent represents a Buyer who is moving to Idaho from out of the country. Buyer was under contract for a transaction but ended up canceling the contract and received the earnest money back. Buyer asked agent if the brokerage could hold the earnest money in the trust account in anticipation of Buyer making another offer on another property. Agent questions if this is possible and how to properly document it in agent's files.

RESPONSE: Yes, it is possible for the brokerage to continue to hold the earnest money in the trust account. Brokerage should make sure to close out the ledger for the failed transaction and open a new ledger for a second transaction and cross reference the two ledgers. Further, best practice would be to have written instructions regarding the earnest money from client in both files.

What happens to the earnest money if a Buyer terminates based on an unsatisfactory inspection?

QUESTION: Brokers question if a Buyer can terminate the contract for any reason during the inspection period and what happens to the Earnest Money if the contract is terminated based on an unsatisfactory inspection within the timeframe stated in the contract.

RESPONSE: Under the standard terms of the RE-21, a Buyer may terminate the agreement pursuant to an inspection and receive Buyer's Earnest Money back. The RE-21 states:

> Buyer's inspection contingency allows a BUYER to conduct a general inspection of the PROPERTY which includes all aspects of the PROPERTY, including but not limited to neighborhood, conditions, zoning and use allowances, environmental conditions, applicable school districts and/or any other aspect pertaining to the PROPERTY or related to the living environment at the PROPERTY; hereinafter referred to as the Primary Inspection. Except for additional items or conditions specifically reserved in a Secondary Inspection below BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items/conditions or written notice of termination of this Agreement based on an unsatisfactory inspection. Once BUYER delivers written notice to SELLER it shall end BUYER'S timeframe for inspections other than those specifically reserved in a Secondary Inspection below and is irrevocable regardless of if it was provided prior to the deadline stated above.
>
> RE-21, 10(B)(1).
>
> …
>
> 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.
>
> RE-21, 10(C)(2).

The language cited above allows the Buyer to terminate based on an "unsatisfactory inspection" and to have their earnest money returned.

The term "unsatisfactory inspection" is not defined in the contract, therefore the common interpretation of that term controls. Black's Law Dictionary defines inspection as:

> To examine; scrutinize; investigate; look into; check over; or view for the purposes of ascertaining the quality, authenticity or conditions of an item, product, document, residence, business, etc. Word has broader meaning than

> just looking, and means to examine carefully or critically, investigate and test officially, especially a critical investigation or scrutiny.

In addition, in 2012 the Supreme Court of Idaho reviewed similar language in a Purchase Sale Agreement and stated:

> Despite appellants' contentions, when read as a whole, the Buyer's Obligations clause expressly and unambiguously grants Buku [the Buyer] the right to refuse to close, in the event that Buku is not "fully satisfied with the condition of the property."…[This] is what is sometimes referred by real estate law practitioners as a "free look" provision, granting the Buyer the ability to decline the purchase for virtually any reason, without losing the earnest money deposit.
>
> *Buku Properties, LLC v. Clark* 153 Idaho 828.

Based upon the boiler plate language in the contract and the Supreme Court's previous interpretation of similar contracts, if challenged a court would most likely rule that the Purchase and Sale Contract can be terminated by buyer for any item or condition which is not satisfactory to buyer. However, the unsatisfactory item or condition must be based on some sort of inspection. Further, there is no requirement that inspections need to be performed by professional home inspectors and may be performed by the buyer themselves.

Given the facts presented to the Hotline, Seller has made a demand upon the Earnest Money. Responsible broker has the following options when an Earnest Money dispute arises:

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

The Hotline believes it is best practice to keep the earnest money in the trust account and to not release it until the Broker is instructed by all parties or a court order to release the disputed funds. Another option the parties have is to go to Small Claims Court if the disputed amount is $5,000 or less. Broker may also wish to advise clients to seek private legal counsel in this matter.

PROPER FORM USE

How should the forms be filled out if Seller is a Trust or Estate?

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

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

A new construction property condition disclosure was initially filled out using the 2017 forms. A 2018 offer came in and Buyer's agent has requested another form be filled out using the new 2018 form. Does Seller have to update the form?

QUESTION: Broker listed a new construction project in 2017. Seller filled out a July 2017 version of the RE-26. Buyer's agent believes Broker needs to have Seller fill out a new RE-26 on the 2018 version of the forms. Broker questions if this is correct.

RESPONSE: Given the facts presented to the Hotline, it is not necessary to have Seller fill out a new RE-26. The contents of the RE-26 did not change from 2017 to 2018.

Because the IR forms undergo changes from year to year it is best practice to always use an updated version; however, in this case the form did not change from 2017 to 2018 so legally speaking it would be unnecessary for Seller to repeat the disclosures on an identical form.

Must the RE-18 be used when all back up offers are received?

QUESTION: Broker questions if a RE-18 form must be used when all back-up offers are received.

RESPONSE: If Seller is not going to accept the back-up offers in writing then a RE-18 does not need to be utilized. If Seller is going to accept a back-up offer it is best practice to have

the parties execute the RE-18, if not, some other written documentation is needed so that Seller is not obligated under two contracts to sell the property.

MISCELLANEOUS

Is an offer made via email valid?

QUESTION: Broker represents Seller. Broker received an offer via email from an agent and questions if the email is a valid offer or if it needs to be presented on a RE-21.

RESPONSE: Yes, the email offer would likely be valid. In Idaho, offers to purchase must be in writing but they do not have to be on the IR Forms. Idaho Code § 54-2052 states:

> ELECTRONICALLY GENERATED AGREEMENTS. To the extent the parties to the transaction have agreed in writing offers to purchase, counteroffers and acceptances may be electronically generated or transmitted, faxed or delivered in another method shall be deemed true and correct and enforceable as originals.

Broker may wish to check with IREC to see how they would like an email offer documented for audit purposes.

Can Seller's agent still use the IR forms if the offer they received was not on the IR forms?

QUESTION: Broker represents Seller. They have received an offer from a Buyer who did not use the standard IR Forms. Broker questions whether the Seller can still use the State forms when countering and/or amending the contract.

RESPONSE: Yes, Broker can replace Buyer's offer with a RE-21 or use any IR Form when countering and/or amending even though the offer did not originate on the IR Forms. Additionally, if non-IR Forms are used in the transaction it would be prudent for Broker to remind the client in writing that broker cannot interpret Buyer's contract and therefore assumes no responsibility for its use, appropriateness or legality and that Seller should retain legal counsel to review the offer from Buyer.

Who has the authority to control the transaction when two people are listed on a deed but one has quitclaimed the property to the other?

QUESTION: Broker questions if two people are listed on a deed but one has provided the other a quit claim deed, who has the authority to control the transaction when the property gets listed.

RESPONSE: A quit claim deed delivered to an individual transfers any and all interest an individual has in the real property described in the deed. This transfer includes the right to make any decisions related to the sale of the property. Given the facts presented to the Hotline the individual who tendered the quit claim deed has no legal authority over the property and the Broker does not have to take instruction from said individual.

When does a power of attorney terminate?

QUESTION: Broker is receiving conflicting instructions from a property owner and an individual who had a power of attorney for the owner. Broker would like to know under what conditions a power of attorney can terminate?

RESPONSE: According to the facts presented to the Hotline, the Owner's instruction would control because the owner revoked the power of attorney; when the instructions from a person granting a power of attorney (called a "principal") and the individual who received the power of attorney (called an "agent") conflict the authority of the principal controls. Further, pursuant to Idaho Code 15-12-110:

(1) A power of attorney terminates when:
- (a) The principal dies;
- (b) The principal becomes incapacitated, if the power of attorney is not durable;
- (c) The principal revokes the power of attorney;
- (d) The power of attorney provides it terminates;
- (e) The purpose of the power of attorney is accomplished; or
- (f) The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

(2) An agent's authority terminates when:
- (a) The principal revokes the agent's authority;
- (b) The agent dies, becomes incapacitated or resigns;
- (c) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or
- (d) The power of attorney terminates.

What is required to have a valid legal description?

QUESTION: Broker questions exactly what is required for a valid legal description in a Purchase and Sale Agreement. Broker also inquired as to whether the parties' intent or personal knowledge can save an otherwise faulty Purchase and Sale Agreement.

RESPONSE: In 2009, the Supreme Court provided a detailed analysis regarding what is required by way of a stated legal description in a purchase sale agreement. The Court's analysis is reprinted below:

The statute of frauds renders an agreement for the sale of real property invalid unless the agreement or some note or memorandum thereof is in writing and subscribed by the party charged or his agent. I.C. § 9–505(4). Agreements for the sale of real property that fail to 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. *Hoffman v. S V Co., Inc.,* 102 Idaho 187, 190, 628 P.2d 218, 221 (1981) (citing 72 Am.Jur.2d Statute of Frauds § 285 (1974); 73 Am.Jur.2d Statute of Frauds § 513 (1974)). An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain a description of the property, either in terms or by reference, so that the property can

be identified without resort to parol evidence. *Garner v. Bartschi,* 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003).

For over 100 years, this Court has held that a contract for the sale of real property must speak for itself and that a court may not admit parol evidence to supply any of the terms of the contract, including the description of the property. *Kurdy v. Rogers,* 10 Idaho 416, 423, 79 P. 195, 196 (1904). In *Kurdy,* the written contract did not include the terms or conditions of the sale, the consideration, or a description of the land or even indicate the county or state in which the land was located. *Id.* This Court specifically held that parol evidence is not admissible to supply any of the terms of the contract. *Id.*

Five years after deciding *Kurdy,* in a case involving the sale of real property, this Court took up the question what constitutes a sufficient description of real property under the statute of frauds. *Allen v. Kitchen,* 16 Idaho 133, 100 P. 1052 (1909). In *Allen,* the contract described the real property as "Lots 11, 12, and 13, in block 13, Lemp's addition," and "Lot 27, Syringa Park addition, consisting of 5 acres." *Id.* at 137, 100 P. at 1053. Absent from the description was the city, county, state, or other civil or political division or district in which any of the property was located. *Id.* The Appellant argued that the contract was sufficient to admit oral evidence showing the location of the real property. This Court disagreed.

In *Allen,* we reaffirmed our holding from *Kurdy* that a contract must speak for itself and stated that "[i]t is not a question as to what the contract was intended to be, but, rather, was it consummated by being reduced to writing as prescribed by the statute of frauds." *Id.* at 145, 100 P. at 1055. We also indicated that a contract that references "any record or external or extrinsic description from which a complete description could be had" sufficiently describes the real property for purposes of the statute of frauds. *Id.* at 143, 100 P. at 1055. The contract in *Allen* neither contained a complete description of the real property nor referred to any external record containing a sufficient description. Therefore, we concluded that there was no complete contract before the court. *Id.* at 149, 100 P. at 1058.

A description of real property must adequately describe the property so that it is possible for someone to identify "exactly" what property the seller is conveying to the buyer. *Garner,* 139 Idaho at 435, 80 P.3d at 1036. "A description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers." *Id.* (quoting *City of Kellogg v. Mission Mountain Interests Ltd., Co.,* 135 Idaho 239, 244, 16 P.3d 915, 920 (2000)). This rule is consistent with our approach in *Allen,* which required that the contract either contain a sufficient description of the real property or refer to an external record containing a sufficient property description.

The contract in *Garner* described the property as the " 'Bartschi Property, *City*___, *Zip* 83252, legally described as approx. 500 acres of mountain property.' " *Id.* at 434, 80 P.3d at 1035. An addendum to the contract further described the property as: "Acreage: As deemed by Bear River [sic] County Platt and Tax Notices to be 512 acres." *Id.* (quotations omitted). We held that this description did not satisfy the statute of frauds. *Id.* at 436, 80 P.3d at 1037. Because the contract referred to certain tax notices, we also analyzed the descriptions of the real property in the tax notices for compliance with the statute of frauds. The property descriptions in the tax notices were incomplete and did not allow someone to identify exactly what property the seller was conveying to the buyer. *Id.* at 435–36, 80 P.3d at 1036–37. Therefore, we concluded that the property descriptions referenced in the tax notices did not satisfy the statute of frauds. *Id.* at 436, 80 P.3d at 1037.

We most recently addressed the sufficiency of a property description in a contract for the sale of real property in *Lexington Heights Dev., LLC v. Crandlemire,* 140 Idaho 276, 92 P.3d 526 (2004). In Lexington Heights, we relied heavily on the analysis from the *Allen* Court indicating that a contract must speak for itself and that parol evidence is not admissible to supply the terms of a contract. *Id.* at 281, 92 P.3d 526, 92 P.3d at 531. We also reaffirmed the rule we relied upon in *Garner* stating, "[a] description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers." *Id.* at 281–82, 92 P.3d 526, 92 P.3d at 531–32 (quoting *Mission Mountain,* 135 Idaho at 244, 16 P.3d at 920).
...

In the instant case, the contract described Frasure's real property by reference to the street address and the city, county, state and zip code in which the property was located. The physical address is not a sufficient description of the property for purposes of the statute of frauds. It is impossible to determine exactly what property Frasure intended to convey to Respondents relying solely on the physical address in the contract. The physical address gives no indication of the quantity, identity, or boundaries of the real property.

Respondents argue that extrinsic evidence can supply a complete legal description of the instant property. Respondents' expert, Allan Knight, testified at trial that he entered the physical address from the contract into the computer system at the Ada County Assessor's office. That search revealed the name of the property owner, Don Frasure. Knight then entered Frasure's name into the computer system at the Ada County Recorder's Office and obtained a copy of the prior deed that conveyed the property to Frasure. The deed conveying the property to Frasure contained a complete legal description of the instant property. This Court's precedent from the past 100 years permits a party to ascertain a property description from extrinsic evidence only when the contract or deed references the extrinsic evidence. The instant contract does not reference the records at the Ada County Recorder's Office or the prior recorded deed conveying the property to Frasure. Therefore, the statute of frauds does not permit Respondents to supplement the real property description in the contract with the proffered extrinsic evidence.

We are unwilling to create an area of unsettled law by holding that a real property description that does not allow a person to determine exactly what property the seller is conveying to the buyer satisfies the statute of frauds. We are equally unwilling to overturn over a century's worth of legal precedent and erase the limits on the use of extrinsic evidence that a party may use to supply a missing term from a contract for the sale of real property. Our current approach to extrinsic evidence fulfills the policy behind the statute of frauds by preventing fraud and deception and is not overly burdensome on the parties to a contract for the sale of real property. In order to make use of extrinsic evidence in a real estate contract, the parties merely need to reference the extrinsic evidence in their contract or deed. This system has functioned well over the past 100 years and we see no need to change it now. Therefore, we reverse the decision of the district court and hold that the property description in the instant case does not satisfy the statute of frauds.

Ray v. Frasure, 146 Idaho 625, 628–30, 200 P.3d 1174, 1177–79 (2009)

As to Brokers question into the parties' intent, the Supreme Court has also held the intent is irrelevant to the test:

> In order to be enforceable, "a description of real property must adequately describe the property such that it is possible for someone to identify 'exactly' what property the seller is conveying to the buyer." Whether a description is such that the property can be 'exactly' identified is an objective determination made by the court. This objective determination is not affected by the understanding or intention of the contracting parties at the time they drafted the property description. Such considerations are irrelevant. They do not aid the court in determining whether the document itself, standing alone (including with any outside materials directly referenced therein), meets the necessary qualifications.
>
> *The David & Marvel Benton Tr. v. McCarty*, 161 Idaho 145, 151, 384 P.3d 392, 398 (2016). Internal citations omitted.

Broker should be mindful that there are few exceptions to the hard and fast rules stated above. One such exemption states "The preceding section must not be construed to … abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." Idaho Code § 9-504. This exception is known as the doctrine of partial performance. The Supreme Court also provides guidance on the application of this exception:

> As an exception to the strict application of the Statute of Frauds, the doctrine of part performance is well-established in Idaho. I.C. § 9–504. Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the statute of frauds—as in this case where the alleged agreement was not reduced to writing—the agreement may nevertheless be specifically enforced when the purchaser has partly performed the agreement.
>
> …
>
> "What constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is a matter of law." *Boesiger,* 85 Idaho at 556, 381 P.2d at 804. "The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined." *Roundy,* 98 Idaho at 629, 570 P.2d at 866 (quoting *Barton v. Dunlap,* 8 Idaho 82, 92, 66 P. 832, 836 (1901)). The acts constituting part performance must be proven by clear and convincing evidence.
>
> *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994) Internal Citations Partially Omitted.

The general statements of the law contained herein are provided to enhance Broker's knowledge and understating of the law. Like Brokers, the Legal Hotline does not provide legal advice directly to Buyers or Sellers and does not resolve conflicts between them. If Broker's client believes there is an issue with a legal description Broker should advise client to seek qualified independent legal counsel to advise client on the law and facts applicable to client's particular situation.