The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2020

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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 2020 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2020. 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 2021 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2020 "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

Can a Buyer be represented by two brokerages?

QUESTION: Broker questions if two different brokerages can co-represent the same Buyer and the best way to document such a representation.

RESPONSE: There is nothing in Idaho law that prevents two brokerages from representing the same client. However, the Idaho REALTORS® Representation Forms (RE-14 and RE-16) are not specifically designed to provide for co-representation. Best practices would be for a brokerage to have a specific co-representation contract that addresses all the material terms. At a minimum, the parties can use the RE-16A to add the second brokerage.

Line 31 of the RE-16A states:

> The representation shall be a co-listing agreement with the following Brokerages _____ and _____, **each Brokerage having the right to represent Buyer and/or Seller exclusive of all other Brokers**. (Emphasis added)

Can a Buyer request proof that Buyer's offer has been submitted to Seller?

QUESTION: Broker questions if a Buyer's agent is entitled to confirmation that an offer has been submitted to the Seller.

RESPONSE: Yes, but only upon request to another REALTOR® member. A recent addition to the NAR Code of Ethics states:

> When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. **Upon the written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide, as soon as practical, a written affirmation to the cooperating broker stating that the offer has been submitted to the seller/landlord**, or a written notification that the seller/ landlord has waived the obligation to have the offer presented. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. *(Amended 1/20)*
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> Standard of Practice 1-7, *Code of Ethics and Standards of Practice of the National Association of REALTORS®*. (Emphasis added).

If written request for proof that an offer was submitted to Seller is received, listing agent, as a REALTOR® member, is required to provide said confirmation or he or she could be at risk of

violating the Code of Ethics. It is also important to note that Idaho law requires all offers to be submitted to the Seller up until the time of closing. It has not been established that a Seller can waive this statutory requirement as contemplated in the NAR Code of Ethics language set forth above.

What are best practices when contacted by a represented Seller?

QUESTION: Agent represents Buyers. They have been trying to schedule a showing of a certain property but have not had a response from the listing agent. Buyers and their agent drove by the property and agent left her business card. Sellers contacted her directly and mentioned that the listing agent is nonresponsive, and they would like out of their contract. Her Buyers still want to look at the property and she wonders what advice she could give Sellers.

RESPONSE: Like real estate licensees, the Hotline cannot give advice to Buyers and Sellers. Given the facts presented to the Hotline, Sellers have executed a RE-16 with another Brokerage. The RE-16 is a legally binding contract between a seller and a brokerage. Both Idaho law and the REALTOR® Code of Ethics have strict rules that prohibit interference with brokerage agreements. The brokerage should take care not to expose itself to liability. Best practices would be to not communicate directly with Sellers until Sellers can establish that they are no longer represented by another Brokerage.

COMMISSIONS & FEES

How should a commission dispute be handled so as not to interfere with the sale of the property?

QUESTION: Buyer hires Brokerage #2 to write an offer on a property. Buyer tells Brokerage #2 that Buyer was previously working with Brokerage #1 but has terminated the Representation Agreement. Brokerage #2 finds Buyer a property and Buyer goes under contract. Brokerage #1 showed back up and provided a copy of a Representation Agreement with Buyer to the title company and maintains it is still a valid contract. Brokerage #2 questions if that agreement is valid even though Buyer terminated.

RESPONSE: Whether or not the agreement between Buyer and Brokerage #1 is valid and binding is not for Brokerage #2 to decide. Buyer will have to work that out directly with Brokerage #1.

Given the facts presented to the Hotline, the dispute over who is owed the commission is holding up the transaction. All Brokers involved should take care not to let the commission dispute interfere with closing. Brokers may instruct the closing agency to hold the Buyer's share of commissions in escrow until the two brokerages work out who is owed the commission.

Could a Seller owe commission if an offer is never accepted?

QUESTION: Broker called the Hotline regarding the Seller Representation Agreement (RE-16). 1) Does a Seller ever have an obligation to pay commission if Seller never accepts an offer? 2) Can the Brokerage unilaterally terminate a Representation Agreement with a client?

RESPONSE: Regarding Broker's first question, the facts presented to the Hotline indicate that the Brokerage has presented Seller with three full-price offers but Seller has not accepted any of said offers. Section 6(A) of 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 $_____.

If the Brokerage representing Seller has found purchasers ready, willing and able to purchase the property, Brokerage could, in rare and limited circumstances, be entitled to their commission based on the language above even if Seller does not accept an offer. However, it would be up to the Broker/agent to prove that they did procure purchasers which could be a lengthy and costly process.

As to Broker's second question, no, the Representation Agreement cannot be unilaterally canceled by either party. The 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 or the Brokerage to unilaterally cancel the agreement. The Brokerage should attempt to get Seller to agree to a mutual cancellation of the agreement. If Seller is failing to communicate, the RE-16 Section 35 states:

> COMMUNICATION: Failure of SELLER to reasonably maintain communication with BROKER is a breach of this agreement.

Unless Seller has breached the agreement, the RE-16 cannot be unilaterally terminated.

What is the best way to handle a commission dispute?

QUESTION: Brokerage has an exclusive Representation Agreement with a client to purchase property. Buyers allegedly found a property and had another agent write up the offer for them. Broker questions if the Representation Agreement is an enforceable contract and the best way to handle the potential commission dispute.

RESPONSE: The Idaho REALTOR® Form RE-14, Buyer Representation Agreement (Exclusive Right to Represent), when properly executed, is a valid and legally binding contract. Generally speaking, if Buyers agreed to exclusive representation with the Brokerage; having another brokerage write up an offer is likely a breach of contract. Broker may wish to instruct the closing agency to hold the Buyer's share of commissions in escrow until the two brokerages work out who is owed the commission. Broker may also be able to utilize the REALTOR® arbitration program for the commission dispute.

Further, the *Code of Ethics of Standards of Practice of the National Association of REALTORS®* prohibits knowingly interfering with representation agreements:

> REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other Realtors® have with clients.

Article 16, *Code of Ethics.*

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

CONTRACTS

Are irrigation pipes included in a vacant land transaction?

QUESTION: Broker is involved in a transaction where the parties used a RE-24, Vacant Land Purchase Sale Agreement. After closing, a dispute arose as to whether or not certain irrigation pipe was or was not included in the transaction.

RESPONSE: Typically, in a real estate transaction any "fixtures" relating to the property are sold with the property. A "fixture" is a legal term and is typically defined as any item that cannot be removed or separated from the real property without damaging the property. However, the RE-24, unlike the RE-21 conveys certain items beyond just fixtures. The pertinent part of the RE-24 states:

> **5. ITEMS INCLUDED & EXCLUDED IN THIS SALE**: All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below) and shall be transferred free of liens and in as-is condition. **Unless specifically excluded below, the fixtures and fittings and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY are included in the purchase price** and shall include (1) all personal property owned by the SELLER and used primarily in connection with the PROPERTY, and (2) all rights and easements appurtenant to the PROPERTY. BUYER should satisfy himself/herself that the condition of the included items is acceptable. The terms stated in this section shall control over any oral statements, prior written communications and/or prior publications including but not limited to MLS listings and advertisements. Personal property described in a property disclosure report shall not be inferred as to be included unless specifically set forth herein.
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> *Bold formatting added for reference.*

As stated in the language cited above, the default provision of the RE-24 includes not only fixtures but also "irrigation fixtures and equipment, that are now on or used in connection with the property," along with other personal property that may have been owned by the seller. If

the parties did not specifically state that irrigation equipment which was on the property or were not excluded from the sale, then they likely were conveyed to Buyer along with the real property.

The Legal Hotline does not provide legal advice to Buyers or Sellers nor does it make legal determinations as to whether or not any particular item is a fixture or if it was personal property conveyed with the transaction. All of those determinations are very fact specific and need to be determined on case by case basis. If a disagreement arises between the Buyer and the Seller, Broker should instruct their clients to seek independent legal counsel to advise them of their legal rights and to provide contract interpretation.

Can a Builder/Seller automatically extend the closing date?

QUESTION: Broker represents Buyer. Buyer is under contract with Seller for pre-sold new construction. The contract was set to close on December 18th. The Seller verbally informed Buyer that the closing date would need to be extended another month. Buyer's agent followed up with a formal addendum to extend the closing date, but the Seller has not signed it and the original closing date has passed. Broker questions if Section 43 of the contract would automatically extend the closing date in this case.

RESPONSE: Section 43 of the Pre-Sold New Construction Form (RE-22) states:

> TIME IS OF THE ESSENCE - UNAVOIDABLE DELAY: In the event the residence may not be substantially complete by the date provided in Section 46 herein due to interruption of transport, availability of materials, strikes, fire, flood, extreme weather, governmental regulations, delays caused by lender, acts of God or similar occurrences beyond the control of SELLER, **SELLER shall immediately provide BUYER written notice of the nature and projected time of delay.** If any of the above actually cause a delay in substantial completion and SELLER has provided written notice of the delay to BUYER, the completion date shall be extended for a reasonable period based on the nature of the delay, but in no event shall the extension be more than thirty (30) days beyond the completion date set in Section 47 herein. AFTER THAT DATE, THE COMPLETION DATE MAY ONLY BE EXTENDED, MODIFIED OR ALTERED BY A FURTHER AGREEMENT IN WRITING EXECUTED BY BUYER AND SELLER. Time is of the essence in this Agreement. (Bold added).

In order for the extension of the closing date referenced above to happen, Seller must notify Buyer in writing and cite which of the specific occurrences is causing the delay and need for extension. Broker alleges that Seller did not notify Buyer in writing, in which case Seller could be in breach of contract since the property was not completed by the closing date.

The Hotline does not resolve disputes between Buyers and Sellers. All Brokers should advise their clients to consult independent legal counsel to determine each party's legal rights in the matter.

Can a Seller terminate a contract if they do not like the proof of funds documentation provided by Buyer?

QUESTION: Broker represents Buyer in a cash transaction and within the time period stated in the RE-24, provided what Buyer believes is adequate written proof of funds. A dispute has arisen as to whether or not the document provided by Buyer is adequate proof. Buyer's Broker questions whether there is language in the RE-24 that allows a seller to terminate a contract with a buyer if seller does not like the proof of funds documentation.

RESPONSE: According to the Broker, the parties entered into a real estate purchase agreement using the vacant land form (RE-24). The relevant part of the RE-24 states:

> (B) ALL CASH OFFER: … BUYER agrees to provide SELLER within _____ business days (five [5] if left blank) from the date of acceptance of this agreement by all parties written confirmation of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes but is not limited to a copy of a recent bank or financial statement.
> …
>
> If such written confirmation required in 3(B) or 3(D) is not received by SELLER(S) within the strict time allotted, SELLER(S) may at their option cancel this agreement by notifying BUYER(S) in writing of such cancellation within _____ business days (three [3] if left blank) after written confirmation was required. If SELLER does not cancel within the strict time period specified as set forth herein, SELLER shall be deemed to have accepted such written confirmation of lender approval or waived the right to receive written confirmation and shall be deemed to have elected to proceed with the transaction. SELLER'S approval shall not be unreasonably withheld.
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> *RE-24 Vacant Land Real Estate Purchase and Sale Agreement §3*

In the language stated above, there is no attempt to define what is or is not acceptable documentation. While recent bank or financial statements are enumerated, the language leaves it open ended with text "including, but not limited to." The language also states that "Seller's approval shall not be unreasonably withheld."

What constitutes reasonable documentation will vary on a case by case basis from transaction to transaction. Brokers should not get involved in making legal determinations as to what would constitute reasonable proof and should rely on their clients to instruct them as to whether or not the proof provided is acceptable. Just like Brokers, the Legal Hotline does not get involved in determining what is reasonable for each transaction. Brokers should advise their clients to seek independent legal counsel to advise them of their rights and provide contract interpretation. Regardless of whether acceptable proof was or was not provided, Seller must

notify Buyer in writing of any termination under the above cited section within a certain amount of business days after the written confirmation was due. If seller fails to provide such written documentation, the analysis of the proof of funds becomes moot as the Seller will be "deemed to have accepted" the documentation provided by Buyer.

If the parties utilize the Late Acceptance section of the contract, when do the timelines begin?

QUESTION: Broker questions which signature controls the timelines of a Purchase and Sale Agreement when a Buyer signs the Late Acceptance Section—the Seller's late signature accepting the offer or the Buyer's signature acknowledging the late acceptance.

RESPONSE: The Buyer's signature acknowledging the Seller's late acceptance controls. "Formation of a valid contract requires a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer followed by an acceptance." *Justad v. Ward*, 147 Idaho 509, 512 (2009). An offeror "controls the terms of acceptance, and an acceptance is often defined as a manifestation of assent to the terms of an offer, made by the offeree in the manner invited or required by the offer." *Fed. Nat.Mortg. Ass'n v. Hafer*, 158 Idaho 694, 701 (2015). A Seller cannot unilaterally revive an expired offer. Therefore, a Seller's late acceptance does not form the contract but simply signifies his or her desire to revive the original offer which Buyer is able to accept or decline. If Buyer chooses to revive by signing the Late Acceptance section, a binding contract between Buyer and Seller is formed only at that time. Therefore, the timelines which are based off of "acceptance" would commence when Buyer signs the Late Acceptance section.

Can the second walkthrough occur on the day of closing?

QUESTION: Broker questions specific language in Section 20 of the RE-21 and whether or not the second walkthrough can happen on the day of closing.

RESPONSE: The pertinent language of the RE-21 states:

> **20. WALK THROUGHS:** … 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 use of the word "prior" in the above-referenced section means that the second walkthrough must be completed in the days *before* closing and does not include the date of closing. For example, if closing is to take place on a Thursday and the parties agreed that Buyer had to complete the second walkthrough within 3 days prior to closing, Thursday would be excluded. One day prior to closing would be Wednesday, two days prior would be Tuesday and three days prior would be Monday. Buyer could conduct the second walkthrough Monday through Wednesday the week of closing. The parties can always agree to do the walkthroughs at any time prior to the deadlines.

Does the original buyer have any obligations once the contract is assigned to Buyer 2?

QUESTION Broker inquired into a transaction where a Seller entered into a contract with Buyer No. 1 who then assigned the contract to Buyer No. 2. Broker questions what documentation should exist and what obligations Buyer A may have after the assignment is accomplished.

RESPONSE: The parties to the transaction used an RE-29 to assign the contract, this is proper and binding. Idaho law requires purchase and sale agreements to be in writing and this law would be applicable to any assignments, addendums, or amendments. This is the reason that the Idaho Association of REALTORS® provides the "Assignment of Buyers Rights" form (RE-29). Brokers involved with transactions where Buyers are assigning their interest are encouraged to use the RE-29.

One of the reasons that the Idaho REALTORS® encourage the use of the RE-29 is that it contains a paragraph that specifically points out that the assignment does not necessarily relieve the first Buyer from his legal obligations. Specifically, the RE-29 states:

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

Further, it states:

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

Once the RE-29 has been signed, Buyer 2 steps into the shoes of Buyer 1 and assumes the responsibilities and obligations under the original contract. However, there is nothing in the RE-29 or Idaho law that alleviates Buyer No. 1's legal responsibilities to the Seller. Until and unless Buyer No. 1, Buyer No. 2, and Seller execute a new agreement or addendum to the prior Purchase-Sale Agreement, Buyer No. 1 is still responsible to the seller.

If the parties desire to release Buyer 1 from the original agreement, then Seller will have to consent and an addendum could be utilized to accomplish that purpose. Brokers are advised to direct their clients to legal counsel as assignments of any contract, and especially real estate purchase sale agreements, are complex and require all parties to have clear understanding of their responsibilities. It is the experience of the Hotline that assigning purchase and sale agreements is a commonly misunderstood process.

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

QUESTION: Broker called regarding a contract that lists the closing date as "TBD." Broker questions if a firm closing date is necessary in order to create a binding contract.

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

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

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

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

However, the Courts have also said:

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

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

The Hotline does not get involved in disputes between Buyers and Sellers. Broker should advise client to seek legal counsel to help determine their rights in this matter.

Can a Seller be under contract with two Buyers?

QUESTION: Broker represents Buyer. Buyer submitted an offer to Seller and Seller responded with a counteroffer. Buyer accepted the counteroffer and delivered it back to Seller within the allowed timeframe. Seller allegedly accepted another offer before Buyer sent back the accepted counteroffer yet never revoked the counteroffer with Buyer. Broker questions if her Buyer has a valid contract with Seller.

RESPONSE: It is likely that a contract was created since the counteroffer sent to Buyer was not revoked prior to Buyer's acceptance and delivery back to Seller. Idaho law states that an offer can be accepted at any time prior to its revocation. Given the facts presented to the Hotline, Seller accepted a different offer but did not notify Buyer that the counteroffer was no longer on the table. If a Seller does not immediately revoke a counteroffer before accepting an offer from another Buyer, Seller could potentially find themselves under contract with two different Buyers.

The Hotline does not resolve disputes between Buyers and Sellers. All Brokers should advise their clients to consult independent legal counsel to determine each party's legal rights in the matter.

Are the parties under contract if acceptance was never delivered?

QUESTION: Broker represents a Seller who received an offer from Buyer 1. Seller countered Buyer 1 with a counteroffer that contained the typical deadline for a response. Seller never heard back from Buyer 1. After the expiration of the counteroffer deadline, Seller received an offer from Buyer 2 which was eventually accepted. In investigating the property to prepare for closing, Buyer 2 learned that Buyer 1 is claiming they are under contract with Seller for the property. When Broker inquired with Buyer 1's agent, Broker learned that Buyer 1 did sign the

counteroffer prior to its expiration but never delivered it back to Broker. Broker questions if his Seller is under contract with Buyer 1 or Buyer 2.

RESPONSE: Based upon the facts provided to the Hotline the Seller is under contract with Buyer 2. Buyer 1 never legally "accepted" the counteroffer before it expired. In order to have a legal contract there must be an offer, acceptance and consideration. The reason Buyer 1 never had a contract in this circumstance is the lack of acceptance. A contract is not fully accepted until the other party is made aware of the acceptance. One party cannot accept a contract in a vacuum, meaning that the acceptance, typically in the form of a signed contract, must be delivered to the other party to create a contract. Both parties must be aware of the acceptance for the acceptance to be complete and legally binding. The Idaho Supreme Court summarizes it as follows:

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

Justad v. Ward, 147 Idaho 509, 512 (2009) Emphasis added. Internal citations omitted.

If Buyer 1 never provided a copy of the signed counteroffer to Broker, then there was no acceptance and no contract. Further, due to the deadline in the counteroffer Buyer 1 cannot create acceptance by delivering the counteroffer after it has expired because the offer is no longer on the table. Broker is also concerned that Buyer 1 is preventing Buyer 2 from meeting Buyer 2's contractual deadlines. If Buyer 1 is interfering with Buyer 2, then Buyer 2 should be advised by his or her own broker to obtain legal counsel to prevent this.

The Hotline does not get involved in disputes between Buyers and Sellers and Broker should wish to advise client to retain private legal counsel in this matter to advise Seller of his legal obligations.

Can a Seller terminate in response to a Buyer RE-10?

QUESTION: Broker represents Buyer under contract in a transaction and sent over an RE-10 requesting certain items be addressed on the Property. Seller responded by sending a termination document. Broker questions if Seller has that option under the terms of the RE-21.

RESPONSE: No, the Seller does not have the right to terminate the agreement at this point. Pursuant to the terms of the contract between the parties (the RE-21) once a Buyer provides an RE-10 to a Seller the Seller has three options (as documented in Section 10(C)(3) of the RE-21). The Seller can: (1) Agree to correct all the items in the Buyer's RE-10. (2) Agree to correct some of the items in the Buyer's RE-10. (3) Refuse to correct any items.

If the Seller chooses option 2 or 3 then the Buyer has a specific timeframe (3 business days by default) to decide what Buyer would like to do (as documented in Section 10(C)(4) of the RE-21). Buyer can terminate the transaction or continue with only the items the Seller agreed to correct, if any. Of course, the Buyer can also continue to negotiate during that time with the Seller but must choose to terminate or continue by the specified deadline.

What happens if a Seller never responds to a RE-10 submitted by Buyer?

QUESTION: Broker represents Seller and questions what happens if a Seller never responds to a Buyer's RE-10.

RESPONSE: The RE-21 contains the following language:

> 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 above, then within _____ business days (three [3] if left blank) the BUYER has the option of 1) negotiating with SELLER to obtain a modification of SELLER'S response 2) proceeding with the transaction without the SELLER being responsible for correcting the disapproved items/conditions stated in that particular BUYER'S notice, or 3) giving the SELLER written notice of termination of this agreement in which case Earnest Money shall be returned to BUYER. If within the strict time period specified in this paragraph BUYER does not obtain a modification of SELLER'S response or give written notice of cancellation, BUYER shall conclusively be deemed to have elected to proceed with the transaction without the repairs or corrections to the disapproved items/conditions stated in that particular BUYER'S 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).
>
> RE-21 Section 10 (C)(4).

According to the language above, if Seller does not respond within the provided time period then Buyer has three business days in which to negotiate, proceed with the transaction as

is and/or terminate. As stated in the section above, if Buyer essentially failed to exercise any of the three options, then Buyer "shall conclusively be deemed to have elected to proceed with the transaction without the repairs or corrections."

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

What items are included in a sale?

QUESTION: Broker is involved in a transaction where the parties used a RE-21. After closing, a dispute arose as to whether or not a certain appliance was or was not included in the transaction.

RESPONSE: Typically, in a real estate transaction any "fixtures" relating to the property are sold with the property. A "fixture" is a legal term and is typically defined as any item that cannot be removed or separated from the real property without damaging the property.

> **5. ITEMS INCLUDED & EXCLUDED IN THIS SALE**: All existing fixtures and fittings that are attached to the PROPERTY are **INCLUDED IN THE PURCHASE PRICE** (unless excluded below) and shall be transferred free of liens and in as-is condition. These include, but are not limited to, all seller-owned attached floor coverings, television wall mounts, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. The terms stated in this section shall control over any oral statements, prior written communications and/or prior publications including but not limited to MLS listings and advertisements. Personal property described in a property disclosure report shall not be inferred as to be included unless specifically set forth herein. It is agreed that any item included in this section is of nominal value less than $100.

The Legal Hotline does not provide legal advice to Buyers or Sellers, nor does it make legal determinations as to whether or not any particular item is a fixture or if it was personal property conveyed with the transaction. All of those determinations are very fact specific and need to be determined on case by case basis. If a disagreement arises between the Buyer and the Seller, Brokers should instruct their clients to seek independent legal counsel to advise them of their legal rights and to provide contract interpretation.

Does a Buyer's timeframe to conduct secondary inspections begin upon acceptance of upon completion and delivery of inspection report?

QUESTION: Broker represents Buyer. The Purchase and Sale Agreement indicated that Buyer had 10 days to conduct the septic inspection, but the contract also made it Seller's responsibility to order and pay for said inspection. Seller never ordered the inspection, and now Buyer's 10-day timeframe is over. Broker questions if Buyer's timeframe to inspect begins upon acceptance or upon Seller's completion and delivery of the inspection report.

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

> **2) SECONDARY INSPECTION:** Items or conditions marked below, if any, allow BUYER the indicated additional time to conduct inspection of only those items or conditions. If not indicated below BUYER may still conduct these inspections but must do so under the 10(B)(1) Primary Inspection timeframe. BUYER shall, within each timeframe stated below, complete the inspections indicated and give to SELLER written notice of the disapproved item/condition or written notice of termination of this Agreement based on an unsatisfactory inspection of that item/condition. Once BUYER delivers written notice to SELLER it shall end BUYER'S timeframe for only that item/condition and is irrevocable regardless of if it was provided prior to the deadline stated below. Any notice provided under this subsection is unrelated to a notice provided under subsection 10(B)(1). BUYER shall be responsible for the cost of all indicated inspections unless otherwise noted in the *Costs Paid By* section or elsewhere herein. BUYER reserves the right to conduct the following inspections outside the Primary Inspection timeline:
>
> …
>
> ☐ Septic Inspection and required Pumping which shall be completed and notice provided within ____ business days (ten [10] if left blank) from acceptance.

The above cited language gives Buyer 10 days from acceptance to complete the septic inspection. Given the facts presented to the Hotline, the Costs Paid By section referred to above gave Seller the responsibility of ordering and paying for the inspection, but Seller did not order the inspection within the 10 business days of acceptance.

If Seller does not order the inspection, Buyer clearly cannot review the report and meet Buyer's obligations referenced above. Given that there is no language in the RE-21 that accounts for what happens if Seller does not order the test, a court would use reasonableness to determine the Buyer's rights. Best practices would be for Broker to advise agents to keep track of strict timelines, especially if the contract in question has Seller ordering and paying for a Buyer inspection, so that Buyer's agent can communicate with Seller's agent to make sure they do not miss the deadline.

Can a Buyer's unsatisfactory inspection be for any reason?

QUESTION: Broker questions if a Buyer can terminate the contract for any reason during the inspection period. Broker also questions if a specific reason must be supplied by Buyer and if circumstances outside the property can be considered by Buyer.

RESPONSE: Under the standard terms of the RE-21, a Buyer may terminate the agreement pursuant to an inspection. 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 208 states "BUYER shall provide to SELLER pertinent section(s) of written inspection reports upon request, if applicable."

Like Brokers, the Legal Hotline does not provide legal advice to Buyers or Sellers, nor is it intended to be used as a resolution for disputes between Buyers and Sellers. In the event a Buyer or Seller desires legal contract interpretation or requests advice regarding their legal rights under the contract, Brokers should advise their clients to seek independent legal counsel.

Can a Buyer revoke a RE-10 that terminated the contract?

QUESTION: Broker questions the logistics involving a termination under Section 10 of the RE-21. Specifically, the broker asks to whether or not an RE-10 that terminates a contract maybe revoked by buyer.

RESPONSE: Buyers responses under a RE-10 cannot be revoked regardless of whether it is simply requesting additional repairs or if it terminates the contract. The pertinent language in the RE-21 states:

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

Further, the RE-21 also contains the following language:

> 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.

Additionally, the RE-10 notice states:

> TERMINATION PROVISION. BUYER deems the results of the inspection stated above to be unsatisfactory. As a result, BUYER hereby terminates the Purchase and Sale Agreement and the Earnest Money shall be returned to BUYER, unless Earnest Money has previously become non-refundable. BUYER and SELLER further agree to release brokers and their associates from any claims, actions and demands by reason of releasing and disbursing of said earnest money deposit.

The language stated above provides the buyer the exclusive right to terminate a contract based upon an unsatisfactory inspection. The right to terminate rests exclusively with buyer and does not require sellers' consent or approval. Therefore, when buyer provided termination to seller the transaction ended regardless of whether seller provided any sort of response.

Terminations under the buyer's inspection contingency section are not amendments or modifications to the sales contract and thus do not require a meeting of the minds or any written agreement signed by each of the parties as contemplated in section 40 of the RE-21.

Like brokerages, the legal hotline does not provide legal advice to buyers or sellers, nor is it intended to be used as a resolution for disputes between buyers and sellers. In the event a buyer or seller desires legal contract interpretation or requests advice regarding their legal rights under the contract brokers should advise their clients to seek independent legal counsel.

What are the standards for revoking an offer?

QUESTION: Broker questions the standards for revoking or withdrawing an offer.

RESPONSE: Pursuant to Idaho contract law offers can be revoked and withdrawn at any time prior to acceptance. This has long been the law for contracts, in fact it was articulated by Idaho's territorial courts even before Idaho become a state:

> The counsel for the defendant is most surely in the right in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract.
>
> *Vincent v. Larson*, 1 Idaho 241, 249 (1869).

There are limited exceptions to this rule where the person making the offer promises to leave it open for a certain amount of time or states that it is irrevocable in which case the offer is termed a "firm" offer. The Idaho REALTORS® form contract purchase sale agreements do not contain "firm" offers in fact they contain the following language:

> ACCEPTANCE: This offer may be revoked at any time prior to acceptance and is made subject to acceptance on or before (Date) _____ at _____ (Local Time in which PROPERTY is located).

Pursuant to the language stated above and Idaho contract law the party who made an offer can revoke it at any time prior to acceptance. While the facts provided by broker to hotline pertained to a seller replying to an offer the same law would apply to those circumstances as well as with counteroffers.

Can Buyer sign Counter Offer #1 if Counter Offer #2 has been tendered?

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

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

> An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract.
>
> *C. H. Leavell & Co. v. Grafe & Assocs., Inc.*, 90 Idaho 502 (1966).

Given the facts presented to the Hotline, the original offer from Buyer was rejected when Seller tendered Counter Offer #1. Then Counter Offer #1 was rejected when Buyer tendered Counter Offer #2. Buyer cannot sign Counter #1 as it is no longer a valid offer. Once an offer is rejected it cannot be unilaterally revived by one party to a transaction. Both Buyer and Seller would have to agree to revive any previously rejected offer.

Similar to Brokers, the Hotline's role is not to provide legal advice to Buyers and Sellers and/or resolve disputes between them. Broker may wish to advise client to seek independent legal counsel.

Can a property go back on the market if Buyer has not signed the termination?

QUESTION: Broker represents Seller. Buyers have indicated that they will not be able to perform their obligations under the contract. However, Buyers refuse to sign the termination

form that Seller has signed. Broker questions if Seller's property can go back on the market without getting Buyer's signature on the RE-20.

RESPONSE: Idaho law does not necessarily require both signatures on the termination form for termination to be effective. Contract termination can occur in a number of ways. General contract law provides for the legal theory of *Anticipatory Repudiation* also known as *Anticipatory Breach* in which a promisor, prior to the time set for performance of his promise, indicates that he will not perform when the time comes. Idaho courts have stated:

> "An anticipatory breach of a contract has been defined as 'a repudiation [by the promisor] of his contractual duty before the time fixed in the contract for his performance has arrived.' " A repudiation is "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach[.]" A repudiating party's language "must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." Further, a statement of repudiation must threaten a breach of sufficient gravity that, "if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach."
>
> *Trumble v. Farm Bureau Mut. Ins. Co. of Idaho*, 166 Idaho 132 (2019).

Buyers allegedly made it very clear that they were not going to close. Depending on the facts the Seller might recognize this situation as anticipatory repudiation by the Buyers. According to the facts, Buyers are refusing to sign the presented termination form simply to punish Seller and not allow Seller to go back on market. If Seller believes a breach has occurred and/or that anticipatory repudiation terminated the contract, Seller has no obligation to wait for Buyers to sign the termination form; Seller can mitigate his damages by immediately going back on market with the property.

In addition to the legal provisions stated above, Seller and Seller's agent should be cognizant of any applicable MLS rules relating to changing a property status from pending to back on market. Typically MLSs do not have any rules as to when a property can be relisted. However, each MLS has its own unique rules and caution should be utilized to ensure those rules are followed.

The Hotline does not resolve Buyer and Seller disputes. As a result, Broker may wish to advise their client to contact private legal counsel to determine the party's rights and responsibilities under the contract.

DISCLOSURE

What liabilities would a Buyer have if they do not disclose that an offer is contingent on selling Buyer's current property?

QUESTION: Broker questions the potential liability of a Buyer choosing not to disclose that a contract is contingent on the sale of Buyer's current property.

RESPONSE: If the Buyer cannot close the transaction unless they sell their home, and it is not clearly stated in the contract, then it is not a clear contingency. If there is no clear contingency, Buyer may not be able to cancel the Purchase and Sale Agreement and may get stuck with both properties. Buyer and brokerage are also obligated to disclose any known adverse material facts which is defined in Idaho Code § 54-2083 as:

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

In addition, brokerage has the obligation to act "honestly" and "in good faith." (Idaho Code § 54-2086). If the contingency regarding the sale of Buyer's other property is not disclosed to the Seller, the brokerage could be liable for not disclosing an adverse material fact or not acting honestly and in good faith. The RE-21 Section 3(c) contains a check box for the Buyer to check whether or not the contract will be contingent upon the sale of their property, and includes language that reads "N/A if left blank." The RE-21 defines the term N/A in Section 33 which states:

> The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.

If a Buyer does not check either box in Section 3(c) then the absence of a check box is likely going to be interpreted that cash proceeds from another sale is not applicable to the transaction. The Hotline believes the best practice is to always disclose this information clearly.

Does a Seller need to disclose that a sex offender is living in the neighborhood?

QUESTION: Broker is representing a Seller who has disclosed to Broker that there is an individual residing near the property that is a registered sex offender. Seller has requested that Broker disclose this information to prospective buyers. Broker questions whether that information is public record, whether it is required to be disclosed and what the best practices for disclosure would be.

RESPONSE: In 1998, Idaho created the "Sexual Offender Registration Notification and Community Right-To-Know Act" which is codified under Idaho Code §18-8301 *et. seq.* This act requires certain individuals to register with the State of Idaho and further provides that the individuals registered shall be become public information:

> 18-8323. PUBLIC ACCESS TO SEXUAL OFFENDER REGISTRY INFORMATION. Information within the sexual offender registry collected pursuant to this chapter is subject to release only as provided by this section.
>
> (1) The department or sheriff shall provide public access to information contained in the central sexual offender registry by means of the internet.
>
> Idaho Code §18-8323(1).

That statute also includes the following language:

> (5) The department shall include a cautionary statement relating to completeness, accuracy and use of registry information when releasing information to the public or noncriminal justice agencies as well as a statement concerning the penalties provided in section 18-8326, Idaho Code, for misuse of registry information.
>
> (7) Further dissemination of registry information by any person or entity shall include the cautionary statements required in subsection (5) of this section.
>
> Idaho Code §18-8323(5) and (7).

The act also provides certain exemptions from civil liability:

> 18-8325. EXEMPTION FROM CIVIL LIABILITY.
>
> (3) No person or governmental entity, other than those specifically charged in this chapter with a duty to collect information under this chapter regarding registered sexual offenders, has a duty to inquire, investigate or disclose any information regarding registered sexual offenders.
>
> (2) No person or governmental entity, other than those specifically charged in this chapter with an affirmative duty to provide public access to information regarding registered sexual offenders, shall be held liable for any failure to disclose any information regarding registered sexual offenders to any other person or entity.

(3) Every person or governmental entity who, acting without malice or criminal intent, obtains or disseminates information under this chapter shall be immune from civil liability for any damages claimed as a result of such disclosures made or received.

Idaho Code §18-8325.

As stated in the language cited above, there is no duty to disclose any information regarding registered sexual offenders and if one does so they are provided with certain immunity.

Idaho law also has specific chapter related to sex offenders and real property transfers codified under Idaho Code §55-2801 *et. seq.* All real estate professionals should be familiar with the provisions of these statutes as there are a few nuances; but generally speaking, no cause of action shall exist if an owner or their real estate agent fails to disclose that a registered or suspected sex offender resides near the property.

It is ultimately up to the seller and the brokerage to determine the best practices for disclosing any information related to the real property. However, if the seller is concerned about the level of disclosure it may be more practical to only disclose this information to buyers at the time they request a viewing of the property or upon the receipt of a written offer. If the brokerage is going to post the information in an MLS, brokerage should check with the MLS to see if there are any rules pertaining to that type of disclosure. A disclosure should not go beyond a referral to the actual state registry to avoid the possibility of misrepresentation and out of an abundance of caution shall include the language posted in Idaho Code §18-1323(5) stated above.

What happens if a Seller does not provide Buyer with property disclosures?

QUESTION: Broker represents Buyer who had entered into a purchase and sale agreement that provided for earnest money to become non-refundable on a certain date. However, in the transaction the Seller never provided Buyer with the property disclosures.

RESPONSE: In Idaho, certain property disclosures are required for all residential real property – which is defined as any real property that is improved by a building or other structure that has one to four dwelling units or an individually owned unit in a structure of any size. (I.C. 55-2503). This disclosure is required to be provided to Buyer within 10-days of the acceptance of the offer. (I.C. 55-2509). The statute also has very specific language allowing the Buyer (aka a transferee) to rescind the contract if he finds something in the disclosures Buyer does not like:

55-2515. RESCISSION BY TRANSFEREE. Subject to section 55-2504, Idaho Code, if a transferee of residential real property receives a property disclosure form or an amendment of that form as described in section 55-2508, Idaho Code, after the transferee has entered into a transfer agreement with respect to the property, the transferee, after his receipt of the form or amendment may rescind the transfer agreement in a written, signed and dated document that is delivered to the transferor or his agents in accordance with section 55-2510, Idaho Code.

> Transferee's rescission must be based on a specific objection to a disclosure in the disclosure statement. The notice of rescission shall specifically identify the disclosure objected to by the transferee. Transferee incurs no legal liability to the transferor because of the rescission including, but not limited to, a civil action for specific performance of the transfer agreement. Upon the rescission of the transfer agreement the transferee is entitled to the return of, and the transferor shall return, any deposits made by the transferee in connection with the proposed transfer of the residential real property.
>
> (I.C. 55-2515)

While the statute above does not address a Seller refusing to provide a required disclosure, the chapter also includes the following language:

> 55-2517. FAILURE TO COMPLY. No transfer, subject to this chapter, shall be invalidated solely because of the failure of any person to comply with any provision of this chapter. However, any person who willfully or negligently violates or fails to perform any duties prescribed by any provision of this chapter shall be liable in the amount of actual damages suffered by the transferee.
>
> (I.C. 55-2517)

Parties using the standard Idaho Realtor Association transaction forms should also be advised that the contract includes certain rights in the event of the other party's default.

However, given all the above, the Legal Hotline cannot review non-form contract language such as a non-refundable earnest money clause. A proper legal analysis would have to include a review of the specific language agreed to by all parties. It is for this reason that the Legal Hotline, just the same as brokers, cannot conclusively resolve disagreements between buyers and sellers relating to contract terms. Broker should advise client to seek independent legal counsel to advise clients of their legal rights.

Are trustees exempt from filling out and providing property disclosures?

QUESTION: Broker questions whether or not a Trustee who is selling a home for a trust falls under any exemption of the property disclosure statute and whether or not Trustee living in the property would affect any exemption.

RESPONSE: Generally speaking, Trustees are considered fiduciaries and would be exempt from property disclosures under Idaho Code 55-2505 which states as follows:

> (7) A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust…

However, the fact that the Trustee resided in the home may interfere with his exemption. Ultimately it is not up the Brokerage to provide clients with legal advice as to whether they are or are not exempt from property disclosures. Best practices are always to make disclosures;

however, Brokerage can provide client a copy of the statute and have client make its own determination as to whether or not the disclosures are legally required and refer client to competent legal counsel.

Is an estate exempt from providing property condition disclosures?

QUESTION: Broker questions if an estate is exempt from filling out the RE-25 Seller's Property Condition Disclosures.

RESPONSE: Yes, if the property is transferring from an estate, the RE-25 would not be required. Idaho Code § 55-2505 states in relevant part:

> EXEMPTIONS. The provisions of this chapter do not apply to any transfer of residential real property that is any of the following:
> …
> (16) A transfer from a decedent's estate.

However, given the facts presented to the Hotline, the property in question is not transferring from an estate. The property was given to Seller through a quitclaim deed, in which case Seller would not be exempt from filling out the RE-25.

What are a Seller's obligations when Seller is aware of a lot line issue on the property?

QUESTION: Broker informs the Hotline that is it common for homes in Boise's North End to have incorrect lot lines and questions best practices when a Seller is aware of lot line issues.

RESPONSE: If a Seller is aware of an important lot line issue, it should be disclosed to potential Buyers, and language can be added to the contract in order to protect Seller. Acceptable language can be found in Section 13 of the RE-23, which states:

> BUYER is aware that any reference to the square footage, the boundaries and/or property lines of the real property or improvements is approximate. If exact knowledge of the square footage, boundaries and/or property lines is material to the BUYER, they must be verified by BUYER during the inspection period. BUYER is advised that fences, walls, hedges, and other natural or constructed barriers or markers do not necessarily identify true property boundaries. Property lines and boundaries may be verified by surveys.

EARNEST MONEY

Can property be relisted during an earnest money dispute?

QUESTION: Broker represents the Seller. Seller was under contract with a Buyer who did not go through with the purchase. Seller sent a Contract Termination and/or Release of Earnest Money (RE-20) to Buyer but Buyer has not signed it. Broker questions if she can relist the property without a fully executed RE-20 or during an earnest money dispute.

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

What happens to the earnest money in the event of a dispute?

QUESTION: Broker is dual agent in a transaction that is now terminated. Buyer will not sign a RE-20 and is demanding earnest money back. Broker questions what happens to the earnest money if there is a dispute between Buyer and Seller, even if Broker believes Buyer is being unreasonable.

RESPONSE: Given the facts presented to the Hotline, Buyer has made a demand upon the Earnest Money. Responsible Broker has the following options when any 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 cannot resolve disputes over Earnest Money. 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 all clients to seek private legal counsel in this matter.

Can a Seller retain the earnest money and still pursue other legal remedies if Buyer breaches?

QUESTION: Broker questions if Seller can retain the Earnest Money and also pursue other legal remedies if a Buyer defaults on a Purchase and Sale Agreement. Broker also questions the specific circumstance where the Earnest Money has already become non-refundable.

RESPONSE: No, Seller can only choose one remedy. Section 30 of the Purchase and Sale Agreement (RE-21) states in relevant part:

> **If BUYER defaults** in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S Broker, provided that the amount to be paid to SELLER'S Broker shall not exceed the Broker's agreed-to commission. **SELLER and BUYER specifically acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER'S sole and exclusive remedy, and such shall not be considered a penalty or forfeiture**.
>
> ….
>
> If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER'S Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, appraisal, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the matter. (Emphasis added).

The above language in bold indicates that in the event of a Buyer default, Seller can choose one remedy. If Seller chooses to accept the Earnest Money as liquidated damages, Seller is giving up the right to pursue other legal remedies.

However, if the Buyer and Seller have agreed prior to a default to make the Earnest Money non-refundable, Section 30 states:

> [I]n the event the parties mutually agree in writing that the Earnest Money shall become non-refundable, said agreement shall not be considered an election of remedies by SELLER and the non-refundable Earnest Money shall not constitute liquidated damages; nor shall it act as a waiver of other remedies, all of which shall be available to SELLER; it may however be used to offset SELLER'S damages.

Seller can pursue other legal remedies and retain the Earnest Money only if the parties previously agreed to make said Earnest Money non-refundable.

Like Brokers, the Hotline does not provide legal advice to Buyers and Sellers. If a party to the contract has defaulted, Broker should advise client to seek independent legal counsel.

Can earnest money become nonrefundable is Buyer is getting a FHA/VA loan?

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

RESPONSE: The pertinent part of the RE-21, Section 3 Lines 50-53, states:

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

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

PROPER FORM USE

Can a Seller accept an offer made using out-of-state forms?

QUESTION: Broker represents Seller. They have received an offer from a Buyer who used California forms. Broker questions whether Seller can accept an offer made on out-of-state forms.

RESPONSE: Technically yes, there is no law that says an offer to purchase must be made on the IR Forms. However, the Hotline strongly urges against the use of out-of-state forms since Idaho licensees are not familiar with them, and because Idaho REALTOR® forms contain the specific language and terms required by Idaho law. If forms other than Idaho forms are used, 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.

Can a Seller use the RE-27 to force Buyer to change closing date?

QUESTION: Broker represents Seller. Seller accepted an offer from Buyer contingent on Seller being able to continue to market the property and accept other offers. The parties signed the RE-27 which listed Buyer's financing contingency. Seller received another offer that had an earlier closing date than current offer. Buyer was notified of the offer and decided to remove the financing contingency listed in the RE-27. Broker questions if Buyer also has to agree to meet the closing date listed in the second offer received.

RESPONSE: No, Buyer would have no obligation to meet said closing date. The RE-27 is designed to allow the Seller to continue to accept offers subsequent to accepting an initial offer; typically because the initial offer has at least one concerning contingency. The concerning contingency must be stated in the RE-27, and according to the facts presented to the Hotline, the only contingency listed related to financing, not a closing date. If a second offer comes in that Seller finds more acceptable Seller must notify the initial Buyer that he would like to accept the second offer. The initial Buyer then has 72 hours (or the timeframe specified on Line 55 of the RE-27) to waive or remove Buyer's contingencies as listed in the RE-27 or Buyer will lose his contract with Seller

If Seller's intent was to "bump" Buyer 1 if an offer with an earlier closing date was received, an addendum signed by both parties indicating that Buyer 1 needs to meet or beat any new terms would be required.

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

MISCELLANEOUS

Is a contract legally binding if it is signed as a company name, rather than the officer for the company?

QUESTION: Broker represents Seller. Seller typically holds real estate in a corporation or a limited liability company. Broker questions if it is legally binding for a contract to be signed in the name of the company or corporation rather than an individual officer's name.

RESPONSE: Best practices would include a signature line stating an officer's name, title, and the name of the legal entity for which the officer is signing. However, the signature on a contract is to memorialize a meeting of the minds and any mark which conveys a party's intent to be bound will probably be legally interpreted as such. Broker may wish to confirm with IREC precisely what is required from a regulatory standpoint.

Do initials on changes on a contract need to also include dates and times?

QUESTION: Broker is involved with a transaction where parties have agreed to a change in a contract. The parties initialed next to the change however failed to provide either dates or times next to said initials. Broker questions if dates and times are necessary.

RESPONSE: When a contract is being modified and the parties are initialing modifications, they are signifying their intent to be bound by the modifications. Legally any mark would probably suffice to document a meeting of the minds between the parties. However, given that modifications typically occur after a contract is signed or printed, the date and time of the parties agreement to the change can become an issue if challenged. Therefore, best practice is to always obtain a date, and if possible, a time when all parties executed a document, or initialed for a change.

Would a new holiday declared by the President be considered a legal holiday in Idaho?

QUESTION: Broker questions if December 24, 2020 would be considered a legal holiday under the Idaho REALTOR® Forms given that the President has declared the day a paid day off for federal employees.

RESPONSE: The answer to this question is complex because the President did not specifically use the term "holiday." Nevertheless, the 24th of December, this year only, is most likely considered a federal holiday and thus not a business day under the IR Forms. The IR contracts state that a business day "shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho…" Idaho codifies its recognized legal holidays in Idaho Code §73-108 which states:

> HOLIDAYS ENUMERATED. Holidays, within the meaning of these compiled laws, are:
>
> Every Sunday;
>
> January 1 (New Year's Day);

Third Monday in January (Martin Luther King, Jr.-Idaho Human Rights Day);
Third Monday in February (Washington's Birthday);
Last Monday in May (Memorial Day);
July 4 (Independence Day);
First Monday in September (Labor Day);
Second Monday in October (Columbus Day);
November 11 (Veterans Day);
Fourth Thursday in November (Thanksgiving Day);
December 25 (Christmas);
Every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday.

Any legal holiday that falls on Saturday, the preceding Friday shall be a holiday and any legal holiday enumerated herein other than Sunday that falls on Sunday, the following Monday shall be a holiday. (Emphasis added)

The President's executive order makes it clear that December 24, 2020 is a federal paid day off; however, an ambiguity exists in that the executive order entered on December 11, 2020 states in part that "December 24, 2020, shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971." That particular 1971 executive order states "(a) Holiday means the first day of January… the twenty-fifth day of December, or any other calendar day designated as a holiday by Federal statute or Executive order." This answer turns on did President Trump "designate" the 24th as a holiday if his executive order never actually uses the word holiday.

Without the benefit of a legal precedence, it is difficult to predict how a legal challenge on this issue would be resolved. Due to the lack of a black and white court guidance on this matter, best practices would be to conduct transactions in a manner as if December 24 were in fact a business day.

What is the new Clear Cooperation Rule?

QUESTION: Broker questions if NAR published guidelines for the new "Clear Cooperation Rule" relating to MLS listings.

RESPONSE: Yes. The NAR MLS Handbook contains the following mandatory language which all multiple listing services must include in its bylaws:

> Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public. (Adopted 11/19)

> Note: Exclusive listing information for required property types must be filed and distributed to other MLS Participants for cooperation under the Clear Cooperation Policy. This applies to listings filed under Section 1 and listings exempt from distribution under Section 1.3 of the NAR model MLS rules, and any other situation where the listing broker is publicly marketing an exclusive listing that is required to be filed with the service and is not currently available to other MLS Participants.
>
> *HANDBOOK ON MULTIPLE LISTING POLICY* 2020 Edition, Section 1.01, Page 58.

If Broker has further questions about this new "Clear Cooperation" rule, additional resources may be found on the NAR website (https://www.nar.realtor) and/or from Broker's MLS.