The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2021

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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 2021 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2021. 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 2022 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2021 "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 2021 legislative changes to the law.

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AGENCY/LICENSE LAW

Can a Representation Agreement that only allows single agency be amended to allow dual agency?

QUESTION: Seller executed a representation agreement that did not allow for limited dual agency representation. A circumstance arose where Seller wanted to take an offer from a Buyer also represented by listing brokerage. Broker asked if Seller could change her mind on the utilization of limited dual agency.

RESPONSE: Yes. So long as all parties are properly informed on the issue of limited dual agency they can consent to allowing limited dual agency at any time during the representation. Broker should clearly document that all parties have been properly advised and have agreed in writing to allow the limited dual agency.

Can a title company be listed as the Responsible Broker on a Purchase and Sale Agreement?

QUESTION: Broker noticed that an offer they received on a client's listing named a title company as the Responsible Broker. Broker questions whether or not this is allowed.

RESPONSE: No, only a licensed designated broker can be the responsible broker in a transaction. Idaho license law defines responsible broker as:

> "Responsible broker" means the **designated broker** in the regulated real estate transaction who is responsible for the accounting and transaction files for the transaction, in the manner described in section 54-2048, Idaho Code.
>
> Idaho Code § 54-2004(44). Emphasis added.

A designated broker is defined as:

> "Designated broker" means an individual who is licensed as a real estate broker in Idaho and who is designated by the brokerage company to be responsible for the supervision of the brokerage company and the activities of any associated licensees in accordance with this chapter.
>
> Idaho Code § 54-2004(21).

The responsible broker for the transaction has a long list of duties, therefore only designated brokers licensed by the Idaho Real Estate Commission can act as responsible broker. The list of duties is outlined in Idaho Code § 54-2048:

> RESPONSIBLE BROKER FOR THE TRANSACTION — DUTIES AND RECORDKEEPING. The "responsible broker," as referred to in this section, shall be responsible to the commission for the transaction, transaction records, the funds and closing in accordance with the requirements of this chapter. The

broker who lists and sells any real property shall be deemed the responsible broker in the transaction. In the case of a cooperative sale, the broker who holds entrusted funds in a real estate trust account while the transaction is pending, or who delivers or transfers the funds to the closing agency or any authorized party other than the cooperating broker in the transaction, shall be deemed the broker responsible for the transaction. The responsible broker shall:

(1) Ensure the correctness and delivery of detailed closing statements that accurately reflect all receipts and disbursements for their respective accounts to both the buyer and seller in a transaction, even if the closing is completed by a real estate escrow closing agent, title company or other authorized third party and regardless of the responsible broker's agent or non-agent relationship to the buyer or seller.

(2) Show proof of delivery of the closing statement to the buyer and seller by their signatures on copies of such closing statements, which shall be retained in the broker's transaction file. When signatures of the parties cannot be obtained, a copy of the closing statement transmittal letter, sent by certified mail, return receipt requested, or a written certification of delivery signed by an officer of the escrow closing agency, shall be retained in the broker's transaction files.

(3) Create and maintain, for the retention period required in section 54-2049, Idaho Code, a transaction file containing the following documents, as applicable. For all pending, closed or fallen transactions, the original or a true and correct copy of:

(a) Signed closing statements, if applicable;

(b) Written and signed brokerage representation agreements, if any. A responsible broker who is representing both the seller and the buyer in a transaction shall retain properly executed brokerage representation agreements in the transaction file and, if appropriate to the transaction, a properly executed "consent to limited dual representation" statement. A responsible broker who has a signed brokerage representation agreement with only one (1) party to the transaction, either buyer or seller, must retain only that one (1) agreement in the transaction file;

(c) All offers accepted, countered or rejected, which must each be retained in the manner required in section 54-2049, Idaho Code;

(d) The original or a true and correct copy of all rejected offers must be retained in the files of the selling broker for the statutory records retention period in section 54-2049, Idaho Code.

Is a real estate license necessary to sell a mobile and/or manufactured home?

QUESTION: Broker questions if a real estate license is required to sell mobile and/or manufactured homes.

RESPONSE: In Idaho, mobile/manufactured homes are typically considered personal property. However, under Idaho law a manufactured home can become real property. Idaho Code § 63-304 states in relevant part:

> MANUFACTURED HOMES TO CONSTITUTE REAL PROPERTY. (1) A manufactured home may constitute real property if the running gear is removed and:
>
> (a) If the manufactured home becomes permanently affixed to a foundation:
>
> (i) On land which is owned or being purchased by the owner or purchaser of said manufactured home; or
>
> (ii) On land which is being leased by the owner or purchaser of the manufactured home if such home is being financed…

If a manufactured home owner has taken the necessary steps to convert the home to real property, then a real estate license would be necessary to sell the property on behalf of a Seller. If the manufactured home is not affixed to a foundation it would not be considered real property, therefore a real estate license would not be required.

Broker further questioned whether or not his agents need a dealer's license to sell mobile homes. Dealer law is outside the scope of the Legal Hotline, therefore the Hotline cannot provide a response to this question. Broker should contact the agency that licenses mobile/manufactured home dealers in Idaho.

COMMISSIONS & FEES

What is the best way to terminate an existing Representation Agreement to ensure the brokerage still receives its commission?

QUESTION: Broker represents Seller, and Seller is under contract with a Buyer. Seller wants to terminate the RE-16 with the brokerage. The brokerage is willing to terminate the RE-16 as long it will still receive its commission once the property sells. Broker questions best practices to achieve this.

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

> (C) Further, the 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. This subsection (C) shall survive the term or termination of this Agreement unless explicitly revoked in a written document signed by Broker and Client.

The above cited language ensures the brokerage's commission for 90 days after the expiration or termination of the RE-16 if the property is sold to a Buyer that was introduced to the property during the term of the RE-16. However, Section 6C also states that brokerage is not entitled to a commission if Seller enters into an exclusive representation agreement with another brokerage, therefore if Seller hires a new brokerage after terminating the current representation agreement, Broker would not receive the commission. If the brokerage is willing to terminate the representation agreement, it can do so using the Broker Agreement Addendum (RE-16A), but it should not do so unless Seller and brokerage agree in writing that brokerage will still earn its commission after the agreement has been terminated.

If an offer is made while the property is listed on the MLS but ultimately accepted after the listing was removed from the MLS, would the listing agent still need to honor the cooperating broker fee?

QUESTION: Broker represents Buyer. Buyer made an offer but the terms were not agreeable to Seller so the offer was not accepted. Buyer then made another offer and the parties continued to negotiate but were still unable to agree on terms. Seller finally accepted Buyer's third offer, which was submitted a day after the listing agent took the property off the MLS. Broker questions if the listing agent would still need to honor the cooperating brokerage fee that was listed in the MLS.

RESPONSE: The answer would likely be determined by the rules of the particular MLS in which the property was listed. Since MLS rules vary throughout Idaho, the Legal Hotline cannot comment on any specific MLS; however, generally speaking, if an offer is made under the promise of cooperation, the negotiations would continue under those same terms unless it is clearly disclosed that the terms are changing.

CONTRACTS

When does a Buyer's timeframe to release or waive RE-27 contingencies begin?

QUESTION: Broker questions when a Buyer's timeframe to release or waive contingencies listed in a RE-27 begins and questions if Buyer and Seller have the right to continue to negotiate the terms of the contract if Buyer does not remove the contingencies.

RESPONSE: Broker represents Seller. Broker informed the Hotline that Seller accepted Buyer 1's offer and the parties executed the Seller's Right to Continue to Market the Property (RE-27). Seller received another offer and placed Buyer 2 in a back-up position using the Back-Up Offer Addendum (RE-18). When Buyer 2 was placed in back-up position, Broker notified Buyer 1 via email that another offer was received. The following day, Broker sent an addendum signed by Seller that notified Buyer 1 of the other offer. Broker questions if Buyer 1's timeframe to remove/waive the contingencies began when Buyer 1 was notified via email or the next day when the addendum was delivered.

Buyer 1's timeframe would have started when Broker sent the initial email notifying Buyer 1 that another offer was received. The RE-27 states:

> This agreement is subject to SELLER'S right to market the property and accept other offers as specified in this Addendum. SELLER shall have the right to continue to offer the herein property for sale and to accept written offers, subject to the rights of the BUYER, until such time as said contingency(s) have been waived or removed by BUYER. Should SELLER receive another acceptable offer to purchase, SELLER shall give BUYER written notice of such acceptable offer. BUYER shall have_____ consecutive hours (seventy-two [72] if left blank) to waive or remove all BUYER(S) contingencies in this addendum. (Underline added)

The underlined language above indicates that the Seller is to simply give written notice, it does not state how the notice must be presented. Broker's email would have triggered Buyer 1's timeframe for releasing the contingencies, nothing requires the notice to include an addendum with Seller's signature.

Broker further questions if Seller and Buyer 1 have the ability to negotiate the terms of the agreement if there is an accepted back-up offer. Seller and Buyer always have the option to continue to negotiate the terms of the agreement if both parties want to remain under contract. The RE-18 which Seller and Buyer 2 executed advises Buyer 2 of this fact, as it states in relevant part:

> SELLER is currently in a binding Purchase and Sale Agreement, dated _____, with a third party that is not a party to this Agreement ("Offer in First Position"). 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.

Having a Buyer 2 in a back-up position does not automatically move Buyer 2 into first position if Buyer 1 fails to perform. The RE-18 states Seller must notify Buyer 2 in writing that they are now in first position upon Buyer 1's failure to close or termination of the contract. Buyer 2 remains in the back-up position until otherwise notified by Seller.

What happens if a box is not checked in a contract?

QUESTION: Broker represents Seller. Seller accepted offer from Buyer where the first blank line on Line 276 was filled in to reflect "1%", but the check box immediately before the line was not checked. Seller has transferred the contract to another party and Seller is now a relocation company who is allegedly arguing that Seller is not obligated to pay the 1% as a Seller concession because the box was not checked. Broker questions the accuracy of this argument.

RESPONSE: The analysis turns on whether or not the contract contained an ambiguity. Black's Law Dictionary defines ambiguity as:

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

Given the facts presented to the Hotline, Buyer and new Seller have two different interpretations as to what was agreed to in the Purchase and Sale Agreement. It is always best practice to check all pertinent boxes, make additional terms as specific as possible and to always detail exactly what the intent of the parties is. However, if a court finds an ambiguity it will look outside the four corners of the contract to ascertain the parties' intent. If the original Seller was aware that the intent was for Seller to pay this 1% regardless of the box not being checked, it is likely that a court would rely on that information to conclude there was a meeting of the minds as to the Seller paying the 1%.

The Hotline does not make conclusive determinations as to the existence of ambiguities nor does it get involved in disputes between Buyers and Sellers. Broker may wish to advise client to retain private legal counsel in this matter.

Is a contract valid if the loan information section is not complete?

QUESTION Broker received an offer that did not contain complete loan information in Section 3(D) of the RE-21 and questions if the offer is valid.

RESPONSE: While it is common practice that the agent representing the Buyer fills in the loan information on the RE-21, the legal analysis will turn on whether or not accepting an offer that is missing loan information creates a legally binding contract. In order for a purchase and sale agreement to be legally binding it must satisfy Idaho Code and certain basic common law requirements for enforceability.

To begin with 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 loan terms are not addressed in this statute, therefore it provides minimal guidance. However, Idaho appellate courts have commented on the general common law requirements:

> 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).

Using the language stated above, a court analyzing a contract that states something less than clear financing terms would have to determine if those terms were "an essential term of the agreement." If the court finds that they are and the contract is missing those terms, then the parties may have trouble enforcing the contract.

The Hotline always recommends that all blanks in the Idaho Realtor® Forms be specifically addressed by the parties and filled in so as to create a clear memorialization of the meeting of the minds between the parties. Doing anything less runs the risk of confusion, ambiguities, misinterpretation and possibly an unenforceable contract. Just like Brokers, the Hotline cannot provide legal advice to Buyers and Sellers and does not make determinations as to whether or not a specific term is material to the contract. If an offer is accepted and a question arises as to the binding nature of the contract, Brokers should advise clients to seek legal counsel to help determine their rights in this matter.

If lender is aware of Buyer and Seller settling payments outside of closing, is it a double contract?

QUESTION: Agent represents Buyer. Buyer and Seller agreed that Seller would pay $7,000 to Buyer at closing as a Seller concession. Only a portion of the $7,000 could be applied to lender approved costs and fees and the lender indicated that the remainder could not go on the

settlement statement. Agent questions if Seller pays Buyer the difference outside of closing, would that be considered a double contract?

RESPONSE: All agreements between the Buyer and Seller 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).

Given the facts presented to the Hotline, Buyer's lender is aware of the additional monies owed to Buyer, therefore the additional contract between the parties cannot be considered a double contract so long as the parties make the lender aware of the agreement.

Brokers on both sides of the transaction should advise their clients to seek independent legal counsel if there is a conflict between what the contract requires and what a lender will allow on a closing statement.

Can Seller terminate the contract if Buyer does not provide lender approval?

QUESTION: Broker represents Seller. The Buyer did not provide written confirmation showing lender approval within the time period specified in the contract. Seller, within the 3 business days allotted, notified Buyer that Seller was terminating the contract. Buyer is allegedly claiming that Seller cannot do this. Broker questions whether or not Seller can terminate the contract if written confirmation of loan approval is not provided by Buyer.

RESPONSE: The RE-21 Section 3 states in relevant parts:

> Within _____ business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios, and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. (Lines 40 through 43)
> …
> 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. (Lines 55 through 59)

According to the language cited above, if Seller does not receive the written confirmation required under this Section, Seller then has 3 days to terminate the contract by notifying Buyer in writing.

The Hotline does not review documents outside the Idaho REALTORS® forms and cannot comment on whether or not any specific document is or is not appropriate to satisfy the requirements listed in the financing section. Like Brokers, the Hotline does not provide legal advice to Buyers and Sellers, Brokers on both sides of the transaction may wish to advise clients to seek legal counsel if a dispute arises.

What can a Buyer do if a tax lien is discovered on the title commitment?

QUESTION: Broker represents the client in a transaction who discovered there is a tax lien against the title. Given that tax liens take a long time to resolve, the brokerage questions what Buyer's options are to recoup expenses.

RESPONSE: Presumably, Buyer became aware of the lien during the title commitment review outlined in Section 9 of the RE-21 which states:

> **PRELIMINARY TITLE COMMITMENT AND CC&Rs:** Within ___ business days (six [6] if left blank) of final acceptance of all parties, □SELLER or □BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY **and** a copy of any covenants, conditions and restrictions (CC&Rs) applicable to the PROPERTY. 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. Nothing contained herein shall constitute a waiver of BUYER to challenge CC&Rs terms directly with a homeowner's association after closing.

According to the terms above, buyer can terminate the contract and shall recover earnest money, cost of title insurance, escrow, and legal fees if any.

In the event that the Buyer believes Seller is in default, for example knowing about the tax lien and fraudulently inducing Buyer to enter the contract or not disclosing the lien in the RE-25, then the Buyer can proceed under Section 30 to pursue other damages.

In the event the Buyer is seeking damages beyond the return of earnest money, the Brokerage should encourage Buyer to seek competent legal counsel.

What happens if a Buyer and Seller have different interpretations of language written into Other Terms and Conditions?

QUESTION: Broker represents Seller. Seller accepted an offer that had a closing date of February 26. The offer contained language in Other Terms and Conditions regarding extending the closing date for lending. The parties did not close on the original closing date and now there is a dispute between Buyer and Seller regarding this extension language. Broker questions if the language in question is binding and whether or not they are still under contract.

RESPONSE: The Hotline cannot interpret any non-boilerplate language written into the contracts. Given the facts presented to the Hotline, Buyer and Seller have different interpretations of the language written into Other Terms and Conditions of the contract, which means the contract could contain and ambiguity. Black's Law Dictionary defines ambiguity as:

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

Brokerages for both Buyer and Seller should use caution in attempting to interpret ambiguous language as it might constitute practicing law. It is always best practice to make additional terms as specific as possible and to always detail exactly what the intent of the parties is. However, if a court finds an ambiguity it will look outside the four corners of the contract to ascertain the parties' intent.

What if a Buyer objects to certain restrictions in the CC&Rs?

QUESTION: Broker represents Buyer. The preliminary title report showed several easements on the property that prohibit Buyer's ability to put up a fence. The CC&Rs also have certain concerning restrictions. Broker questions if Buyer can terminate based on the information in the preliminary title report.

RESPONSE: Section 9 of the RE-21 states:

> **PRELIMINARY TITLE COMMITMENT AND CC&Rs**: Within ___ business days (six [6] if left blank) of final acceptance of all parties, □SELLER or □BUYER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY and a copy of any covenants, conditions and restrictions (CC&Rs) applicable to the PROPERTY. 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. Nothing contained herein shall constitute a waiver of BUYER to challenge CC&R terms directly with a homeowner's association after closing.

According to the terms above, Buyer's only option is to object in writing to the condition of the title. Seller then has a certain number of days to make the property marketable and correct Buyer's objections, if possible. If Seller cannot make the property marketable, Buyer is entitled to a return of the earnest money and is not obligated to continue with the transaction.

Given the facts presented to the Hotline, a review of the CC&Rs showed a height limit for fences that Buyer took issue with. The Preliminary Title Commitment and CC&Rs section cited above also allows for a Buyer to object to the CC&Rs and immediately receive the earnest money back. Unlike with the title report, there is no timeframe for a Seller to correct objections to the CC&Rs because a seller cannot typically do so. Once a Buyer objects to the CC&Rs, in writing, the parties are not obligated to continue with the transaction.

Can offers be revoked prior to acceptance?

QUESTION: Broker represents Seller. Seller received an offer and sent a counter offer back to Buyer. In the meantime, Seller received another offer and notified Buyer that they were revoking the counter offer. Buyer had signed the counter a few hours prior to Seller notifying

Buyer of the revocation. Do the parties have a valid binding contract since Buyer signed the document prior to Seller revoking the counter offer?

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

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

Given the facts presented to the Hotline, Buyer did not notify Seller of Buyer's acceptance of the counter offer, therefore the parties are not under contract because Seller revoked the counter offer prior to delivery of Buyer's signature, and thus prior to legal acceptance.

Broker also questions the form of delivery, and whether or not a text message or email, rather than a fully executed counter offer, from Buyer's agent would have constituted delivery. The above cited case law specifies that the acceptance of a contract is not complete until it has been communicated to the offeror. It says the test for proper communication will take into account both what the offeree (aka the individual who received the offer) said, wrote or did and the transactional context. Therefore, each transaction has to be analyzed on a case by case basis.

Broker may wish to advise client to retain private legal counsel if further issues arise.

Is a Purchase and Sale Agreement valid for property that has not yet been recorded?

QUESTION: Brokers on both sides of the transaction called the Hotline to question if a Purchase and Sale Agreement is valid if there is no legal description because lots have not been officially recorded. They also question if the parties should use a Lot Reservation Agreement instead.

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

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

Further, the Idaho Supreme Court has ruled:

> Under Idaho's statute of frauds pertaining to transfers of real property, agreements for the sale of such property must be in writing and subscribed by the party to be charged. I.C. § 9–503; the writing must contain all "conditions, terms [ ] and descriptions necessary to constitute the contract," including a description of the property to be sold. The property description must be specific enough, either by its own terms or by reference, to ascertain the quantity, identity, or boundaries of the property without resorting to parol evidence. In other words, the description "must adequately describe the property so that it is possible for someone to identify 'exactly' what property the seller is conveying to the buyer." Parol evidence may only be relied on "for the purpose of identifying the land described and applying the description to the property." It may not be used "for the purpose of ascertaining and locating the land about which the parties negotiated" or for "supplying and adding to a description insufficient and void on its face." Consequently, under the statute of frauds, "the issue is not whether the parties had reached an agreement. The issue is whether that agreement is adequately reflected in their

> written memorandum." Agreements for the sale of real property that do not "comply with the statute of frauds are unenforceable both in an action at law for damages and in a suit in equity for specific performance."
>
> *Callies v. O'Neal,* 147 Idaho 841, 847, 216 P.3d 130, 136 (2009).

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

The Buyer and Seller may wish to enter into a Lot Reservation Agreement instead of a Purchase and Sale Agreement. However, the Hotline cannot comment or advise on third party contracts. Brokers on both sides should advise clients to retain legal counsel to advise them of their rights when trying to purchase/sell a piece of land does not yet have a recorded legal description.

Can a non-assignable contract be assigned without Seller's consent?

QUESTION: If a contract is marked as non-assignable, can a Buyer assign it without Seller's consent?

RESPONSE: No. According to the facts given to the Hotline, the contract does not allow for assignment. If Buyer wants to alter the agreement to allow assignment, Buyer needs Seller's consent which could be obtained through an addendum. The Legal Hotline cannot draft addendums, nor can it review and interpret contract language outside the standard IR forms.

Does a contract that contains "as-is" language remove Buyer's right to terminate based on an unsatisfactory inspection?

QUESTION: Broker represents Buyer. Buyer offered to purchase the property "as is," but also chose to conduct inspections. After conducting inspections Buyer attempted to terminate. Seller does not believe Buyer had the ability to back out and is refusing to return the earnest money back to Buyer. Broker questions if the "as is" language would remove Buyer's right to terminate based on an unsatisfactory inspection.

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

> **INSPECTION: (A). BUYER chooses ☐to conduct inspections ☐not to conduct inspections.** If BUYER chooses not to conduct inspections, skip Sections 10(B) and (C). **If indicated, this contract is contingent upon BUYER'S approval of the condition of the PROPERTY** and BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense**.**

Given the information provided to the Hotline, the contract was marked that Buyer would conduct inspections. In the Other Terms and Conditions Section (Section 4) there was language that stated Buyer was going to purchase the property "as is." The Hotline cannot interpret any

non-boilerplate language written into the form contracts; however Buyer and Seller appear to have different interpretations of the language written into Other Terms and Conditions, which means the contract could contain an ambiguity. Black's Law Dictionary defines ambiguity as:

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

Broker should also be aware of an Idaho statute that gives greater importance to the "handwritten" portions of contracts. The statute states:

> CONSTRUCTION OF CONFLICTING PROVISIONS. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded.
>
> Idaho Code § 29-109.

The "as is" language that was written into the contract would be considered the handwritten portion, as it is not the standard pre-printed boilerplate language, therefore a court would likely look at the drafted handwritten sections as to what controls. However, this still may not resolve any ambiguity over what "as is" meant.

Brokerages for both Buyer and Seller should use caution in attempting to interpret ambiguous language as it might constitute practicing law. It is always best practice to make additional terms as specific as possible and to always detail exactly what the intent of the parties is. Like Brokers, the Hotline cannot make conclusive determinations as to the existence or interpretation of ambiguities. Broker may wish to advise client to retain private legal counsel in this matter.

Does "N/A" written into a blank line remove that section from the contract?

QUESTION: Broker represents Seller. The original offer had "N/A" written into the blank on line 56 in the financing section of the RE-21 contract and Broker questions if this removes the entire paragraph from the contract. Further, Seller has terminated the contract, but Buyer has not signed the RE-20, so Broker also questions whether or not they can put the back-up offer in first position without a signature from Buyer terminating the agreement.

RESPONSE: The language in question is contained in the Financial Terms section (Section 3) of the RE-21. It states:

> 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.
>
> RE-21, Lines 55-59.

According to the facts presented to the Hotline, "N/A" was written into the blank line instead of a number. The RE-21 goes on to define N/A in Section 39:

> "NOT APPLICABLE" DEFINED: 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 Buyer's offer stated "N/A" in the financing section cited above, it is possible that the parties made the entire paragraph not applicable, therefore Seller may not have the ability to cancel the agreement due to Buyer not providing written confirmation of funds. In the alternative the parties may have created an ambiguity in the contract which would have to be resolved by the courts.

As to Broker's second question regarding putting another offer in first position without having two signatures on the RE-20, Idaho law does not necessarily require both signatures on the termination form for termination to be effective. It is up to Seller to determine if the original contract has been effectively terminated and move the backup offer into first position.

Broker should advise client to seek legal counsel in this matter.

Can Seller unilaterally make the RE-27 part of the contract?

QUESTION: Broker represents Buyer who made an offer on a property. The Seller of the Property accepted the terms of Buyer's offer, signed the RE-21 and delivered it back to Buyer. Nowhere in the acceptance did the seller indicate that the Seller's acceptance was subject to the Buyer also executing an Idaho REALTORS® Form RE-27 (Seller's Right to Continue to Market Property). At some time later in the transaction, Seller began to insist that the transaction was indeed subject to an RE-27. Broker questions if the Seller has the ability to add an RE-27 to a transaction after the fact.

RESPONSE: No, if an RE-27 is not agreed to by all parties when forming the contract, it cannot be added later absent the consent of all parties. In the event the Seller decided to include an RE-27 in the transaction, Seller should have conditioned his signature by indicating as much on lines 464-467 of the RE-21. Based upon the facts presented to the Hotline, the Seller did not condition his acceptance subject to the RE-27, therefore the RE-27 is not a part of the transaction.

Broker should advise client to seek independent legal counsel to advise Client of his or her rights.

What does a Buyer need to provide when submitting written confirmation of funds necessary to close?

QUESTION: Broker represents Seller who is involved in a transaction that included an Idaho REALTORS® Form RE-27. When Seller received another offer, they notified Buyer Number 1 who then waived their contingency. Buyer Number 1, however, did not provide written confirmation of funds necessary to close, and only provided a Purchase and Sale Agreement referring to Buyer Number 1's previous home. Seller does not believe the Purchase and Sale Agreement is sufficient pursuant to the terms of the RE-27. Broker questions if there are legal standards as to what Buyer needs to provide.

RESPONSE: The controlling language in the RE-27 states:

> Upon waiver or removal of any contingency(s) specified, BUYER warrants that adequate funds needed to close will be available and that BUYER'S ability to obtain financing is not conditioned upon sale and/or closing of any property. BUYER agrees to provide SELLER within ____ business days (two [2] if left blank) from waiver or removal of contingencies of this agreement by all parties written confirmation of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement.

Based upon the above, Buyer is to provide "written confirmation of sufficient funds and/or proceeds necessary to close transaction." Given that Purchase and Sale Agreements typically contain numerous contingencies and frequently do not make it to closing, it would be a stretch to deem such an agreement proof of "sufficient funds"; this is especially true when read with the examples provided in the agreement that reference a bank or financial statement.

Nevertheless, The Legal Hotline, just like Brokers, cannot make determinations as to what constitutes sufficient written confirmation to satisfy Buyer's obligation under the RE-27, each determination must be made on a case-by-case basis. If the buyer did not meet Buyer's obligations under the contract, Buyer may be in default.

Broker should advise client to obtain independent legal counsel to advise client of his or her rights.

Can a Seller terminate if a RE-27 has been executed and there is another Buyer in back up position?

QUESTION: Broker's client, Seller, entered into a contract with Buyer #1 which was subject to an agreement allowing the Seller to continue to market the property (the RE-27). Subsequently, Seller entered into a contract with Buyer #2 which was placed in back-up position using the RE-18. Seller did not use Buyer #2's offer to force Buyer #1 to remove his or her contingency. After entering into these two contracts, a third offer has come in which Seller believes has better terms. Broker questions if Seller can terminate with Buyer #1 and Buyer #2 and accept the third offer.

RESPONSE: Seller cannot unilaterally terminate with either Buyer; however, if Buyer #1 acts under typical circumstances Seller may be able to remove Buyer #1 from the equation.

Neither the RE-18 nor the RE-27 contain a unilateral option for a Seller to terminate the contract; a so called "bump clause."

The RE-27 states a contingency which must be removed by Buyer if the Seller notifies the Buyer that Seller has received a subsequent acceptable offer. Given the facts presented to the Hotline, Buyer #1 probably cannot remove this contingency (the sale of another property); thus, if Seller used either the second or third offer as a basis to request Buyer #1 to remove that contingency, the effect would be that Buyer #1 would likely terminate the transaction. However, if Buyer does appropriately remove the contingency and present an ability to proceed with the transaction, Seller should be prepared to proceed with Buyer #1.

If Buyer #1 terminates, then Seller is contractually bound to proceed with Buyer #2 pursuant to the terms of the RE-18, keeping in mind that there is no RE-27 associated with Buyer #2's offer. The RE-18 is specifically tied to Buyer #1's offer through the language on Line 17 which defines the "Offer in First Position." The form then goes on to require Seller to notify the backup Buyer once the "Offer in First Position" fails or is terminated. While the RE-18 makes the Back-up offer terminable by Buyer at any time prior to notice from Seller, it does not allow a Seller to terminate at will.

Broker should advise client to seek independent legal counsel to advise Seller of his or her rights in this matter.

DISCLOSURE

Do alleged murders on the property need to be disclosed?

QUESTION: Broker questions if an alleged murder on the property needs to be disclosed to potential Buyers.

RESPONSE: A homicide in the home would fall under Idaho's "psychologically impacted" property statutes. Idaho Code Title 55 Chapter 28 governs "psychologically impacted" property. Idaho Code § 55-2801 states in relevant part:

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

Further, Idaho Code § 55-2802 States:

> NO CAUSE OF ACTION. No cause of action shall arise against an owner of real property or a representative of the owner for a failure to disclose to the transferee of the real property or a representative of the transferee that the real property was psychologically impacted.

Given the above stated language, knowledge of a homicide on the property would not have to be pro-actively disclosed to Buyers.

However, the above pertains to pro-active disclosure. Idaho Code differentiates what steps to take if a potential Buyer specifically asks Seller and/or agent if they have knowledge of specific acts:

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

If the seller believes this statute applies to them Broker should advise Seller to seek legal counsel.

Does a COVID diagnosis fall under psychologically impacted property?

QUESTION: Broker questions if Seller having COVID needs to be disclosed to Buyer or if it would fall under psychologically impacted property.

RESPONSE: Idaho Code Title 55 Chapter 28 governs "psychologically impacted" property. Idaho Code § 55-2801 states in relevant part:

> As used in this chapter, "psychologically impacted" means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to the following:
> (1) That an occupant or prior occupant of the real property is or was at any time suspected of being infected or has been infected with a disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place…

The Hotline does not determine whether or not a property is psychologically impacted, and Broker should also not to make the determination. It is up to Seller to determine if the COVID diagnosis needs to be disclosed or if it would fall under psychologically impacted property.

Is a Seller required to amend the RE-25 if new information is discovered during a transaction?

QUESTION: Does Seller have to amend Seller's Property Condition Disclosures (RE-25) when there is a change in circumstance discovered during the course of the transaction? Broker also questions a Buyer's recourse if Seller refuses to amend the disclosures.

RESPONSE: Yes, Idaho law requires a Seller to amend any previous disclosures if new information is discovered. Idaho Code § 55-2513 states:

> AMENDMENT TO FORM. Any disclosure of an item of information in the property disclosure form described in section 55-2508, Idaho Code, may be amended in writing by the transferor of the residential real property at any time following the delivery of the form in accordance with section 55-2510, Idaho Code. Transferor shall amend the disclosure statement prior to closing if transferor discovers any of the (the) information on the original statement has changed. In the event of amendments to the statement, transferee's right to rescind is strictly limited to the amendments to the disclosure statement. The amendment shall be subject to the provisions of this chapter.
>
> I.C. § 55-2513.

In response to Broker's question regarding what happens if a Seller does not amend the RE-25 disclosures, Idaho Code § 55-2517 states:

> 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.

A Seller is required by law to make certain property condition disclosures and is further obligated to amend said disclosures if new information regarding the property is discovered. Broker should advise client to retain legal counsel to advise client of his or her rights if Seller is refusing to amend disclosures.

EARNEST MONEY

Is Earnest Money required for a contract to be binding?

QUESTION: Broker has a client in a transaction governed by a purchase sale agreement that states no earnest money will be required from the Buyer. Broker questions if earnest money is required as consideration to create a valid and binding contract.

RESPONSE: It is highly recommended that parties use earnest money in all real estate transactions utilizing the Idaho REALTORS® forms. Those forms are designed around, and contain various references to, earnest money not the least of which is the option for a forfeiture of earnest money in the event of a Buyer default.

While it is best practice to always state an amount of earnest money, that practice is based on several aspects and not solely to create monetary consideration for the agreement to be binding. Other factors can constitute consideration. The legal analysis into whether a real estate contract involved proper consideration is extremely complex and it does not always turn on the fact that earnest money was provided. The Idaho Supreme Court has stated:

> While this Court will not inquire as to the adequacy of consideration as bargained for by parties to an agreement, some consideration is a necessary element to a contract. *Vance v. Connell,* 96 Idaho 417, 419, 529 P.2d 1289, 1291 (1974). "To constitute consideration, a performance or a return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise." Restatement (Second) of Contracts § 71 (1981).
>
> *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 780 (2009).

Further, the definition from Black's Law Dictionary, a widely cited and referenced legal text defines earnest money as follows:

> A deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily

> forfeited if the buyer defaults. Although earnest money has traditionally been a nominal sum (such as a nickel or a dollar) used in the sale of goods, it is not a mere token in the real-estate context: it is generally a percentage of the purchase price and may be a substantial sum.
>
> The amount of earnest money deposited rarely exceeds 10 percent of the purchase price, and its primary purpose is to serve as a source of payment of damages should the buyer default. Earnest money is not essential to make a purchase agreement binding if the buyer's and seller's exchange of mutual promises of performance (that is, the buyer's promise to purchase and the seller's promise to sell at a specified price and terms) constitutes the consideration for the contract." John W. Reilly, *The Language of Real Estate* 131 (4th ed. 1993).
>
> EARNEST MONEY, Black's Law Dictionary (11th ed. 2019)

These quotations are not directly on point as the hotline is unaware of a direct Idaho court case or statute that soundly addresses the issue. As stated above best practice is to always use some amount of earnest money.

What happens to Earnest Money if Buyer terminates with the RE-10 after the inspection period deadline passed?

QUESTION: Broker represents Seller. Buyer used the RE-10 to terminate the contract after Buyer's inspection period had passed. Broker questions what happens now, and wonders if Seller has any right to the earnest money.

RESPONSE: Section 10(C)(1) of the RE-21 states:

> If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items/conditions or written notice of termination of this Agreement under the Primary Inspection or any particular 10(B)(2) reserved item, BUYER shall, for only that particular inspection or item/condition, conclusively be deemed to have: (a) completed applicable inspections, investigations, review of applicable documents and disclosures; (b) assumed all liability, responsibility and expense for repairs or corrections for that particular inspection or item/condition and (c) waived BUYER'S right to terminate based upon that particular item/condition. BUYER not providing one written notice shall not affect BUYER'S rights regarding other unrelated notices and inspections.

According to the facts presented to the Hotline, Buyer had 5 days to conduct inspections but did not deliver the RE-10 terminating the transaction until after this timeframe had passed. The above cited language clearly states if Buyer does not give written notice of disapproved items or written notice of termination within the strict timeframe, Buyer has waived the right to terminate based on the inspection.

If both parties have elected not to proceed with the transaction and both have made a demand for the earnest money, then the Responsible Broker has three options:

> (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 above of course assumes that the Responsible Broker is in possession of the earnest money; it is common that earnest money is deposited with title companies. Typically, a title company will not release the earnest money until all parties have reached an agreement as to how the monies are to be distributed and/or receives a court order. Broker may wish to advise client to seek independent legal counsel in this matter.

Can the Responsible Broker pay third parties with the Earnest Money held in trust?

QUESTION: Broker represents Buyer. Buyer is backing out of the offer and will lose their earnest money. Can the Broker use the Earnest Money to pay the inspector hired by the Buyer and then give the rest to the Seller?

RESPONSE: Not according to the typical terms of the RE-21 which state:

> 30. DEFAULT: 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.

The language above only contemplates Seller's broker's expenses being paid out of the earnest money, not Buyer's expenses.

What obligations does the Responsible Broker have when there is an Earnest Money dispute?

QUESTION: Broker represents Buyer, who was unable to obtain financing and thus terminated the Purchase and Sale Agreement and requested a return of Buyer's earnest money. Seller then made a demand for half of the earnest money. Broker is acting as Responsible Broker for this transaction and questions what his obligations are in this situation.

RESPONSE: When there is disputed earnest money, the Responsible Broker holding the earnest money has three options which are outlined in Idaho Code § 54-2047 and summarized in Section 31 of the RE-21:

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.

Given that Broker is acting as Responsible Broker, he can utilize any of the options cited above.

The Hotline does not determine the outcome of earnest money disputes. Broker may wish to advise client to seek independent legal counsel in this matter.

PROPER FORM USE

Can RE-10s go back and forth multiple times?

QUESTION: Broker is involved in a vacant land transaction. Buyer and Seller have exchanged multiple RE-10 forms negotiating on Seller's response to Buyer's requests for repairs. Broker's client is growing tired of the exchanges and Broker questions when the exchanges have to stop.

RESPONSE: The relevant part of Section 7(c) of the RE-24 states:

> 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 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.

Presuming a 3-day period, according to the terms above, Buyer had 3 days from Seller's response to 1) obtain a modification to Seller's response, 2) elect to proceed, or 3) terminate the contract. If Buyer did not accomplish 1 or 3 within 3 days, he will be deemed to have number 2- which is to proceed with the transaction. Parties are free to extend the 3-day period but any agreement to do so would need to be in writing, and likely prior to the expiration of the original 3-day period due to Section 24 which states:

> **ENTIRE AGREEMENT:** This Agreement including any addendums or exhibits, constitutes the entire Agreement between the parties respecting the matters set forth and supersedes all prior Agreements between the parties respecting such matters. This Agreement may be modified only by a written agreement signed by each of the parties.

Is the contract binding if the parties use the Addendum form instead of the Counter Offer form?

QUESTION: Broker questions the best way to proceed if a Seller responds to an offer with an addendum instead of a counter offer form. In this case, both parties signed the addendum prior to Seller signing the RE-21.

RESPONSE: The intended use of the RE-11 Addendum is to make changes to the contract after all parties have agreed to and signed the Purchase and Sale Agreement. The RE-13 Counter Offer form should be used to make changes to Buyer's original offer prior to all parties signing the RE-21. Given that Buyer had not yet received an accepted RE-21 from Seller, the addendum in question should have been on a counter offer form. The RE-13 contains language that indicates the parties accept the terms of the Purchase and Sale Agreement by signing the Counter Offer: "The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes…" (Line 11, RE-13). The Addendum form does not contain such language, and using it incorrectly can cause confusion as to when the parties went under contract.

In this case, best practices would be to have the parties execute an addendum that clearly states the acceptance date of the contract to eliminate any confusion. Further, Broker should train agents to go back to listing agents who incorrectly use an Addendum form to counter a RE-21 and ask them to recreate it on the proper Counter Offer form.

MISCELLANEOUS

Can the FHA/VA loan language in the Purchase and Sale Agreement be amended?

QUESTION: Broker questions if a Buyer can agree to pay the difference in price in the event of a low appraisal when Buyer is using a VA loan.

RESPONSE: No. 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.

Called the "amendatory clause," 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 and the parties cannot contract around federal mandates. 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. If Buyer is using a VA loan and the property appraises below the stated contract price, Buyer is not obligated to complete the purchase of the property. REALTORS® with Buyers who intend to get a FHA or VA loan should also ensure the clause is not removed or amended.

Broker may wish to advise client to seek legal counsel in this matter if a client has questions or concerns about the terms or applicability of the federally mandated amendatory clause.

Is a gate considered an attached fixture or personal property?

QUESTION: Broker was representing a client in a transaction. After closing, it was discovered that Seller removed an expensive gate from the property because Seller believes the gate is personal property. Broker questions whether or not a gate would be considered an attached fixture or personal property.

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. The purchase sale contract 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. 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. Broker should advise client to seek independent legal counsel to advise them of their legal rights.