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.

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)*
>
> 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.
>
> *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.
>
> *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."
>
> *Lawrence v. Jones*, 124 Idaho 748, 750–51 (Ct. App. 1993) (Internal citations omitted).

However, the Courts have also said:

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

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.

The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2019

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WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes

The responses contained in the 2019 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2019. The Idaho Legislature has enacted changes to the laws that apply to real property and made changes to the Idaho Real Estate Licensing Law during the 2020 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2019 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho REALTORS® "RE" forms, which may reflect the 2020 legislative changes to the law.

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AGENCY/LICENSE LAW

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

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

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

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

A double contract is defined as follows:

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

If Buyer and Seller use the RE-10 to agree to repairs and/or a reduction of the purchase price, not providing said agreement to lender would typically fall under the definition of a double contract and thus be prohibited and/or fraudulent conduct. Best practice is to always provide all documentation to lenders in order to avoid a double contract circumstance. If the lender does not want to receive it, the Broker should always get that in writing as it will prove the lender knew about the RE-10, which will remove it from the definition of a double contract.

COMMISSIONS & FEES

What if another brokerage interferes with an active representation agreement?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONTRACTS

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

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

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

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

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

Can the RE-10 be revoked?

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

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

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

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

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

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

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

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

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

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: The RE-10 language reads as follows:

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

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

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

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

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

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

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

RESPONSE: RE-13 contains the language:

> To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by this Counter Offer shall remain the same. Buyer and Seller acknowledge the down payment and/or loan amount on Page 1 of Purchase & Sale Agreement may change if purchase price is changed as part of this Counter Offer. **If original offer has expired, has been revoked and/or acceptance is late, then mutual execution of this Agreement shall constitute consent to revive and retender the original offer.** Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement. (Lines 40-45 emphasis added).

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

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

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

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

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

Is a contract valid if it contains a typographical error?

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

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

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

Further, the Idaho Supreme Court has ruled;

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

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

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

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

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

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

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

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

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

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

RESPONSE: Yes. The RE-21 states in relevant part:

> If an appraisal is required by lender, the PROPERTY must appraise at not less than PURCHASE PRICE or BUYER'S Earnest Money shall be returned at BUYER'S request **unless** SELLER, at SELLER'S sole discretion, agrees to reduce the purchase price to meet the appraised value. SELLER shall be entitled to a copy of the appraisal and shall have 24 hours from receipt thereof to notify BUYER of any price reduction. (Emphasis added).

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

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

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

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

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

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

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

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

become a integral part of this contract. Otherwise, immediately upon a written response from SELLER that rejects BUYER'S requests, in whole or in part, said response is irrevocable and BUYER may proceed under 10(C)(4) below**.**

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

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

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

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

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

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

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

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

RESPONSE: No. The RE-21 states in relevant part:

> If an appraisal is required by lender, the PROPERTY must appraise at not less than PURCHASE PRICE or BUYER'S Earnest Money shall be returned at BUYER'S request **unless SELLER, at SELLER'S sole discretion**, agrees to reduce the purchase price to meet the appraised value, in which case SELLER shall be entitled to a copy of the appraisal and shall have 24 hours from receipt thereof to notify BUYER of any price reduction. (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When does possession take place?

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

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

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

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

> CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing company all funds and instruments necessary to complete this transaction. **Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER.**

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

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

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

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

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

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

RESPONSE: The RE-10 Inspection Contingency Notice states:

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

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

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

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

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

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

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

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

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

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

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

> On or before the closing date, BUYER and SELLER shall deposit with the closing company all funds and instruments necessary to complete this transaction. **Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER.**

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

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

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

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

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

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

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

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

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

If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items/conditions, **it shall end BUYER's timeframe for that particular inspection and is irrevocable.**

RE-21 Section 10(C)(3).

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

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

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

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

RESPONSE: The contract between the Buyer and Seller states:

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

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

What is the purpose of Buyer's walk throughs?

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

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

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

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

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

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

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

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

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

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

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

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

DISCLOSURE

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

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

RESPONSE: Idaho Code § 45-525 states:

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

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

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

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

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

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

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

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

DUTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> A nonagent brokerage and its licensees owe no duty to a **buyer/customer** to conduct an independent inspection of the property for the benefit of that buyer/customer and owe no duty to independently verify the accuracy or completeness of any statement or representation made by the seller or any source reasonably believed by the licensee to be reliable. (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statutes also state:

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

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

EARNEST MONEY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Buyer's inspection contingency allows a BUYER to conduct a general inspection of the PROPERTY which includes all aspects of the PROPERTY, including but not limited to neighborhood, conditions, zoning and use allowances, environmental conditions, applicable school districts and/or any other aspect pertaining to the PROPERTY or related to the living environment at the PROPERTY; hereinafter referred to as the Primary Inspection. Except for additional items or conditions specifically reserved in a Secondary Inspection below BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items/conditions or written notice of termination of this Agreement based on an unsatisfactory inspection. Once BUYER delivers written notice to SELLER it shall end BUYER'S timeframe for inspections other than those specifically reserved in a Secondary Inspection below and is irrevocable regardless of if it was provided prior to the deadline stated above.
>
> RE-21, 10(B)(1).
>
> …
>
> If BUYER does within the strict time period specified give to SELLER written notice of termination of this Agreement based on any unsatisfactory inspection, the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER.
>
> RE-21, 10(C)(2).

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

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

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

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

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

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

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

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

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

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

PROPER FORM USE

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

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

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

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

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

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

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

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

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

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

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

MISCELLANEOUS

Is an offer made via email valid?

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

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

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

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

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

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

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

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

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

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

When does a power of attorney terminate?

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

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

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

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

What is required to have a valid legal description?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2018

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WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes

The responses contained in the 2018 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2018. The Idaho Legislature has enacted changes to the laws that apply to real property, and made changes to the Idaho Real Estate Licensing Law during the 2019 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2018 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho REALTORS® "RE" forms, which may reflect the 2019 legislative changes to the law.

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AGENCY/LICENSE LAW

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

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

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

> This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within ____ calendar days (ninety [90] if left blank) after this Agreement expires or is terminated, if the property acquired or leased by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term or extension of the term of this Agreement.

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

In answer to Broker's second question regarding how to proceed if a REALTOR® is contacted by a client who is currently being exclusively represented by someone else, the *Code of Ethics of Standards of Practice of the National Association of REALTORS*® does have language dealing with this type of circumstance:

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

Idaho law also has similar language about interfering with business contracts. If Broker believes that another REALTOR® has violated the Code of Ethics, Broker can call her local

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONS & FEES

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

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

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

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

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

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

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

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

CONTRACTS

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

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

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

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

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

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

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

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

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

Further, the Idaho Supreme Court has ruled:

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

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

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

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

RESPONSE: No. The RE-21 states in relevant part:

> If an appraisal is required by lender, the PROPERTY must appraise at not less than purchase price or BUYER'S Earnest Money shall be returned at BUYER'S request **unless SELLER, at SELLER'S sole discretion, agrees to reduce the purchase price to meet the appraised value. SELLER shall be entitled to a copy of the appraisal and shall have 24 hours from receipt thereof to notify BUYER of any price reduction.** (Emphasis added).

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

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

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

RESPONSE: The RE-21 Financial Terms Section states:

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

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

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

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

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

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

RESPONSE: Section 35 of the RE-21 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Can late acceptance of a contract be revoked?

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

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

> This offer is made subject to the acceptance of SELLER and BUYER on or before (Date)_____ at (Local Time in which PROPERTY is located)_____ ☐A.M. ☐P.M.

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

> If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE (_____)(_____) Date _____.
> If BUYER timely approves of SELLER's late acceptance, an initialed copy of this page shall be immediately delivered to SELLER.

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

Further, if Buyer does not want to initial the late acceptance and decides to propose a counter offer, a tender of a counter offer that adds a new term or changes a term of the original offer constitutes rejection of the original offer in its entirety:

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

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

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

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

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

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

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

Do contract terms extend beyond the closing date?

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

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

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

But there are exceptions:

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

Fuller v. Dave Callister, 150 Idaho 848, 854 (2011).

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

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

Does boilerplate language in the forms supersede handwritten verbiage?

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

RESPONSE: The RE-10 states in relevant part:

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

According to the facts presented to the Hotline, the RE-10 in question stated that Buyer does not remove the inspection contingency. It appears that the contract contains an ambiguity. Black's Law Dictionary defines ambiguity as:

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

Given the facts presented to the Hotline, Buyer and Seller have two different interpretations as to whether or not Buyer waived the inspection contingency. It is always best practice to make additional terms as specific as possible, and to always detail exactly what the intent of the parties is.

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

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

RESPONSE: The RE-21 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, the Courts have also said:

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

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

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

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

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

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

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

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

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

However, the Courts have also said:

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

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

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

Can the RE-10 be revoked prior to acceptance?

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

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

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

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

DISCLOSURE

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

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

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

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

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

Does a suspected drug house need to be disclosed?

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

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

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

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

Further, under Idaho law, licensees are required to disclose any "adverse material facts." Idaho Code § 54-2083(1) defines an adverse material fact as:

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

The Hotline cannot determine what an adverse material fact is because it has to be done on a case by case basis. Brokers and Sellers are required to decide for themselves whether or not any particular fact would rise to the level of an "adverse material fact" as defined by Idaho Code. However, based on the information provided to the Hotline, a rumor that Seller's home was a drug house that was disproved by lack of police record is unlikely to constitute a fact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Would a past fire be considered an adverse material fact?

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

RESPONSE: Idaho Code § 55-2506 states:

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

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

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

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

Idaho Code § 54-2083(1).

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

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

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

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

Are timeshare properties exempt from property disclosures?

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

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

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

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

DUTIES

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

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

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

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

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

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

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

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

RESPONSE: It was a good idea for Broker to request a search warrant as this requires the Brokerage to turn over the documents and ensures the legitimacy of the request. As to the question about confidential information, Idaho Code defines confidential client information as:

> "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.
>
> Idaho Code § 54-2083(6).

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

> To maintain the confidentiality of specific client information as defined by and to the extent required in this chapter, and as follows:
> (a) The duty to a client continues beyond the termination of representation only so long as the information continues to be confidential client information as defined in this chapter, and only so long as the information does not become generally known in the marketing community from a source other than the brokerage or its associated licensees;
> (b) A licensee who personally has gained confidential client information about a buyer or seller while associated with one (1) broker and who later associates with a different broker remains obligated to maintain the client confidentiality as required by this chapter;
> (c) If a brokerage represents a buyer or seller whose interests conflict with those of a former client, the brokerage shall inform the second client of the brokerage's prior representation of the former client and that confidential client information obtained during the first representation cannot be given to

> the second client. Nothing in this section shall prevent the brokerage from asking the former client for permission to release such information;
> **(d) Nothing in this section is intended to create a privileged communication between any client and any brokerage or licensee for purposes of civil, criminal or administrative legal proceedings.** (Emphasis added).

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

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

Is the purchase price in an offer considered confidential information?

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

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

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

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

EARNEST MONEY

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

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

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

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

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

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

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

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

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

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

PROPER FORM USE

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

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

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

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

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

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

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

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

What is the purpose of the RE-27?

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

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

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

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

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

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

> This offer is made subject to the acceptance of SELLER and BUYER on or before (Date)_____ at (Local Time in which PROPERTY is located)_____ ☐A.M. ☐P.M.

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

> If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE (_____)(_____) Date _____.
> If BUYER timely approves of SELLER's late acceptance, an initialed copy of this page shall be immediately delivered to SELLER.

This late acceptance section is to be used in the event that a Seller wants to accept an offer after the deadline listed in Section 42 of Buyer's offer. Seller would then submit the signed offer back to the Buyer, in which case the Buyer then can accept Seller's signature by initialing the Late Acceptance section, or choose not to revive the expired offer. The contract is only binding on the parties if Buyer initials this section or otherwise signifies his or her acceptance.

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

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

RESPONSE: The RE-21 contains the following language:

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

Idaho Code § 55-116 states:

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

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

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

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

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

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

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

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

MISCELLANEOUS

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

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

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

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

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

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

How does Seller determine if they are selling water rights?

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

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

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

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

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

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

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

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

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

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

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

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

What if a Buyer is unsatisfied during the final walkthrough?

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

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

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

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

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

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

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

Is an electrical conduit considered an attached fixture?

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

RESPONSE: The RE-21 Section 5 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Can the RE-10 be withheld from the lender?

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

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

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

A double contract is defined as follows:

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

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

The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2017

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WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes

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

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AGENCY/LICENSE LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Confidential client information" means information gained from or about a client that:
(a) Is not a matter of public record;
(b) The client has not disclosed or authorized to be disclosed to third parties;
(c) If disclosed, would be detrimental to the client; and
(d) The client would not be personally obligated to disclose to another party to the transaction. **Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information** within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.

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

Can brokerages have "pocket listings?"

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

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

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

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

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

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

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

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

The rules go on to specifically state:

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

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

COMMISSIONS & FEES

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

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

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

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

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

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

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

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

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

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What is the proper way to document a commission reduction?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONTRACTS

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

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

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

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

And further, Section 2 states:

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

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

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

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

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

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

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

RESPONSE: Black's Law Dictionary defines ambiguity as:

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

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

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

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

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

Who pays the appraisal fee if the transaction falls apart?

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

RESPONSE: The RE-20 states in relevant part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Unless otherwise addressed, BUYER shall, within ___ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

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

What is the best practice when assigning contracts?

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

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

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

Further, it states:

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

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

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

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

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

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

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

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

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

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

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

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

The current 2017 version states:

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

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

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

Does the inspection timeframe include the CC&Rs?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But there are exceptions:

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

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

Further, a double contract is defined as:

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: The RE-10 states in relevant part:

> SELLER will service, repair or replace, in a good and workmanlike manner, the following items on or in the property _____ business days (ten [10] if left blank) from final acceptance of this notice by all parties. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-

> inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement.

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

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

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

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

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

A double contract is defined as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCLOSURE

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

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

RESPONSE: The RE-25 states:

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

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

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

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

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

RESPONSE: Idaho Code states:

> No cause of action shall arise against an owner of real property or a representative of the owner for a failure to disclose to the transferee of the real property or a representative of the transferee that the real property was **psychologically impacted**.
>
> Idaho Code § 55-2802. (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DUTIES

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

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

RESPONSE: Idaho Code defines confidential client information as:

> "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.
>
> Idaho Code § 54-2083(6).

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

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

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

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

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

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

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

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

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

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

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

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

> "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. **Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information** within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.
>
> Idaho Code § 54-2083(6). (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FORMS

When does the RE-18 go into effect?

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

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

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

Further, the RE-18 Section 7 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> This offer is made subject to the acceptance of SELLER and BUYER on or before (Date)_____ at (Local Time in which PROPERTY is located)_____ ☐A.M. ☐P.M.

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

> If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE (_____)(_____) Date _____.
> If BUYER timely approves of SELLER's late acceptance, an initialed copy of this page shall be immediately delivered to SELLER.

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

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

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

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

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

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

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

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

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

What constitutes "notice" in the RE-18?

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

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

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

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

Can Seller object to Buyer assigning the contract?

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

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

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

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

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

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

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

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

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

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

> BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

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

MISCELLANEOUS

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

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

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

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

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

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

Can one property be split into two transactions?

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

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

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

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

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

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

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

Is there any way to stop a foreclosure sale?

QUESTION: Broker had a client whose home was in foreclosure, prior to the foreclosure sale they found a buyer and went under contract. For one reason or another the bank did not stop the foreclosure process and the property was sold at a foreclosure sale. Broker questions the proper way to advise client and if there is anything that can be done.

RESPONSE: Whether or not the bank had the obligation to postpone the sale will be dependent upon the facts and circumstances unique to each bank loan and each foreclosure process. If the bank did have a legal obligation that was not performed then the Seller and Buyer to the transaction, and perhaps the successful bidder at the foreclosure sale may have legal recourse against the bank. In addition, depending on the type of loan the Seller had with the bank there may be an opportunity for Seller to redeem the property even after the foreclosure sale. Under any circumstance Broker should advise Seller to seek independent legal counsel to advise them of their rights. Broker should also keep Buyer's agent informed as to exactly what happened as it would in all likelihood constitute an adverse material fact which would require disclosure. As always Broker should remind clients that Brokerage cannot offer legal advice.

Is there any recourse if a neighbor interferes with a transaction?

QUESTION: Brokerage represents the Seller. They have an accepted offer and are nearing the closing date. The Seller and a neighbor have had previous problems regarding the cost of repairing a shared sewer pipe. This information was disclosed to the Buyer. Buyer elected to proceed with the transaction. Now, the neighbor has allegedly sent letters to Seller, Agent, Buyer and the title company informing them that she plans to take legal action to resolve the sewer issue. The parties have now extended the closing date in order to address the matter. Broker questions how to proceed and whether or not the brokerage would have any ability to recover its commission if the neighbor improperly causes the transaction to fail.

RESPONSE: Broker's agent was correct to disclose the previous dispute with the neighbor. A licensee always has the duty to disclose any adverse material fact known about the property. Given that the neighbor has threatened to take legal action, Agent should advise client to seek independent legal counsel.

As to the commission, Brokerage's contract is with the Seller. Pursuant to the terms of the standard representation contract, Broker is entitled to its commission if Brokerage "procures a purchaser ready, willing and able" to purchase the property. Once that happens, Brokerage is typically entitled to a commission. Contractually speaking, because Broker did not have a contract with anyone but Seller, Seller would typically have to pay Broker, then pursue the neighbor to recover the damages caused by neighbor's wrongful interference.

There are other non-contractual causes of action where under the right facts and circumstances, Brokerage could pursue the neighbor directly. However, due to the complexity of these causes of action and theories of recovery, Brokerage would need to consult its legal counsel to analyze the Brokerage's legal rights under this circumstance, as such complexities are beyond the scope of the Hotline services.

The Hotline Top Questions

THE LEGAL HOTLINE

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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 2016 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2016. 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 2017 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2016 "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 2017 legislative changes to the law.

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AGENCY/LICENSE LAW

What are the obligations of the brokerage if the transaction falls apart?

QUESTION: Broker represents Buyer in a transaction. Recently Buyer learned that the individual executing the purchase and sale agreement was not the owner of the property Buyer was purchasing. Upon discovering this information Buyer notified broker that he intends to abandon the transaction and pursue other property. Broker questions the appropriate action for the brokerage in this type of circumstance.

RESPONSE: Based upon the facts given to the Hotline, it appears that the Seller and the Buyer are at an impasse with this transaction. Buyer thinks buyer has legal right to abandon the transaction, as there was no legal contract between the parties. Seller thinks the Seller has the ability to force Buyer to perform. It does not appear that there is any reasonable action which can be taken by the brokerage to resolve the dispute between the buyer and seller. Brokerage should advise all parties to seek competent legal counsel to advise them of their rights. Brokerage should take care not to offer legal advice. Buyer alone should decide if it is appropriate to enter into a new contract.

Further, based upon the facts presented to the Hotline, it appears the earnest money was deposited with a title company. The title company is unlikely to release the earnest money to either party until all parties are in agreement as to who is entitled to receive said earnest money.

The Hotline does not get involved with, nor does it offer advice in attempt to, settle disputes between buyers and sellers and therefore will not address the issue of whether or not there ever was a legally binding contract.

Can a licensee who is employed as a property manager represent their employer in a real estate transaction?

QUESTION: Agent is employed as a manager of a mobile home park and the owner would like to list the lots for sale. Agent questions if there is anything that would prevent him from representing the Seller/Boss. Would it be violating any licensing laws?

RESPONSE: No, there is nothing in Idaho Code that prevents this type of relationship. Licensee should have no issue representing the Seller. The best practice for the agent would be to always disclose to potential buyers that agent is also employed as a manager by the Seller/owner of the park. Agent should also be aware that as an individual with knowledge about the property he may be aware of various adverse material facts which require disclosure. Agent's knowledge likely goes beyond that of a typical agent involved in an arm's length transaction.

Does a licensee have a duty to disclose that their client is a registered sex offender?

QUESTION: Agent represents a Buyer. The Buyer is a registered sex offender and wishes to purchase a home. Agent questions whether she has an obligation to disclose to the seller that a sex offender is buying a house in the area.

RESPONSE: Idaho Code Title 18 chapter 83 governs sex offender registration. The Hotline is unaware of any Idaho law or court opinion that extends the disclosure obligation of a registered sex offender to a real estate salesperson hired to represent the offender in the purchase of a home. Furthermore, Idaho Code § 18-8325 which governs sex offender registration states:

> (1) 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 sexual offenders, shall be held liable for any failure to disclose any information regarding registered sexual offenders to any other person or entity.

In addition, when it comes to disclosure of adverse material facts by licensees, that term is defined in Idaho Code § 54-2083(1) as:

> (1) "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.

As seen in the definition above it pertains to facts relating to the property or an individual's intent or ability to close the transaction. It does not include any facts about the actual buyer or seller.

Given the facts provided to the Hotline, there is no duty for the Agent to disclose the fact that her client is a registered sex offender.

Can a licensee share knowledge about a certain property they used to list to an interested Buyer?

QUESTION: Broker represented Seller who cancelled their listing and representation agreement. Seller has relisted with another brokerage. The brokerage now has an interested Buyer in the property, and Broker questions what information, if any, can be given to this Buyer since the brokerage has prior knowledge about the Seller and the property.

RESPONSE: Idaho Real Estate License Law states:

> DUTIES AND OBLIGATIONS OWED AFTER TERMINATION OF REPRESENTATION. Except as otherwise agreed in writing, a

> brokerage owes no further duty or obligation to a client after termination of the agreed representation except:
> …
> (2) Maintaining the confidentiality of all information defined as confidential client information by this act.
>
> Idaho Code § 54-2092.

Licensees have an obligation to maintain confidential client information, even after termination of representation. Idaho Code § 54-2083(6) enumerates the following definition of confidential client information:

> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.

Broker is urged to exercise caution in this circumstance, so long as the information known about the property falls within the definition of confidential client information as described above, the brokerage cannot give the information to the potential buyer. It would be best practice to also inform the Buyer that brokerage previously had this listing, and inform Buyer that license law requires the brokerage to keep certain information regarding the listing confidential.

COMMISSIONS & FEES

Does a licensee have to disclose their commission agreements to cooperating agents?

QUESTION: Broker called regarding whether or not an agent is obligated to disclose their commission agreement with a cooperating agent.

RESPONSE: No. There is no Idaho law that requires a licensee to disclose the commission agreement that they have with their client to another agent. Typically, when a property is listed in the MLS it discloses how much a cooperating agent who brings a willing buyer will get, but the agreement between the listing brokerage its and client does not be disclosed to another party or agent.

The Hotline does not resolve disputes between brokerages, and if a cooperating brokerage demands to see a representation agreement between another agent and client, Broker may wish to consult private legal counsel.

CONTRACTS

When does a timeline start if a contract is delivered before 8:00 am?

QUESTION: Broker questions when a "business day" timeline will start ticking if certain documents are delivered at 7:50 a.m. Would the timeline start that same day or would it start the next day?

RESPONSE: The RE-21, Section 26 defines "business day" as follows:

> A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real PROPERTY is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day, thus the first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.

Given the facts presented to the Hotline, the agent delivered an executed contract at 7:50 a.m. The date of execution is excluded, but given that 7:50 a.m. does not fall within a business day, the first business day, and therefore the timeline would begin at 8:00 a.m. that same day.

Does the inspection time period reset each time a party responds?

QUESTION: Brokers question the timeframe for the Inspection Contingency (RE-10). Specifically, they are wondering if the timeline resets each time a party submits the RE-10 to the other party. For example, if a Buyer submits to the Seller the RE-10 with a list of ten requested repairs and Seller responds within the strict time period with an RE-10 in which Seller agrees to correct only 7 of those items, does the Buyer then have another three days (or however many days are listed in the contract) to submit another RE-10?

RESPONSE: No. The strict time period of the Inspection Contingency does not reset each time a party delivers an RE-10. If the Seller responds with a counter offer to the Buyer's RE-10, that is considered a rejection of the Buyer's RE-10, which then gives the Buyer the option to either continue with the transaction or terminate the contract.

If the parties wish to use the inspection period for negotiation purposes it needs to be specifically agreed to by all parties through an addendum. The Hotline does not give advice to

Buyers and Sellers. Brokers should advise clients to seek independent legal counsel if a dispute arises regarding the strict timeframes.

If a Buyer releases their inspection contingency, does that also waive their ability to object to the CC&Rs?

QUESTION: Brokers represents the Buyer. Buyer submitted a list of requested repairs to the Seller, long before the inspection time period was up. Broker now questions if the Buyer still has until the end of the inspection time period to also review the CC&Rs, or if the Buyer has also released the inspection contingency for reviewing the CC&Rs because Buyer submitted the RE-10 early?

RESPONSE: The Covenants, Conditions and Restrictions (CC&Rs) referenced in Section 15 of the RE-21 identify a separate and distinct contingency apart from the inspection contingency referenced in Section 10 of the RE-21. While Section 15 does passively reference Section 10, it goes on to state a specific and independent timeframe which, while being loosely tied to the Section 10 timeframe, still provides Buyer the opportunity to raise "reasonable objections within such time period as set forth above…" This language would indicate that regardless of what happens with the inspection contingency in Section 10, a Buyer has the right to raise an objection to the CC&Rs at any time before the prescribed time period expires.

The Hotline does not resolve disputes between Buyer and Seller. If a dispute arises as to the timeframes mentioned above, Brokers on both sides of the transaction should advise their clients to seek independent legal counsel.

What happens if both lines of an either/or clause are filled out?

QUESTION: Broker called with a question regarding the Costs Paid By section of the RE-21 (Section 17). The issue at hand is that both blank lines were filled in on line 239. Broker questions which would prevail when both are filled out.

RESPONSE: Beginning on Line 239 of the RE-21, it reads as follows:

> Upon closing SELLER agrees to pay EITHER _____% (N/A if left blank) of the purchase price OR $_____ (N/A if left blank) of lender-approved BUYER'S closing costs…

Given the facts presented to the Hotline, the contract in question had both blank lines filled in. It states that Seller agrees to pay 3% of the purchase price or $0 of lender approved closing costs. The agent filling out the form likely meant to put N/A but instead put $0, but nevertheless, the conflicting terms create an ambiguity and the parties do not have an agreed upon amount that Seller is to pay. If a court finds an ambiguity in a contract it will look outside the four corners of the contract to ascertain the parties' intent.

Can signing Counter #1 after Counter #2 has been presented create a legally binding contract?

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 counter offer that adds a new term or changes a term of the original offer constitutes rejection of the original offer in its entirety:

> An acceptance of an offer to be effectual must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter-proposition which must in turn be accepted by the offeror in order to constitute a binding contract.
>
> *Heritage Excavation, Inc. v. Briscoe*, 141 Idaho 40, 43 (Ct. App. 2005).

Given the facts presented to the Hotline, the original offer from Buyer was rejected when Seller tendered Counter Offer #1. 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. Nevertheless, the Hotline does not resolve disputes between buyer and seller and if an agreement cannot be reached brokers may wish to advise their respective clients to seek independent legal counsel.

Do the contract timelines begin upon acceptance by both parties or upon delivery?

QUESTION: Broker questions when the timelines listed in the Purchase and Sale Agreement start ticking, is it upon signature indicating acceptance of the offer or upon delivery of the document back to the offeror?

RESPONSE: A contract is not fully executed until the other party is made aware of the acceptance. One party cannot accept a contract in a vacuum, meaning that the acceptance, typically in the form of a signed contract, must be delivered to the other party to create a contract. Both parties have to be aware of the acceptance for the acceptance to be complete and legally binding. The Idaho Supreme Court summarizes it as follows:

> Formation of a valid contract requires a meeting of the minds as evidenced by a manifestation of mutual intent to contract. This manifestation takes the form of an offer followed by an acceptance. … **The acceptance is not complete until it has been communicated to the offeror.** Acceptance of an offer must be unequivocal. Generally, silence and inaction does not constitute acceptance. More specifically:

> Because assent to an offer that is required for the formation of a contract is an act of the mind, it may either be expressed by words or evidenced by circumstances from which such assent may be inferred, such as the making of payments or the acceptance of benefits. Anything that amounts to a manifestation of a formed determination to accept, and is communicated or put in the proper way to be communicated to the party making the offer, completes a contract.
>
> A response to an offer amounts to an acceptance if an objective, reasonable person is justified in understanding that a fully enforceable contract has been made, even if the offeree subjectively does not intend to be legally bound. This objective standard takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.
> 17A Am.Jur.2d Contracts § 91 (2d ed.2008).
>
> *Justad v. Ward*, 147 Idaho 509, 512 (2009) Emphasis added. Internal citations omitted.

For example, Buyer submits an offer to Seller on Monday and Seller sends Buyer a counter offer on Tuesday which Buyer "accepts" and signs Tuesday night. However, Buyer's agent does not deliver the signed contract to Seller's agent until Wednesday morning at 9:00 am. Based on this sequence of events, acceptance was complete on Wednesday and therefore the timelines in the RE-21 would not begin until Thursday morning at 8:00, the next business day.

Does the lender have to see a copy of the RE-10 Inspection Contingency Notice?

QUESTION: Broker is representing the Seller in a transaction. The parties have negotiated on the RE-10 that a repair company would be paid directly, rather than through closing, but the Buyer has no intention of giving the RE-10 to the lender. Broker questions if this would be considered loan fraud, specifically because Buyer said the RE-10 was drafted in order to avoid providing it to the lender.

RESPONSE: If a lender requires that all documents pertaining to the transaction must be submitted, then that means all documents. The Idaho REALTOR® Forms were not created so that the parties would not have to submit them to lenders. Frequently, all lending institutions require all agreements between the parties to be submitted for review. Lenders almost always want to see the inspection report and review what repairs are requested or required. Sometimes lenders want to see all versions of the RE-10, sometimes they do not. If the lender requests these documents and they are not provided it could very well constitute loan fraud.

Further, by not disclosing the agreements made in the RE-10 to the lender, the parties could be facing a "double contract" situation, which is prohibited by Idaho law. A double contract is defined in Idaho Code § 54-2004(22) as:

> [T]wo (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one (1) of which is not made known to the prospective loan underwriter or the loan guarantor… An agreement or loan application is not

> made known unless it is disclosed in writing to the prospective loan underwriter or loan guarantor.

It is important to note that contracts can be oral or written. Licensed real estate agents are prohibited from being involved in double contracts. Idaho Code § 54-2054(5) states:

> 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.

Broker should use extreme caution when these circumstances arise and advise their client that these types of transactions may be prohibited under Idaho law. Broker may also wish to advise client to seek private legal counsel in this matter.

If a Purchase and Sale Agreement contains an incorrect legal description, is the contract still binding?

QUESTION: Broker questions the validity of nonrefundable earnest money language in the Purchase and Sale Agreement which has a defective legal description.

RESPONSE: When a Purchase and Sale Agreement lack 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).

In addition to the statute cited above, Idaho has another statute that governs purchase and sale agreements; Idaho Code § 9-5-03:

> TRANSFERS OF REAL PROPERTY TO BE IN WRITING. No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

The Idaho Supreme Court recently considered a similar situation and stated:

> 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 Hotline cannot get involved in disputes between the parties. Buyer may wish to seek private legal counsel to determine her rights and responsibilities in this matter.

Can a Buyer who previously terminated the contract rescind the termination and continue to move forward with the transaction?

QUESTION: Broker represents a Buyer who terminated a transaction based upon an unsatisfactory inspection. Broker questions if Buyer can rescind this termination and legally revive the transaction.

RESPONSE: The Buyer's right to terminate the transaction based upon an unsatisfactory inspection is unilateral, meaning no consent is required from the Seller. Once Buyer has notified Seller of the termination, said termination is effective immediately. In order to revive a contract there would have to be a meeting of the minds and an agreement by all parties to revive the contract.

Can Buyer and Seller agree to terms outside of the Purchase and Sale Agreement?

QUESTION: Broker is listing agent on a property that is currently deemed "uninhabitable" by the county. It requires several thousand dollars in improvements to get the occupancy permit. Buyer and Seller independently agreed that Buyer will put up money in order to have Seller repair the house prior to closing. At the same time, Buyer is applying for a loan. Broker questions the need to disclose the side agreement to repair the house to the lender.

RESPONSE: All agreements must be disclosed to the lender in order to avoid a "double contract" situation, which is prohibited by Idaho law. Idaho Code § 54-2054(5) enumerates this prohibition:

> Double contracts prohibited. No licensed broker or salesperson shall use, propose the use of, agree to the use of, or knowingly permit the use of a double contract, as defined in section 54-2004, Idaho Code, in connection with any regulated real estate transaction. Such conduct by a licensee shall be deemed flagrant misconduct and dishonorable and dishonest dealing and shall subject the licensee to disciplinary action by the commission.

A double contract is defined as follows:

> "Double contract" means two (2) or more written or unwritten contracts of sale, purchase and sale agreements, loan applications, or any other agreements, one (1) of which is not made known to the prospective loan underwriter or the loan guarantor, to enable the buyer to obtain a larger loan than the true sales price would allow, or to enable the buyer to qualify for a loan which 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(22).

Based upon the facts given to the hotline, if Buyer and Seller enter into two agreements and do not disclose one to the lender, this type of circumstance would land the parties squarely within the definition of a double contract. Broker should advise his client that these types of transactions are prohibited under Idaho law and that all agreements whether written or oral, must be disclosed to the lender.

Does accepting a property "as is" remove a Buyer's ability to terminate based on the results of an inspection?

QUESTION: Broker represents a Buyer who submitted an offer to purchase a property. After the Purchase and Sale Agreement was executed, the Seller sent over an Addendum stating that the property was to be sold "as is" and the Buyer signed it. Broker questions if this language will remove the inspection contingency contained in the RE-21 and prevent the Buyer from getting the earnest money back if Buyer decides to terminate the contract based on the results of the home inspection.

RESPONSE: The Addendum (RE-11) states in relevant part:

> To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Real Estate Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this ADDENDUM shall remain the same. (Emphasis omitted).

Given the information provided to the Hotline, the language contained in the Seller's addendum does not specifically remove the inspection contingency in the Purchase and Sale Agreement; however, "as is" can be an ambiguous term as used in this circumstance, and both parties likely have different interpretations. If the intent was to remove the Buyer's inspection contingency, best practices would involve explicitly spelling it out in the Addendum to eliminate any confusion.

The Hotline does not get involved in disputes between Buyer and Seller nor does it interpret specific addendum language. Given the possibility of the ambiguity of the "as is" language used, Brokers on both sides of the transaction should advise their clients to seek private legal counsel to determine their rights in this matter.

If the parties have executed a RE-27, can Seller accept another offer if Buyer removes their contingencies?

QUESTION: Brokerage represents the buyer. The Seller accepted the Buyer's offer and the parties agreed the Seller could continue to market and both parties had executed the RE-27 (Right to Continue to Market). The Seller received another offer and notified the Buyer who then waived the contingency stated in the RE-27. Seller allegedly wants to accept the second offer because even though Buyer waived their contingency, Seller believes they still will not be able to

get financing unless their current home sells. Broker questions how to proceed and if Seller can terminate once Buyer waives the contingency.

RESPONSE: The Buyer and Seller have entered into a contract and both parties signed the RE-27, which states in relevant part:

> CONTINGENCY RELEASE CLAUSE: 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) after receipt of such written notice to waive or remove all BUYER(S) contingencies in this addendum.** In the event BUYER does not waive or remove the contingency(s) in writing within the hours noted above, then the purchase and sale agreement shall be terminated and all deposits returned to BUYER. … In the event BUYER(S) elect to waive such contingencies after receipt of said notice, BUYER shall proceed to purchase the property under the remaining terms and conditions of this Agreement, notwithstanding that the terms and conditions of the new offer may be more or less favorable.

If Buyer removes their contingency upon notice of a second offer, the Seller is contractually obligated to allow the Buyer to perform and proceed with the transaction.

The Hotline does not weigh in on disputes between Buyers and Sellers and Brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

Does the RE-27 have an effect on the timelines listed in the Purchase and Sale Agreement?

QUESTION: Broker represents the Seller. The parties have agreed that Seller can continue to market the property, and Broker questions what this means for the timelines listed in the RE-21. Does the RE-27 alter them in any way?

RESPONSE: No, the Right to Continue to Market Property (RE-27) makes no reference to the time periods in the Purchase and Sale Agreement and therefore do not alter them. Whether or not the parties have an executed RE-27, the timelines begin when the RE-21 is executed by both parties.

The RE-27 is not to be confused with the Short Sale Addendum (RE-44) which does alter the Purchase and Sale Agreement timelines.

DISCLOSURE

If a Seller is exempt from filling out the RE-25, can a Buyer insist Seller fill one out to reflect items discovered during the inspection?

QUESTION: Broker represents the Seller. Seller is a non-profit housing organization presumed to be exempt from filling out the Seller Disclosure (RE-25). The Buyer has completed inspections and is now requesting that the Seller fill out a RE-25 and include the items that Buyer found during the inspections. Broker questions if this is something that Seller is required by law to do.

RESPONSE: The Hotline cannot comment on whether or not the Seller is indeed exempt from filling out the property condition disclosure statement and Broker should have Seller contact private legal counsel to determine its exemption status.

Assuming that the Seller is exempt, there would be no need for the Seller to update something they were not obligated to provide in the first place.

Further, Seller has the obligation to disclose any adverse material facts known about the property. An adverse material fact is described 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.
>
> Idaho Code § 54-2083(1).

If a Buyer is already aware of what Buyer considers an adverse material fact, there would be no need for Seller to re-disclose it.

The Hotline cannot weigh in on disputes between Buyer and Sellers. Broker may wish to advise client to seek independent legal counsel to determine client's rights and responsibilities in this matter.

Does a nearby property that allegedly has a lease with the State of Idaho need to be disclosed?

QUESTION: Broker is representing the Seller. The property is near another property that allegedly has an oil and gas lease with the State of Idaho. Broker questions the duty to disclose this information to possible Buyers.

RESPONSE: Idaho law requires Sellers and Agents to disclose all adverse material facts known about the property. An adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

The Hotline cannot determine what an adverse material fact is because it has to be done on a case by case basis. Seller will need to decide whether or not the lease in question would rise to the level of an "adverse material fact" as defined by Idaho Code. If Seller is unable to make a decision, Seller should consult Seller's own legal counsel.

Does a Seller of a vacant lot need to fill out a RE-25?

QUESTION: Broker represents the Seller on a vacant land transaction. Broker questions if this Seller has to fill out a Property Condition Disclosure Form when selling vacant land.

RESPONSE: Idaho Code § 55-2514 states:

> PROPERTY CONDITION DISCLOSURE REQUIRED. Any person who intends to transfer any residential real property… by any of the methods as set forth herein shall complete all applicable items in a property disclosure form prescribed under section 55-2508, Idaho Code. Except as provided in section 55-2505, Idaho Code, this chapter applies to any transfer by sale, exchange, installment sale contract, a lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property improved with or consisting of not less than one (1) nor more than four (4) dwelling units.

Vacant land does not fall into this category so a Seller does not need to fill out a disclosure form. However, Sellers and agents are always obligated to disclose any known adverse material facts. And adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

Can a Buyer terminate due to an inaccurate RE-25?

QUESTION: Broker represents the Buyer. During the inspection period, the home inspector discovered fans and buckets in the crawl space. Seller admitted that they had prior water damage, but it was not disclosed because the RE-25 was filled out prior to the occurrence of the water damage. The inspection timeframe has now passed, and Buyer

wants to back out because this information was not disclosed to them. Broker questions if the Buyer is entitled to their earnest money and if the Seller should have amended their disclosure form.

RESPONSE: The Property Condition Disclosure Form (RE-25) is required to be delivered to buyer within 10 days of mutual acceptance of an offer. If the disclosure form was filled out prior to receiving an offer, seller has a statutory obligation to amend the RE-25 and deliver the amendment to the buyer as follows:

> 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 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.
> Idaho Code § 55-2513 (Emphasis added).

This provision allows the Buyer to have the option to rescind based on the amendments made to the disclosure form as follows:

> 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.

> Subject to the provisions of section 55-2505, Idaho Code, a rescission of a transfer agreement may only occur if the transferee's written, signed and dated document of rescission is delivered to the transferor or his agent or subagent within three (3) business days following the date on which the transferee or his agent receives the property disclosure form prescribed under section 55-2508, Idaho Code. If no signed notice of rescission is received by the transferor within the three (3) day period, transferee's right to rescind is waived. Idaho Code § 55-2515.

The Hotline does not get involved in disputes between the Buyer and Seller. Brokers on both sides of the transaction should advise their clients to seek private legal counsel if this matter cannot be amicably resolved, and the Responsible Broker should refer to Idaho Code § 54-2047 for what to do when there is a dispute over earnest money.

Is a Seller that has never occupied the property exempt from the RE-25?

QUESTION: Broker represents the Seller. The Seller has never lived in the property and Broker questions whether or not the Seller needs to fill out the RE-25.

RESPONSE: Idaho Code § 55-2505 exempts certain Sellers from completing a Seller's Property Condition Disclosure Form; however, there is no exemption for Sellers who have simply not lived in the property. The Seller is obligated to fill out the RE-25 to the best of Seller's ability.

DUTIES TO CLIENT & CUSTOMER

Does the brokerage have an obligation to inspect the property?

QUESTION: Broker called regarding vacant lot transactions in which the Seller made certain statements regarding the "availability" of power to the lot. Upon closing the Buyer took issue with that statement. Broker questions if the brokerages have any liability in these circumstances.

RESPONSE: Idaho real estate license law controls licensees' obligations regrading this situation. Specifically, the "Duties to a Client" section found in Idaho Code § 54-2087 states in relevant part:

> (7) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property.

And further, Idaho Code § 54-2093(2) states:

> A licensee or brokerage engaged in representation of a client shall be entitled to rely upon representations made by a client and shall not be liable for a wrongful act, error, omission or misrepresentation made by the client unless the licensee or brokerage had actual knowledge or reasonably should have known of the wrongful act, error, omission or misrepresentation.

Licensees have no obligation to conduct inspections of the property for their client. If the Seller discloses to the agent that power is "available" and the agent passes that along, neither the listing nor selling agent has an obligation to confirm this information, and therefore the brokerage would not be liable if a dispute arises.

The Hotline does not get involved in Buyer and Seller disputes. Broker should advise clients to seek independent legal counsel.

What is a licensee's obligation when the Buyer and Seller are involved in a dispute and licensee is acting as a dual agent?

QUESTION: Broker acted as a dual agent in a transaction that has recently closed. Buyer now reports a recent discovery of various local land use ordinances unique to the subdivision which may increase the cost of construction. Buyer believes that Broker is responsible and should have disclosed this information to him. Broker had no specific knowledge of any such ordnances. Broker questions the parties' various legal obligations.

RESPONSE: Idaho real estate license law controls Broker's obligations regrading this situation. Specifically, the "Duties to a Client" section found in Idaho Code § 54-2087 states in relevant part:

> (7) Unless otherwise agreed to in writing, a brokerage and its licensees owe no duty to a client to conduct an independent inspection of the property and owe no duty to independently verify the accuracy or completeness of any statement or representation made regarding a property.

Brokers have no obligation to conduct inspections of the property for their client. Given the facts presented to the Hotline, the Buyer was afforded ample opportunity to conduct due diligence inspections and decided to proceed to closing. Any conditions related to the property should have been researched and addressed by Buyer during the inspection period.

EARNEST MONEY

Would Buyer get earnest money returned to them if they terminated based on an unsatisfactory inspection if the contract stated the earnest money would be nonrefundable?

QUESTION: Broker called with a question regarding nonrefundable earnest money. The parties agreed that the earnest money would become nonrefundable upon acceptance of the offer.

Later, the Buyer terminated the transaction with the RE-10. The Buyer is claiming he is entitled to the earnest money because the language in the RE-10 states the Buyer gets the earnest money back if the transaction was terminated due to an unsatisfactory inspection. Seller thinks that it is still nonrefundable. Who would be entitled to the earnest money in this case?

RESPONSE: Given the facts presented to the Hotline, the parties both signed the Purchase and Sale Agreement under the condition that Buyer's earnest money would become nonrefundable upon acceptance of the contract. Typically, when the parties agree to make earnest money nonrefundable, it becomes nonrefundable, and the Buyer is likely not entitled to a return of the earnest money based upon other contingencies in the contract.

However, the Hotline does not get involved in disputes between the Buyer and Seller. Broker is acting as dual agent and responsible broker in this transaction. The responsible broker has the following options in an earnest money dispute:

> DISPUTED EARNEST MONEY. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and
> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.
>
> Idaho Code § 54-2047.

The Hotline believes it is best practice to keep the earnest money in the trust account and to not release it until the Broker is instructed by all parties or a court order to release the disputed funds. Broker may also wish to advise clients to seek private legal counsel in this matter.

What are Buyer's or Seller's options if they are involved in a dispute over earnest money but the title company is holding on to the funds?

QUESTION: Agent represents the Seller. They had an accepted contract and the Buyer is using an FHA loan. During the inspection timeframe, the mortgage company requested many repairs in order to comply with FHA requirements. Seller agreed to fix everything listed. Before the transaction closed, the mortgage company informed the parties that the transaction would not

be closing because Buyer allegedly has many years of unpaid taxes. Seller has spent a lot of money working with the Buyer to close the transaction. Seller feels entitled to the earnest money. Does Seller have any legal recourse?

RESPONSE: Given the facts presented to the Hotline, the parties have an earnest money dispute. If a title company is holding the money, they probably will not release it until they are instructed to by mutual agreement of the parties to the transaction or a court order. The Hotline does not get involved in disputes between Buyers and Sellers. Agent should advise his client to seek legal counsel. An alternative for the Seller would also be Small Claims Court if the amount of disputed money is under $5,000.

Would nonrefundable earnest money language supersede the FHA/VA loan clause?

QUESTION: Broker questions if a Seller can ask for earnest money to become nonrefundable in a counter offer when the transaction is being financed with an FHA/VA loan.

RESPONSE: The pertinent part of the RE-21, Section 3C Lines 45-49, 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 and is called the "Amendatory Clause." If the parties sign an addendum that removes this clause from the Purchase and Sale Agreement then the Buyer will not qualify for a FHA or VA loan. 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.

FORMS USE

Can the RE-18 be used for multiple back-up offers?

QUESTION: Broker represents the Seller. Seller is under contract with Buyer 1 and has accepted a back-up offer from Buyer 2. Other Buyers would like to submit even more offers. Broker questions what Seller's obligations are if the contract with Buyer 1 fails; would Seller have

to go through back-up offers chronologically or is Seller allowed to choose the most appealing of the three back-up offers?

RESPONSE: A properly executed RE-18 Back-Up Offer binds the Seller to the back-up contract if the first contract fails. However, the RE-18 is not designed to and should not be used in multiple back-up offer situations. Further, there is no language in the RE-18 which allows Seller to choose whichever offer he or she wants if the contract in first position fails.

In a multiple back up offer situation it would be prudent for Seller to have an attorney draft specific language for a multiple back-up offer circumstance since the Idaho REALTORS® currently do not have a form that deals with a Seller accepting multiple back-up offers.

If the RE-14 is checked for "Residential" property, would a licensee still be entitled to commission if the Buyer ended up purchasing a "Residential Income" property?

QUESTION: Agent questions what the definitions of "Residential" and "Residential Income" are on the RE-14. He specifically wonders if an agent would still be entitled to commission if the Buyer selected the "Residential" check box but ended up purchasing a property that would be considered "Residential Income."

RESPONSE: The Buyer Representation Agreement is a binding contract between a Buyer and the Brokerage wherein Buyer promises to pay a commission if Broker locates a property for Buyer. It is unlikely that a Buyer would be able to get out of paying a commission by claiming Buyer checked a different property box then what was purchased. Further, if a Buyer tried to argue that they didn't have to pay commission because of this, the MLS cooperating brokerage rules and the procuring cause standard would ensure that the Brokerage gets paid for producing a Buyer ready, willing and able.

If Broker believes Buyer may be interested in multiple types of properties, then the best practices would be to teach agents to check all of the "type of property" boxes on the RE-14 so that there is no confusion and the brokerage is covered if a Buyer decides to buy a different type of property.

What is the intent of the RE-28?

QUESTION: Broker questions if the RE-28 needs to be utilized for an additional fee that is already incorporated into the Representation Agreement they have with a client.

RESPONSE: No. The RE-28, Disclosure of Broker's Intent to Offer Additional Services and/or Collect Compensation, is to be used to give notice to a party to the transaction that the Broker intends to collect an additional fee from a third party, may provide additional services outside of the regulated real estate transaction for a fee or provide notice that they are going to receive compensation from more than one party. If disclosure of offering an additional service for an additional fee is already incorporated into a Representation Agreement and the client is already aware of the fee, it is not necessary for the Broker to fill out the RE-28 with this information.

What is the difference between the RE-16 and the RE-12?

QUESTION: Broker has an agent that has an RE-12 with a Seller. While looking over the contract, agent questioned how the compensation section works when using the RE-12, as it states payment is received only if agent procures a buyer. Is she interpreting this correctly? How does the RE-12 differ from the RE-16?

RESPONSE: The RE-12 is designed for a customer rather than a client. The most significant legal difference is that Sellers who have signed the RE-12 do not become clients of the Brokerage. This means the Brokerage represents the Seller in a non-agency relationship. The most significant practical difference is that there is no exclusivity agreement in the RE-12 while there is in the RE-16. Under an RE-12, a Brokerage only receives compensation from the Seller for a Buyer they personally procure to buy the house; whereas under the RE-16, the exclusivity language states the Brokerage will get paid by the Seller no matter who brings the Buyer. The RE-12 is typically used when a Brokerage represents a Buyer and locates a property whose Seller is not currently represented by another Brokerage.

It is important to note that there are many legal complexities when trying to recover a brokerage fee under an RE-16 when the listing brokerage did not procure the Buyer (either personally or through an MLS). This response does not attempt to address these complexities and Brokers should consult their own legal counsel before endeavoring to collect under such circumstances.

Do both the RE-10 and RE-20 need to be signed by both parties?

QUESTION: Broker questions how to properly use the RE-10 and/or the RE-20 when a Buyer wants to terminate based on an unsatisfactory inspection. Should the agents be sending over both when they have a Buyer that wants to terminate? If a Seller does not sign one and/or either, where does that leave the earnest money?

RESPONSE: The RE-10 is the proper form to use when terminating based on an inspection. Section 3 states:

> TERMINATION PROVISION: BUYER deems the results of the inspection of the Property to be unsatisfactory. As a result, BUYER hereby terminates this Agreement and the Earnest Money shall be returned to BUYER. BUYER and SELLER agree to release brokers and their associates from any claims, actions and demands by reason of releasing and disbursing of said earnest money deposit.

This language was recently added to the RE-10 to accomplish what the RE-20 does, which is twofold: release the earnest money back to the Buyer and release the brokerage from any liabilities for doing so.

It is not uncommon for a Buyer to send over the RE-10 with notice to terminate, or the RE-20, and not get a response or signature back from the Seller. Without the Seller signing either one of these forms, the brokerages are not getting the release from liability. If a Seller does not sign the document and disputes the release of the Earnest Money, the responsible broker has three options regarding disbursing the Earnest Money per Idaho law:

> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall: (a) Notify each party, in writing, of the demand of the other party; and (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement. (Idaho Code § 54-2047).

The Hotline believes that it is best practice to have both the RE-10 and RE-20 signed by both parties, as each release the brokerages from certain liabilities. However, it is not always simple to obtain the Seller's signature, in which case Broker can rely on the disputed earnest money language in the contract and above to decide how best to deal with the earnest money.

MISCELLANEOUS

How does the 2016 rental legislation affect current CC&Rs that prohibit homeowners from renting out their properties?

QUESTION: Agent questions the legality of a particular term in a homeowner association's Covenants, Conditions and Restrictions which prohibits renting the property in light of Idaho Code § 55-115, which was enacted during the 2016 legislation.

RESPONSE: Idaho Code § 55-115 was amended this year to add the following language:

> (3) No homeowner's association may add, amend or enforce any covenant, condition or restriction in such a way that limits or prohibits the rental, for any amount of time, of any property, land or

> structure thereon within the jurisdiction of the homeowner's association, unless expressly agreed to in writing at the time of such addition or amendment by the owner of the affected property. Nothing in this section shall be construed to prevent the enforcement of valid covenants, conditions or restrictions limiting a property owner's right to transfer his interest in land or the structures thereon so long as that covenant, condition or restriction applied to the property at the time the homeowner acquired his interest in the property.

This law was passed by the legislature, signed by the Governor and went into effect on March 24, 2016.

This legislation and the revisions to this particular Idaho statute appear to be designed to prevent any homeowner's association from adding rental prohibitions to any new or existing CC&Rs. However, the addition of the word "enforce" in this statute may severely limit the enforcement of current CC&Rs that ban rentals unless specifically agreed to by the owner of the affected property. It should be noted that this statute also makes reference to exemptions for valid CC&Rs currently in place when an individual purchases his interest in the property.

Given that this is new and untested law the Hotline cannot comment on exactly how the application will play out over time.

Can a Seller refuse to accept an offer just because they do not like the Buyer?

QUESTION: Broker questions if a Seller can refuse to accept a Buyer's offer or does a Seller have an obligation to consider every offer that comes in?

RESPONSE: Seller can refuse to sell the property to anyone he or she wants, so long as Seller is not discriminating based on race, color, national origin, religion, sex, disability and, in most circumstances, age, as these classifications are protected by the Fair Housing Act.

If a husband is transferring his sole and separate property, does the wife need to sign any of the transaction documents?

QUESTION: Broker questions if one spouse is transferring his or her sole and separate property, is the other spouse required to sign any transaction documents or the deed?

RESPONSE: No. In accordance with Idaho's community property laws, any property acquired during a marriage is presumed to be community property, however if a husband or wife owned property prior to marriage or received property as a gift or an inheritance during marriage, said real property may be that spouse's separate property. Separate property does not require the signatures of the non-owning spouse.

Nevertheless, the rules of community property are complex and separate property may very easily become community property during a marriage, therefore caution is warranted. If a Broker

can obtain both the husband and wife's signatures on the Representation Agreement and any Purchase and Sale Agreements it may potentially eliminate any problems down the line. In addition, Broker should expect that a title company will require a quit claim deed from the non-owning spouse, even if the real property is legally the separate property of the other spouse. While this is not founded in Idaho law, it is based upon a title company's desire to be absolutely sure the wife has no claim to the property at issue.

Who can enforce the CC&Rs?

QUESTION: Agent questions who can enforce CC&Rs if there is no Homeowners Association.

RESPONSE: In the event there is no HOA, covenants will be governed under contract law as if they are a contract between all landowners in the subdivision. The Supreme Court of Idaho has stated the following:

> [C]ovenants may be enforced by one other than a party to them where the original parties intended that the restrictions should benefit the land of the person claiming the right of enforcement.
>
> *Sun Valley Ctr. for Arts & Humanities, Inc. v. Sun Valley Co.*, 107 Idaho 411, 413 (1984).

Further, most CC&Rs typically have language allowing for any individual land owner of the subdivision to enforce the covenants regardless of the existence of a HOA.

The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

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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 2015 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2015. 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 2016 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2015 "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 2016 legislative changes to the law.

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AGENCY/LICENSE LAW

Can an agent meet with a prospective client if client is still under representation by another brokerage?

QUESTION: Agent has been contacted by a seller who has a current representation agreement with another brokerage. The seller informed agent that the current representation agreement is going to expire on October 31 and that seller would like to meet with the agent prior to that date. Agent questions if she would be violating any licensee practices if she met with the seller while he is under contract with another brokerage.

RESPONSE: It is appropriate for agent to be concerned after being contacted by a seller with an active representation agreement. Even though the agent was sought out by the seller, agent could still open herself and the brokerage up to liabilities if she meets with the potential client. While it may be appropriate for the agent to obtain minimal information from the seller in anticipation of representation, the conversations with the seller need to be restricted to the issues of agent's future representation. Agent should exercise caution when conducting any meetings with sellers who still have active representation agreements, as the other brokerage may accuse agent of interfering with an active contract. There are various REALTOR® Code of Ethics considerations as well. The Hotline advises that the best practice is always to wait for the current contract to expire prior to meeting with future customers, unless the purpose is merely to obtain information that will expedite the transition from the old brokerage to the new brokerage.

Should changes to commissions be included in PSAs or counter offers?

QUESTION: Both brokers to a transaction contacted the Legal Hotline. The MLS listing stated 3% would be paid to the buyer's agent. Buyer put in an offer and seller countered. Allegedly the counter offer contained language that reduced the selling brokerage's commission to 2½%. The counter offer was accepted. Brokers question the best practices for documenting and effectuating a reduction in commissions.

RESPONSE: Given the facts presented to the Hotline, the buyer and seller agreed to a reduction in commissions and they documented this in the signed counter offer. Commission negotiations should never be contained in a Purchase and Sale Agreement or any counter offers or addendums because the brokers are not parties to that contract. A listing in the MLS is a unilateral offer to provide a commission to another participating broker. If this commission offer is changed outside the MLS it should be documented in a contract signed by the brokerages, and in certain circumstances signed by the Buyer and Seller. Many MLSs have a form to accomplish this task but the parties could also use an addendum like the RE-16A (Broker Agreement Addendum).

There is also some dispute as to whether or not the brokerages agreed to the commission reduction. The Hotline does not get involved in brokerage disputes. If the brokerages need advice on the legal effect of reducing the commission in a purchase and sale agreement brokers should contact independent legal counsel.

How should a dual agent proceed if seller wants to accept a different offer?

QUESTION: Broker is a dual agent, representing both the buyer and seller. He presented the offer to the seller and the seller sent back a counter offer. Buyer accepted the counter offer and tendered the earnest money. Later, Broker received notice from the seller that he got a better offer from another buyer and wants to withdraw his counter offer to the first buyer and accept offer #2. Broker questions if seller can do this and whether or not the first buyer had a valid and binding contract. He also questions how to proceed since he is a dual agent.

RESPONSE: Based upon the facts communicated to the Hotline, the seller's counter legally constituted an offer, which once accepted by buyer #1 created a valid and legally binding contract between the two parties. Pursuant to contract law, the offeror may only revoke an offer by communicating his revocation prior to acceptance. Nevertheless, the Hotline does not resolve disputes between buyer and seller and Broker should advise both clients to seek private legal counsel to advise them of their rights.

As to Broker's continued involvement with the seller, if a Broker's client is undertaking an illegal transaction and/or Broker believes that continuing with the transaction will result in a violation of the Broker's legal and/or ethical obligations, Broker should, in consultation with the Idaho Real Estate Commission, notify the client that he cannot legally continue to represent client or provide client with Brokerage's services and terminate the representation.

COMMISSIONS & FEES

Is a licensee obligated to disclose their commission agreements with cooperating agents?

QUESTION: Broker called regarding whether or not an agent is obligated to disclose their commission agreement with a cooperating agent.

RESPONSE: No. There is no Idaho law that requires a licensee to disclose the commission agreement that they have with their client to another agent. Typically, when a property is listed in the MLS it discloses how much a cooperating agent who brings a willing buyer will get, but the agreement between the listing brokerage its and client does not be disclosed to another party or agent.

The Hotline does not resolve disputes between brokerages, and if a cooperating brokerage demands to see a representation agreement between another agent and client, Broker may wish to consult private legal counsel.

CONTRACTS

Is an oral termination enough to cancel a contract?

QUESTION: Broker represents the seller. According to the broker, buyers' agent may or may not have called seller's agent and said that buyers will probably not continue with the transaction. However, buyers did not submit their written notice to terminate during the

strict time period. Broker questions what happens now, and wonders if seller has any right to the earnest money.

RESPONSE: Section 10B(1) of the Purchase and Sale Agreement states:

> If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this Agreement, BUYER shall conclusively be deemed to have: (a) completed all inspections… (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

Given the facts presented to the Hotline the buyers did not give seller written notice of disapproved items or notice to terminate within the strict timeframe. The RE-21 is very clear that notice must be given in writing, therefore any oral communication will not likely be considered. If both parties have elected not to proceed with the transaction and both have made a demand upon 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 Hotline does not get involved in earnest money disputes and brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

Can a seller accept another offer while under contract?

QUESTION: Broker represents a Seller who entered into a contract with Buyer #1, but said contract was subject to Seller's right to continue to market the property (RE-27). Broker received a subsequent acceptable offer from Buyer #2 and notified Buyer #1 who, under the RE-27 has 72 hours to remove various contingencies or forfeit the contract. Brokerage questions if there is a way to accept Buyer #2's offer during the 72 hours, thus binding Buyer #2 to the transaction if Buyer #1 forfeits his contract.

RESPONSE: Yes. Seller may accept Buyer #2's offer, however Seller must make it clear in an addendum to Buyer #2 that Seller's acceptance is subject to Buyer #1's right to remove his contingencies and proceed with the first contract. Further, since Seller's acceptance is something less that an unconditional acceptance of Buyer #2's offer, Buyer #2 will also have to agree to the conditional acceptance. Seller must be very clear that the acceptance of the second offer is conditional otherwise Seller could be entering into two purchase sell agreements, one of which he cannot perform and thus exposing Seller to liability.

When would a post-closing occupancy clause go into effect?

QUESTION: Brokerage represented a seller in a transaction that closed but contained a post-closing occupancy clause in favor of the Seller. The addendum stated Buyer has a right to occupancy on November 1, 2015 which was a few days after closing. Broker questions at what specific time on November 1, 2015 the Seller must surrender the premises

RESPONSE: Given that the contact does not specify a specific time on the stated date of occupancy, the timing will be subject to interpretation. The interpretation will turn on the very specific wording of the amendment and the parties' intent at the time of executing the contract. Given the facts presented to the hotline the addendum appears to grant the Buyer the right to take possession on November 1st. November 1st would appear to begin at 12:00 AM that day. However, for the brokerage to offer a legal interpretation of a contract may constitute engaging in the practice of law which could subject the brokerage to liability. In addition the Hotline does not provide legal advice to individual buyers or sellers. The brokerage's best course of action to advise its client that the brokerage cannot provide legal advice and encourage its client to obtain independent legal counsel.

Is square footage a valid reason to terminate a contract?

QUESTION: Broker represents the seller. A few days prior to closing buyer decided to terminate because the square footage of the property was less than they thought it was. Broker questions whether or not this is a valid reason to terminate the contract.

RESPONSE: The RE-21, Section 13 states:

> SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS

APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.

Given the facts provided to the Hotline, all contingencies had been satisfied and the parties were set to close on the property. If the buyer was concerned about the exact square footage they should have confirmed the actual number during the inspection time period.

The Hotline does not resolve legal disputes between Buyers and Sellers. Broker should advise clients to consult private legal counsel in regards to their specific rights and obligations in these matters.

Can a buyer accept a counter offer that a seller already withdrew?

QUESTION: Broker is representing the seller, who sent a counter offer to a potential buyer. While waiting for the buyer to respond, the seller received a better offer from a second buyer. Seller immediately notified the first buyer's agent that the seller was withdrawing their counter offer. The next day the seller received the signed counter offer from the first buyer. Broker questions whether or not the seller's revocation of the offer is valid.

RESPONSE: The first buyer's right to accept the counter offer ends when the counter offer is revoked. The offeror may revoke an offer by communicating his revocation to the offeree any time *before* acceptance.

Based upon the information provided to the Hotline, since the seller gave notice of revocation of the counter offer prior to receiving acceptance, the counter offer was likely terminated. The first buyer cannot unilaterally revive the counter offer by attempting to accept it after revocation. Nevertheless, the Hotline does not resolve disputes between buyer and seller and broker should advise client to seek private legal counsel should the first buyer attempt to enforce the revoked counter offer.

Can a seller rely on "escalating price" language in the RE-21 once the contract has been accepted?

QUESTION: Broker represents the sellers. Broker informed the Hotline that the RE-21 contains a clause that states "Buyer will pay $1,000 more than highest offer received up to purchase price of X." One hour after this contract was accepted an offer came in for $5,000 more than first buyer's offer. Broker questions if the seller now has the right to rely on this verbiage to ask Buyer 1 to increase the purchase price.

RESPONSE: In reviewing the information supplied it appears the escalation is related only to the buyer's "offer." Once the offer is accepted the agreement between the parties ripens into a contract and the offer ceases to exist. Therefore, there is no longer anything to escalate.

Further, the seller cannot accept other offers once under contract with this buyer so there would be no reason for buyer to consider an escalation. However, if this deal falls through for any reason this buyer would have to compete and submit new offers along with all other buyers.

At what point are parties responsible for paying fees outlined on Section 17 of the RE-21?

QUESTION: Agent represents the seller. Section 17 of the RE-21 is filled out stating the seller agrees to pay the appraisal fee. Agent questions at what point in the transaction the seller is responsible for paying this fee.

RESPONSE: This opinion is based on the facts presented to the Hotline by one party to a two party transaction. This opinion is based on those facts and requires several assumptions about the contracts which govern the parties' behavior and legal obligations. The Hotline does not review contracts for each individual circumstance, but rather assumes the basic Idaho REALTOR® Forms are utilized in an unmodified fashion. If additional facts are disclosed or the assumptions are inaccurate, this opinion may be subject to change.

The contractual terms of the Purchase and Sale Agreement will dictate exactly when the appraisal fee must be paid. Assuming no other modifications were made to the boilerplate language of the Idaho REALTOR® RE-21 and assuming the only place where the seller indicated their willingness to pay for an appraisal fee was in the table located in Section 17, then the timing of seller's payment for appraisal will be upon closing:

> **Upon closing SELLER agrees to pay** up to EITHER _____& (N/A if left blank) of the purchase price OR $_____ (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees, and **prepaid costs** which includes but is not limited to those items in BUYER columns marked below. (Emphasis added).

Based upon the language in the paragraph immediately preceding the table, seller agrees to pay certain *prepaid* costs *upon closing*. However, if there were additional terms agreed to between the parties, the timing of payment could have easily been modified.

The Hotline does not resolve disputes between buyers and sellers and brokers and agents should advise their clients to seek independent legal counsel to ascertain their exact legal obligations.

Is an all cash offer for the same price a "better" offer?

QUESTION: Agent represents the seller in a short sale. Buyer 1 made an offer and agent presented the offer to the lender. Buyer 2 made an offer for the same price but it would be an all cash transaction. Agent questions if the seller can also accept this offer and if the Right of First Refusal is applicable in this situation. Is an all cash offer for the same price a better offer?

RESPONSE: The Short Sale Addendum (RE-44) Section 3 states:

> If the parties agree that Seller may accept offers from other buyers, or if the creditor requires that Seller must continue to market the property, then the Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ___ (3 days, if left blank) to submit an offer under this Right of First Refusal.

If the parties signed the RE-44, Buyer 1 would retain the Right of First Refusal. Assuming the all-cash offer is a better offer than offer 1, agent should notify Buyer 1 of the subsequent offer. Buyer 1 then has three days (unless modified) to meet or exceed Buyer 2's offer.

The Hotline cannot give an opinion on whether or not an all cash offer for the same purchase price is a better offer. Short sales are entirely contingent on lender consent and the lender will likely determine the best offer. The Hotline does not resolve disputes between buyer and seller. Both buyer and seller's brokers should recommend that their clients seek private legal counsel if a dispute arises.

If a contract does not specify calendar or business days, what is the default?

QUESTION: Agent questions if the RE-44 timeframes are referring to business or calendar days.

RESPONSE: The RE-21 Real Estate Purchase and Sale Agreement section 27 states in relevant part:

> Any reference to "day" or "days" in this agreement means the same as calendar day, unless specifically enumerated as a "business day."

Given that the RE-44 is an addendum to the RE-21 it means that the timeframes listed in the Short Sale Addendum are to be calendar days.

Should parties sign the RE-10 and RE-20 when terminating a contract?

QUESTION: Broker questions if the Notice to Terminate Contract (RE-10) and Release of Earnest Money (RE-20) should be signed when the buyer terminates based on an unsatisfactory inspection and both parties have signed the RE-10.

RESPONSE: If Section 3 of the Inspection Contingency Notice is checked and both parties have signed it, the parties have legally agreed to terminate the Purchase and Sale Agreement and to return the earnest money to the buyer. However, the purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may later assert. It is always best practice to obtain one, even when the buyer terminates using the RE-10.

Is timber on property considered "attached" and included in the property?

QUESTION: Broker represents the buyer on a property that has recently closed. After the sale the seller's agent informed them that the cut logs on the property belonged to the seller and that they were taking them. Broker questions if the timber would have been included in the sale.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery…

Trees are referenced in the above paragraph; however it is referring to trees that are still in the ground. Trees that have already been cut down, or logs, would likely be considered private property and would belong to the seller.

If the buyer assumes that something is included in the sale it is the best practice to specifically address the matter in the blank lines immediately following Section 5 of the RE-21 so that there is no confusion after closing.

What happens if seller does not provide preliminary title commitment within time frame?

QUESTION: Broker questions if a seller could be in breach of contract for not providing the preliminary title commitment within the specified timeframe.

RESPONSE: Section 9A of the RE-21 states in relevant part:

> 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. Buyer shall have ___ business days (two [2] if left blank) after receipt of the preliminary commitment, within which to object in writing to the condition of the title as set forth in the preliminary title commitment.

If the "Seller" box is checked and the seller does not give the buyer the preliminary title commitment within the strict time period specified, seller could likely be in breach of contract. However, if buyer accepts a late title commitment buyer would then have a certain amount of days (two if left blank) to object to the title report. The parties will probably be deemed to have agreed to waive seller's breach and continue with the transaction.

Can a seller cancel a contract if another all-cash offer comes along?

QUESTION: Broker represents the buyer. They have had their offer accepted and are now under contract with the seller. The buyer is getting a FHA loan and the lender is requesting seller to sign a FHA Disclosure. Broker alleges that seller is refusing to sign the disclosure because they want to accept another cash offer. Broker questions how to advise her client.

RESPONSE: Given the facts presented to the Hotline the seller accepted the offer and signed the contract knowing that buyer was going to get a FHA loan. It is unlikely that seller can now cancel the contract unless the FHA is requiring the contract to be substantially modified. While under contract seller cannot legally accept another first position offer.

Broker or buyer cannot force seller to perform under the contract. Broker should advise client to seek private legal counsel in this matter to determine their rights.

What happens if a buyer terminates based on inspection but purchases another home in subdivision?

QUESTION: Agent represents the sellers. The buyers had an inspection done and sent the RE-10 to the seller. Buyers had checked Box 3, the notice to terminate based on an unsatisfactory inspection. Sellers allege that buyers did not act in good faith because they ended up purchasing another property in the same neighborhood. Agent questions if sellers have any cause for legal action.

RESPONSE: Section 10A of the RE-21 states in relevant part:

> BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies and BUYER'S expense. BUYER shall, within ___ (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

Given the facts presented to the Hotline, the buyers indicated they had found certain items to be unsatisfactory after inspecting the home. They were within the contract's strict time period when they gave seller their written notice of termination. 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 terms of the contract at issue and the Supreme Court's previous interpretation of similar contracts, the Purchase and Sale Contract can be terminated by buyer for any slight item or condition which is not satisfactory to buyer. However, the unsatisfactory item or condition must be based on some sort of inspection. There is no requirement that inspections need to be performed by professional home inspectors and may be performed by the buyer themselves.

The Hotline cannot weigh in on whether or not the buyers acted in good faith. Agent should advise clients to seek private legal counsel to determine their rights in this matter.

Is a central vacuum canister considered an attached fixture or private property?

QUESTION: Broker represents the sellers. Upon closing, the sellers took the central vacuum canister because they had purchased it when they bought the home. Its inclusion or exclusion had not been discussed with the buyers. Buyers assumed it was included with the purchase and buyers' Broker alleges that the listing was advertised having a central vacuum unit. Brokers on both sides of the transaction have contacted the Hotline to try to determine whether or not the canister would be considered and included/attached item.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy

himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100."

Given that the above language does not expressly name central vacuums, determining whether a particular item is attached to the property has to be done on a case by case basis. The Hotline cannot determine whether something is or is not an attached fixture.

If there is any question about what is to be included or excluded in the purchase, it is the best practice for buyer or seller to specifically address the matter in the blank lines immediately following Section 5 of the RE-21. Nevertheless, the Hotline does not resolve disputes between parties and cannot weigh in on whether or not the listing could be classified as false advertising. Brokers on both sides of this transaction should advise clients to seek private legal counsel.

Can a seller get out of a contract they don't think will close?

QUESTION: Broker represents seller. Seller and broker have a feeling that the transaction is not going to close. The buyers are from Afghanistan and are having trouble getting pertinent documents signed. The contract is set to close on the 15th but broker questions if there is a way for seller to get out of the contract. Further, broker questions if they can object to receiving a "prequalification letter" rather than a "lender approval letter" or if seller is able to terminate based on unsatisfactory lender approval.

RESPONSE: Given the facts presented to the Hotline the contract appears valid through May 15, which means that seller must allow the buyer until the 15th to meet all of their contingencies and purchase the property.

The Hotline does not provide legal advice to buyers and sellers. It is a service for Idaho Association of REALTORS® Brokers. Broker should advise her clients to seek independent legal counsel if they want to terminate the contract. Further, if Broker provides advice to a client relating to remedies for breaching a contract Broker could be exposing herself to liability and runs the risk of being fined for practicing law.

Can a buyer submit another RE-10 in response to seller's RE-10?

QUESTION: Broker represents buyer who tendered a RE-10, the Inspection Contingency Notice, to seller listing several items to be addressed. Seller thereafter either refused to make the complete list of requested items or agreed to only a partial list of repairs. Pursuant to the clarified terms in the 2015 RE-21, Purchase and Sale Agreement, it is clear that when seller rejects buyers requests either in whole or in part, buyer then may terminate the transaction or proceed without the seller being responsible for correcting any deficiencies. However, Broker would like to know the legal consequence of buyer responding by tendering another RE-10 to seller.

RESPONSE: The RE-21 contains the following relevant language:

> 10(B)(4). If SELLER does not agree to correct BUYER's items within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within ___ business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.
>
> 10(B)(5). If BUYER **does not** give such written notice of cancellation within the strict time period specified, BUYER shall conclusively be deemed to have elected to proceed with the transaction without repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

Given the existence of these clauses in the Purchase and Sale Agreement, it is incumbent upon buyer to watch the deadline in which they are required to terminate the contract, otherwise they will be legally obligated to continue with the transaction with the property in an "as is" condition. If buyer tenders to seller *another* RE-10, buyer has <u>not</u> notified the seller of buyer's intent to terminate and therefore should ensure that they receive a response from seller within the 10(B)(4) timeframe, otherwise buyer will need to provide written notice of termination in order to exercise that right.

An option for buyer would be to tender buyer's second RE-10 under the condition that if seller does not respond within the allotted 10(B)(4) timeframe then buyer is thereby terminating the transaction.

Can a seller terminate after rejecting a buyer's RE-10 requests?

<u>QUESTION</u>: Broker represents the buyer. They still have a day left of their inspection timeframe. Buyer is going to submit an RE-10 requesting that they get $1000 from the seller for replacement of a well pump. Broker questions if seller responds to this by saying no, can the seller then terminate the purchase and sale agreement?

<u>RESPONSE</u>: Section B4 of the Purchase and Sale Agreement (RE-21) states in relevant part:

> If both parties do not come to a consensus as to the disapproved items to be corrected by SELLER within the strict time period specified… then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice… that they will not continue with the transaction.

Once the buyer submits a list of disapproved items, seller has the chance to respond in writing whether or not they are going to accept the requests made by the buyer. If they do agree to fix the items then both parties agree to move forward with the transaction and the buyer has removed their inspection contingency. If the seller does not agree to the items listed in the RE-10, buyer then has to decide if they want to move forward with the transaction without seller fixing the items or buyer can decide to terminate and get their earnest money back.

Buyers submitted RE-10 one day late. Can seller terminate?

QUESTION: Broker represents the sellers. According to the broker, buyers submitted their RE-10 with a list of disapproved items a day after their timeframe to do so had ended. Broker questions what happens if his sellers respond saying they will fix only a few items. Will the buyers then have the option to terminate?

RESPONSE: Section 10B(1) of the Purchase and Sale Agreement states:

> If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this Agreement, BUYER shall conclusively be deemed to have: (a) completed all inspections… (b) elected to proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

Given the facts presented to the Hotline the buyers did not give seller written notice of disapproved items within the strict timeframe. The above language states that when this happens the buyers have decided to proceed with the transaction. If the sellers wish to fix a few of the items, even though the RE-10 was not delivered on time, the written notice they give to buyers informing them of what they will fix will not likely allow Buyer the chance to terminate. However, seller should make it clear in writing that seller's agreement to repair certain items is not reviving the inspection timeframes or altering the strict time periods in any way.

If both parties agreed to terms in a counter offer but only one party signed the RE-21, would they have a binding contract?

QUESTION: Agent represents the seller. Both parties signed Counter Offer #2. Prior to the seller signing the RE-21 he decided he no longer wanted to sell the home. Is his signature on the RE-13 enough to have a binding contract?

RESPONSE: The RE-13 Counter Offer form states in relevant part:

> To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms in this Counter Offer shall control. **All other terms of the**

> **Purchase and Sale Agreement including all prior Addendums not modified by the Counter Offer shall remain the same.**

Based on the above quoted language, the RE-13 Counter Offer incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with the provisions of the Counter Offer and signifies a "meeting of the minds." Since the Counter Offer incorporated all of the non-conflicting terms of the Purchase and Sale Agreement and terms of the counter offer, the Buyer and Seller signing only the Counter Offer likely creates a binding agreement between the parties, which includes the original terms of the Purchase and Sale Agreement. Although it is possible for the parties to also sign the original Purchase and Sale Agreement subject to the counter offer, such practice is likely not necessary to create a binding contract between the parties. Therefore, the parties likely need only to sign the Counter Offer.

The Hotline does not resolve disputes between parties to a transaction. Therefore, each party may wish to consult private legal counsel regarding their rights and responsibilities under the transaction contract.

DISCLOSURE

Is a seller liable for things found by buyer post-closing?

QUESTION: Agent represented the seller in a transaction that has closed. The buyers recently sent a bill to the seller for the sprinkler repair claiming that seller should have known the sprinklers were not working. Seller never lived in the home and was unaware that they did not work. Agent questions if seller could be liable for not disclosing this and how best to advise her client.

RESPONSE: Seller is required to disclose all adverse material facts which seller knows or had reason to know. Buyers would have to prove that seller knew about the sprinkler system not working and failed to disclose it. However, given the facts presented to the Hotline and that the transaction has already closed, this is going to be a dispute between the buyer and the seller. Agent should inform client that a demand has been made and the brokerage cannot provide legal advice, and that seller should seek independent legal counsel.

Should information given by a neighbor be disclosed?

QUESTION: Broker is representing the seller. The seller apparently has a neighbor that has some concerns about a wall on the property and has shared them with the seller and brokerage. Broker questions the duty to disclose this information to possible buyers.

RESPONSE: Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. An adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

The Hotline cannot determine what an adverse material fact is. Seller will need to decide whether or not the complaints from the neighbor rise to the level of an "adverse material fact" as defined by Idaho Code. If seller is unable to make a decision, seller should consult seller's own legal counsel.

What should an agent do if they have knowledge of a property, yet it was not disclosed?

QUESTION: Broker represents buyer purchasing a property that was well known in the community as a former drug laboratory or "meth lab." In fact, a previous MLS listing describes the situation at length, but also notes that the property went through certified clean up. However, seller's Property Condition Disclosure Form indicates that seller checked the "Do Not Know" box in response to the question "Has the property ever been used as an illegal drug manufacturing site?" Broker questions seller's disclosure responsibilities as well as the broker's obligations to disclose.

RESPONSE: Idaho Code § 55-2801 states in relevant part:

> PSYCHOLOGICALLY IMPACTED DEFINED. As used in this chapter, "psychologically impacted" means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to the following:
>
> …
>
> (2) That the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon… (Emphasis added.)

I.C. § 55-2801 states that an owner does not need to disclose that a property has been psychologically impacted if a felony was committed on the property which had no effect on the physical condition of the property. But frequently there is an effect on the condition of the property due to the operation clandestine methamphetamine laboratory.

Given the information provided to the Hotline, the property has been cleaned and has met all requirements set by law and is now considered to be in a safe condition. However, if the

seller actually knows about the prior use he should disclose the same. Seller should also disclose the cleanup process and provide the relevant reports.

Idaho Codes § 54-2086(1)(d) and 54-2087(4)(a) require an agent to disclose adverse material facts actually known or which reasonably should have been known by the licensee to a customer and/or their client. An adverse material fact is defined as "...a fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligation under a real estate contract." (Idaho Code §54-2083(1)). Disclosure of adverse material facts applies to listing agents as well as buyer's agents.

A fact must be disclosed only if it would "significantly affect the desirability or value of the property to a reasonable person." According to the information provided to the Hotline, if the agent knew or reasonably should have known, that the property had been used to produce dangerous substances such as methamphetamines, that fact would likely have a "significant affect" on the desirability or value of the property to a reasonable person. Thus, it may be considered an "adverse material fact" that agent should disclose to potential buyers.

However, if appropriate remediation occurs, such as certified meth lab cleanup that will eliminate any dangerous chemicals, the past drug production may no longer be considered an adverse material fact affecting the property and would not have to be disclosed.

All parties may also need to be aware of Idaho Code § 6-2607 which states:

> RESIDENTIAL PROPERTY OWNER IMMUNITY. Once a residential property meets the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, the residential property owner and any representative or agent of the residential property owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs. (Emphasis added.)

According to I.C. § 6-2607, once a property has met the cleanup standards the owner is immune to any civil action brought against them by any future owners or tenants.

Should less reliable short term radar tests be disclosed?

QUESTION: Broker questions the responsibility to disclose that a short term radon test done on the property yielded high results. The short term tests are less accurate and she would like to know how to best disclose the information.

RESPONSE: Both the licensee and the seller have the duty to disclose all known adverse material facts. If the seller was given the results of a radon test performed by a prospective buyer and it yielded high results, seller is obligated to disclose this information to any future buyers as it would likely be considered an adverse material fact. If seller or its licensee are aware of facts that mitigate the original report, like a subsequent and more accurate report, then that may negate the need to disclose the original report.

Does a sober-living home in the neighborhood need to be disclosed?

QUESTION: Agent represents the seller. The property next door is a sober living home and a previous buyer had terminated the contract when the sober living home was discovered. Agent and her client question whether or not this needs to be disclosed and if there is any liability if it is not disclosed.

RESPONSE: Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. An adverse material fact is defined as:

> A fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract.
> I.C. § 54-2083(1).

In addition, Idaho has a statute that governs psychologically impacted property, which is defined as:

> 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; or
> (2) That the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon; or
> (3) That a registered or suspected sex offender occupied or resides near the property.
> I.C. § 55-2801.

This Idaho statute states that these types of conditions do not require disclosure.

The Hotline does not determine adverse material facts. Seller will need to decide whether or not the sober living house next door rises to the level of an "adverse material fact" or if it is "psychologically impacted property" as defined by Idaho Code. If seller is unable to make a decision, seller should consult seller's own legal counsel. Further, NAR provides guidelines to assist members in this type of situation.

The sober living property could also be protected under the Fair Housing and Americans with Disabilities Acts. The Hotline cannot weigh in on Fair Housing issues and seller would need to contact a federal agency or their own counsel to determine whether or not it falls under either of those Acts.

Does remediated mold need to be disclosed?

QUESTION: Broker is representing the seller, Fannie Mae. The seller claims to be exempt from Idaho's Property Disclosure Act. The property had contained excess amounts of mold but it has been fully and properly. Now Broker questions whether or not this needs to be disclosed.

RESPONSE: If the property no longer has mold then it is not an adverse material fact, regardless of whether or not seller is exempt from Idaho's Property Disclosure Act. However, given that Broker is aware of the past mold issue, Idaho Code § 54-2086(1)(d) states that Broker has a duty to:

> Disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee.

If a buyer were to ask about mold, Broker may have to disclose it based upon the above statute if Broker determines it to be an adverse material fact. If buyer asks, the best practice for Broker would be to have seller disclose the mold history along with proof of full remediation.

DUTIES TO CLIENT & CUSTOMER

Do agents have an obligation to perform inspections of a property?

QUESTION: Broker represented the seller in a transaction that has closed. Two days before closing the seller died but the executor of his estate was able to close on time. The buyers are now claiming that they are not satisfied with several things including repairs that were not completed and that the RE-25 did not disclose an issue with the pool. They are claiming that executor and selling agent are both responsible. Broker questions if buyers have a legitimate claim against her agent or the seller.

RESPONSE: The seller's agent has no legal obligation to perform inspections, to ensure that the Property Condition Disclosure Form is filled out correctly or to confirm that all repairs have been completed. Given the facts presented to the Hotline, the buyers completed an inspection and the final walk through and went to closing. The inspection or final walk through

is when these issues should have been addressed by buyer. Further, pursuant to Idaho Code § 55-2505 the executor of the estate is exempt from filling out a new RE-25 or probably even checking the original for accuracy.

Given that this is occurring after closing the dispute is going to be between buyer and seller. Broker should advise seller/executor to retain private legal counsel in this matter as the Hotline does not resolve disputes between buyer and seller.

EARNEST MONEY

If a seller does not properly deliver the RE-25, what happens to the earnest money?

QUESTION: Broker represents the buyers and is the responsible broker. Broker alleges that the seller did not deliver the Property Disclosure Form (RE-25) to the buyers and that after the inspection contingency had expired the Buyer had to obtain the RE-25 from the MLS. Once the buyers obtained a copy they found items disclosed in the RE-25 which caused them to terminate the contract. Seller is claiming that Buyers had no right to terminate despite failing to provide an RE-25. Both parties feel they are entitled to the earnest money and broker questions what he should do.

RESPONSE: The relevant parts of Idaho's Property Condition Disclosure Act state:

> 55-2509. DELIVERY OF DISCLOSURE FORM AND ACCEPTANCE. Every transferor shall deliver, in accordance with section 55-2510, Idaho Code, a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) days of transferor's acceptance of transferee's offer. Every prospective transferee of residential real property who receives a signed and dated copy of a completed property disclosure form as prescribed under section 55-2508, Idaho Code, shall acknowledge receipt of the form by doing both of the following:
> (1) Signing and dating a copy of the form;
> (2) Delivering a signed and dated copy of the form to the transferor or his agent or subagent.
>
> 55-2510. DELIVERY REQUIREMENTS. The transferor's delivery under section 55-2509, Idaho Code, of a property disclosure form as described under section 55-2508, Idaho Code, and the prospective transferee's delivery under section 55-2509, Idaho Code, of an acknowledgement of his receipt of that form shall be made by personal delivery to the other party or his agent or subagent by ordinary mail or certified mail, return receipt requested or by facsimile transmission.

> 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.
>
> Subject to the provisions of section 55-2505, Idaho Code, a rescission of a transfer agreement may only occur if the transferee's written, signed and dated document of rescission is delivered to the transferor or his agent or subagent within three (3) business days following the date on which the transferee or his agent receives the property disclosure form prescribed under section 55-2508, Idaho Code. If no signed notice of rescission is received by the transferor within the three (3) day period, transferee's right to rescind is waived.

However, regardless of the facts and timelines, if both parties have made a demand upon 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 Hotline believes that the best practices are for the broker to keep the money in trust until the parties work it out between themselves, ensuring that the brokerage will not be exposed to any liabilities. The Hotline does not get involved in earnest money disputes and brokers on both sides of the transaction should advise their clients to seek independent legal counsel in this matter.

Is responsible broker required to give agent a proof of earnest money deposit?

QUESTION: Broker would like to know if the responsible broker is required to deliver a proof of deposit of the earnest money. Broker states that they often receive just an email confirming that the earnest money has been deposited but she would like to know if she and her client are entitled to a copy of the actual deposit slip.

RESPONSE: The Purchase and Sale Agreement (RE-21) acts as the receipt of the earnest money deposit. However, if the seller asks for more than just an email confirmation from the responsible broker there should be no reason to withhold it. If a licensee makes verbal or written representations that they are holding the earnest money and they are not, they would likely be subject to serious punishment from IREC.

Would a seller ever be entitled to earnest money when the transaction fails due to financing?

QUESTION: Broker represents the seller in a transaction that has failed to close after buyers failed to get financed. According to Broker, buyers tried to get financed through various companies, not just one. The buyers have requested the earnest money back. Seller believes he is entitled to the earnest money. Broker questions the best way to proceed.

RESPONSE: The RE-21 Financial Contingency section states in relevant part:

> (C). This Agreement is contingent upon BUYER obtaining the following financing… In the event BUYER in unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request…

Given the facts presented to the Legal Hotline, the buyers have not been able to obtain financing. If the buyers have exercised good faith efforts to obtain the funds, then pursuant to the contract they are entitled to their earnest money.

Additionally, Idaho Code § 54-2047 states that the responsible Broker has three options when there is an earnest money dispute:

> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and
> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

The Hotline does not resolve disputes between buyer and seller. Broker may wish to advise parties on both sides of the transaction to seek legal counsel in this matter.

Is a seller entitled to earnest money if buyer removed carpet but the sale ultimately fell through?

QUESTION: Broker represents the seller. Ultimately, buyer was unable to obtain financing. However, broker states that the buyer entered the home and started removing the carpet to do repairs. The carpet has been removed and has not been replaced. Both parties have demanded the earnest money and broker questions what his responsibilities are.

RESPONSE: Given the facts presented to the Legal Hotline, the buyer was not able to obtain financing. The contract states that if the buyer exercised good faith efforts to obtain the funds, then buyer is entitled to a return of their earnest money. However, the Hotline cannot weigh in on the damage that took place to the property. If both parties have made claim to the earnest money then the responsible broker has three options in an earnest money dispute. Idaho Code § 54-2047 states:

> DISPUTED EARNEST MONEY.

> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall: (a) Notify each party, in writing, of the demand of the other party; and (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

Similar language is contained in the RE-21 Section 30. The Hotline does not resolve disputes between buyer and seller. Broker should advise client to seek private legal counsel to determine their rights in this matter.

Can a seller revive a contract once buyer terminates because seller won't do repairs?

QUESTION: Broker represents the sellers. According to the broker, beginning on July 5th buyers had seven business days to complete inspections. On the last day of the time period buyer provided the RE-10 with requested repairs to the seller. On July 16th sellers tendered their own RE-10. After receiving Sellers' RE-10 Buyer terminated the contract later that day, thereafter seller signed the original RE-10 in an attempt to salvage the deal. Both parties now feel as though they are entitled to the earnest money.

RESPONSE: Typically the RE-10 is used in a circumstance where the Buyer has found problems with the property upon inspection and is not interested in continuing with the purchase. Buyer has the right to terminate the contract at this point but instead of doing so, offers to continue if certain items are corrected. Buyer's offer to continue under the original purchase sale agreement is basically an offer just like the original offer to purchase the property. In order for Seller to accept the Buyer's offer, the standard rules of contract law apply and Seller must accept the offer to create a binding contract.

Pursuant to Idaho case law Seller's acceptance must "unqualifiedly and unequivocally agree to all the material terms of the offer and must not include any new conditions or provisions." If the Seller's acceptance does not meet this standard then it will most likely be considered a counter offer and again the basic rules of contract law will apply. The law holds

that a counteroffer is two things: a rejection of the original offer, and a new offer. The 2015 modifications to the RE-21 attempt to clarify this point by stating that "immediately upon a written response from SELLER that rejects the BUYER's requests, in whole or in part, BUYER may proceed under 10(B)(4) below."

If the Sellers' RE-10 was a counteroffer then it appears the Buyer cancelled the contract within the time stated in Section 10 of the Purchase and Sale Agreement and more specifically, subsections (B)(3) and (B)(4) since both parties did not come to a consensus of items to be corrected before the contract was terminated. Once the Buyer terminated the contract, and the Sellers' act of signing the original RE-10 was an attempt to revive the contract which cannot be done unilaterally, it requires all parties' consent.

Additionally, whenever an earnest money dispute arises 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 Hotline does not resolve disputes between Buyers and Sellers. Given the complexity of this matter and all of the specific timeframes, brokers on both sides of the transaction should advise their clients to seek private legal counsel if they disagree with the actions of the responsible broker in regard to the earnest money.

FORMS USE

Should every person listed on the title sign the transaction documents?

QUESTION: Broker represents the buyer. A RE-21 was executed by the buyer and one seller. As the transaction proceeded, the buyer learned that two sellers are listed on the title. The listing agent sent over an addendum adding the second seller, and both sellers signed that document. Buyer's broker requested that the second seller sign all of the prior documents and sellers' agent thought it was not necessary. Should both the sellers' signatures be on all the contracts?

RESPONSE: Given the presence of the second seller's signature on the addendum, and given that the addendum refers back to the original contract, the buyer likely has a binding legal contract with both sellers. However, it is always best practice to have all sellers' signatures on every form when purchasing property from individuals.

Further, the brokers may wish to consult the Idaho Real Estate Commission to see if they require and/or look for all signatures during an audit as that may be a factor as well.

What is the proper way to fill out the RE-16?

QUESTION: Broker questions the proper way to fill out Section 6 of the Seller's Representation Agreement. She has seen agents fill in "$0" and has also seen them fill in "N/A." What is the best practice?

RESPONSE: Section 6 of the RE-16 states in relevant part:

> (A) If Broker or any person, including SELLER, procures a purchaser… the SELLER agrees to pay a total brokerage fee of ____% of the contract or purchase price OR $_____.

Given the facts presented to the Legal Hotline, agents are writing in a percentage and also writing in $0. This could cause several problems and possibly result in the seller not paying the brokerage fee. The use of the word "OR" in the contract means that only one or the other is to be filled out. Agents should be filling out either a percentage or a dollar amount, and they should write "N/A" into the line that is not filled out.

How does the rescission language in the RE-25 interact with the RE-21?

QUESTION: Broker enquires into the basis of the rescission language in the RE-25 and how it interacts with the contingencies in the RE-21.

RESPONSE: The Seller's Property Condition Disclosure Form (RE-25) states:

> BUYER hereby acknowledges receipt of a copy of this disclosure form and does hereby ☐ **WAIVE** ☐ **NOT WAIVE** the statutory

> right to rescind the related purchase and sale agreement within three **(3) business days... IF BUYER DOES NOT WAIVE THE RIGHT TO RESCIND BUYER** may only exercise BUYER'S statutory right to rescind the purchase and sale agreement within **three (3) business days.**

If the buyer checks the "not waive" box and within three days objects to an item on the RE-25, they have the ability to rescind the Purchase and Sale Agreement that they entered into with the seller. Termination under this section is statutory based and is entirely separate from the other contingencies in the RE-21. Once the Purchase and Sale Agreement is rescinded, no further timelines in the RE-21 are relevant; the transaction is immediately terminated.

How should an agent fill out forms if a party is an entity?

QUESTION: Broker questions the legally appropriate signature on all pertinent forms when the buyer or seller is an entity or corporation.

RESPONSE: Legally, the buyer or seller of the property is the entity and therefore the "Buyer" or "Seller" line on the purchase and sale forms should state the name of the entity. The officer who will be signing the documents on behalf of the entity should put their title after or under each signature. Nevertheless, the title company may have other rules and preferences and the contracts may have to be filled out according to the title company instructions.

How should agents fill out forms if seller is a trust or an estate?

QUESTION: Broker questions how to list "Seller" on the RE-21 and all pertinent forms when the seller is a trust or estate. Is the name of the trust sufficient or does it need to include the name of the trustee or personal representative; i.e. "Sam Smith, Trustee of Jane Doe Trust?"

RESPONSE: Legally, the seller of the property is the trust and therefore the "Seller" line on the purchase and sale forms should be the name of the trust. However, the trustee is the person who will be signing the documents on behalf of the trust and should put their title after or under each signature. Nevertheless, the title company may have other rules and preferences and the contracts may have to be filled out according to the title company instructions.

MISCELLANEOUS

If a buyer opts out of having an inspection, can they still review CC&Rs?

QUESTION: Broker represents the Buyer on a vacant land transaction. The Buyer elected not to have an inspection but did want to review the CC&Rs. Broker noticed that the contract states the timeframe for reviewing the CC&Rs is not to exceed the time allotted for the inspection. Since Buyer is not having an inspection how should Broker draft the Purchase and Sale Agreement?

RESPONSE: Due to the wording of the CC&R Section of the Idaho REALTOR® Purchase and Sale Agreement form, Broker is correct that placing a "zero" in the time allowed for inspections could interfere with, or waive, a Buyer's right to review the CC&Rs and make them a basis to cancel a contract. If Buyer wants to review the CC&Rs care should be taken to ensure this right is preserved. Best practices would be to add a statement to the Other Terms and Conditions section of the contract, clearly stating that although the Buyer is waiving a right to an inspection he or she is specifically reserving the right to review the CC&Rs and cancel the contract in Buyer finds unacceptable terms. It would also be prudent to strike the line in the CC&R that ties the CC&R review to the inspection contingency timeframe.

The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho Association of REALTORS®

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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 Association of REALTORS® (IAR) and, in that capacity, operates the Legal Hotline to provide general responses to the IAR regarding Idaho real estate brokerage business practices and applications. A response to the IAR which is reviewed by any REALTOR® member of the IAR 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 IAR, which consent may be withheld in their sole discretion. For legal representation regarding specific disputes or factually specific questions of law, IAR 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 IAR.

Note on Legislative Changes

The responses contained in the 2014 "Hotline Top Questions" are based on the law in effect at the time, and the IAR forms as printed in 2014. 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 2015 legislative session. In addition, IAR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2014 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which may reflect the 2015 legislative changes to the law.

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AGENCY/LICENSE LAW

Can a relocation company sign on behalf of a property owner?

QUESTION: Broker has a listing agreement with the property's owner. The owner has help from a relocation company to sell the property. Broker states that the relocation company wants to sign the contracts as the seller and provide other instruction to broker. Broker questions if they are able to do this when they do not own the property.

RESPONSE: Idaho Code § 54-2050(1) states that every Representation Agreement must contain:

> (e) The signature of the **owner** of the real estate or the owner's legal, appointed and duly qualified representative, and the date of such signature. (Emphasis added).

Unless the relocation company helping the seller provides written documentation legally appointing them as the owner's agent, Brokerage must contract directly with the owner of the property, who is also the one who must sign all of the relevant paperwork to sell the property.

Can an agent take a client to a new brokerage if client terminates their agreement with the former brokerage?

QUESTION: Broker has a new agent that had active listings with his old brokerage. Two of the sellers wrote letters to the former brokerage asking to remove the listing so they could list it with the agent, as when they signed the old contract they were under the impression that only this particular agent would be representing them. Agent's new broker sent the letters to the old broker and has heard no response. She questions if just notifying her is enough or if they need some type of response before going any further.

RESPONSE: The Hotline does not encourage or give advice about the termination of a Representation Agreement. However, broker is correct to consider needing a response from the other broker. The RE-16 is a binding contract between a seller and a brokerage, and defaulting on it may have consequences for the seller. Until they hear a response or an acknowledgement of receipt from the other broker, new broker should be careful about going any further with these listings. New broker should feel free to send the request via other means if old broker is not responding to the first request.

What are a broker's duties if a dispute arises when acting as a limited dual agent?

QUESTION: Broker represents both the buyer and seller in a transaction that closed over a month ago. Now that buyer has moved in, buyer alleges that many things that were supposed to be included in the sale were discovered to be missing and/or not working. Buyer wants compensation from seller and they are communicating through the broker. Broker questions what she should do in this situation.

RESPONSE: Section 8 of the Buyer's Representation Agreement, the RE-14, states in relevant part:

> Broker will act in an unbiased manner to assist the BUYER and Seller in the introduction of BUYER to such Seller's client's property and in the preparation of any contract of sale which may result.

The Seller's Representation Agreement contains the same language. The role of the broker acting as a dual agent is to introduce the buyer and seller and to prepare the Purchase and Sale, as well as other pertinent documents. Broker is under no obligation to continue to act as limited dual agent now that the sale has closed. Broker should advise both buyer and seller that she is not going to be involved in their dispute and that they need to work things out between themselves.

Can an agent terminate a Representation Agreement due to a client's failure to communicate?

QUESTION: Brokerage represents both the buyer and seller in a transaction. Agent has not heard anything from the buyer in over a week and critical decisions are not being made by buyer. Agent questions if he can terminate his representation agreement with the buyer.

RESPONSE: Yes. Section 15 of the Buyer's Representation Agreement (RE-14) states "Failure of BUYER to reasonably maintain communication with BROKER is a breach of this agreement." The best practice in this situation would be to send the buyer an email notifying him that he is in breach of the Representation Agreement for failure to communicate and that agent will be terminating the contract if buyer does not respond within a reasonable time.

Can an agent represent a relative in a short sale?

QUESTION: Broker is a listing agent in a short sale. Broker's daughter wants to make an offer on the home, and broker questions whether or not he can act as a limited dual agent or if it would be a conflict of interest to represent a member of his family.

RESPONSE: In most real estate transactions, as long as the relationship is disclosed to all parties and each party confirms in writing that they do not have an issue with the broker representing a family member, broker can represent that family member. However, in a short sale situation, the bank is probably less likely to let a broker represent relatives, and broker may consider referring his daughter to another agent in the area to ensure there are no conflicts, and to provide her with independent representation. Even if broker's daughter is represented by another brokerage, full disclosure should still be provided to seller.

Should an agent alter large portions of a contract with an addendum?

QUESTION: Agent has a customer that wants to make changes to the RE-16. Seller is an attorney, and is requesting large portions to be taken out of the contract completely and wants

significant changes made to other sections. Agent questions if this can be done with an addendum or if an attorney should be drafting a new contract.

RESPONSE: In Idaho, real estate licensees must use caution when deviating from the standard terms of pre-printed legal forms. If large portions of the pre-printed agreements are being changed, that could be considered practicing law and real estate licensees can expose themselves to liability and possible penalties for the unlicensed practice of law for doing so. The Idaho Supreme Court has clearly defined practicing law to include this type of activity:

> The drafting of the documents… or the giving of advice and counsel with respect thereto, by one not a licensed attorney at law, would constitute an unlawful practice of law, whether or not a charge was made therefore, and even though the documents or advice are not actually employed in an action or proceeding in a court. (*Idaho State Bar v. Meservy*).

The Supreme Court has previously sanctioned members of other industries for drafting documents for clients or customers. Real estate licensees should advise clients and customers to seek competent legal counsel if the need arises to significantly amend or alter pre-printed forms. Additionally, in that type of circumstance, real estate licensees should document that is was not the agent who drafted the contracts, confirm with broker to make sure that a contract drafted outside of the IAR forms will be covered by their insurance, and should also check with the MLS to determine if the contract will be valid within the MLS guidelines.

In certain circumstances, a brokerage's client may be allowed to draft legal documents themselves so long as it is pertaining to their personally owned real estate. Again, caution is advised in that if the property in question is owned by a legal entity such as a trust, corporation or limited liability company, the client or customer may be viewed as providing legal services to that company and therefore may find themselves engaging in the unauthorized practice of law.

COMMISSIONS & FEES

Must a referral fee be paid through the brokerage?

QUESTION: Broker A is paying a referral fee to Broker B. Broker A was under the impression that all fees must be paid through the brokerage and he wants to verify that assumption.

RESPONSE: Idaho Code § 54-2054 Paragraph 9 states in relevant part:

All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker.

Given the facts presented to the Hotline, this fee can be paid to the other agent personally, as long as he is the designated broker. The statute does not mention the brokerage entity. It clearly

states that all fees must be paid through the broker, and so long as Broker B is the only designated broker, there should be no issue. However, given that this is a compensation and fees question, broker should contact IREC to ensure that they would not have an issue with this type of payment.

Can an agent make a commission for finding rental property?

QUESTION: Agent represents out-of-state clients looking for a property to rent. Agent questions whether her clients or the property owner should pay her commissions once she finds a property for her clients to rent.

RESPONSE: Agent's only contractual relationship is with her out-of-state clients. Unlike when a property is listed for sale on the MLS, where the listing brokerage offers to share commissions with a cooperating brokerage, Agent is searching for rental properties that are not likely listed on an MLS. Therefore, Agent's only contractual right to commissions is with her clients. Only if a property owner were to agree to pay Agent's commissions would the owner be obligated for said commissions.

The Hotline does not resolve disputes between parties or commission disputes. Agent may wish to consult private legal counsel regarding her contractual obligations and rights to commissions.

Should commissions be paid to an inactive agent?

QUESTION: Broker has an agent that is planning to transfer their license to inactive status. However, Agent is currently referring clients to another Agent in the brokerage. Broker would like to know if the other agent sells real property after Agent is inactive should Broker pay inactive Agent referral fees.

RESPONSE: Idaho Code § 54-2054(9) states:

> All fees must be paid through broker…A broker may pay a former sales associate for services performed while the sales associate was actively licensed with that broker, regardless of the former sales associate's license status at the time the commission or fee is actually paid.

In Idaho, both buyer and seller representation agreements are between the client and the broker. In addition, all fees must be paid through the broker. In this case, Agent is attempting to establish an agreement with another agent within the same brokerage to receive compensation after Agent's license goes inactive. This however is likely not a viable solution, as the representation agreements with any buyer or seller is with the broker, and not with Agent.

Moreover, both agents likely have a commission agreement with the broker, as commissions must be paid through the broker. However, because Agent currently maintains an active license, Agent is likely able to establish an agreement with Broker so that it is still

possible for Agent to receive commission splits even with an inactive license. This commission agreement should be with Agent's broker and not the other agents.

Can a broker accept a commission from a client if they have not formally entered into a Representation Agreement?

QUESTION: Broker has represented Buyer over an extended period. However, Broker and Buyer have never established nor executed a representation agreement. Buyer recently purchased property that was for sale by owners. Broker did not show the property to Buyer nor assist Buyer in the transaction. Subsequent to the Buyer purchasing the property, Broker received a check in the amount of 3% commissions from Buyer. Broker would like to know if it is legal and appropriate to accept the check from Buyer.

RESPONSE: Idaho Code § 54-2054(9) stated in relevant part:

> All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker with whom the sales associate is licensed…

Given the facts provided to the Hotline, Broker received a check from Buyer for 3% commissions. As stated above, Idaho Code requires that all fees must be paid through broker. Since Buyer presented the check to Broker, there does not appear to be a violation of Idaho licensing law. However, because Broker does not have a contractual right to compensation and did not assist Buyer in the transaction, it is unclear whether the payment is a commission or a gift.

Regardless, the Hotline is unaware of Idaho case law or statute that would prohibit Broker from accepting the check. However, Broker may wish to contact the Idaho Real Estate Commission to obtain clarification on Broker's obligations and prohibitions, if any, while accepting gifts or unearned commissions.

Are agents entitled to compensation if the sale of the property does not go through?

QUESTION: Agent represents buyer who performed under the contract all the way up to closing. Right before closing, seller didn't show up and refused to deliver warranty deed, causing the deal to fall through. Agent wants to know if the brokerage can go after the seller for its commission and also if the buyer can get monetary damages from the seller because the purchase fell through.

RESPONSE: Idaho law provides that "the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of a contract." *The Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 260 (1993). "[This rule] does not, however, alter the obligation to pay the commission if the sale is not completed due to the fault of the

seller….if the failure of completion of the contract results from a wrongful act or interference of the seller, the broker's claim is valid and must be paid." *Id*. at 260.

Additionally, Idaho Code § 54-2046(4) states:

> No disbursement of any portion of the broker's commission shall take place without prior written, signed authorization from the buyer and seller or until copies of the closing statements, signed by the buyer and seller, have been delivered to the broker and until the buyer or seller has been paid the amount due as determined by the closing statement.

Given the facts provided to the Hotline, the buyer performed fully on the contract all the way up to closing and the seller didn't show up and failed to deliver a warranty deed. Since it was solely the sellers' fault this transaction didn't close, the brokerage would need to go through the seller's broker in order to try to get a commission. The unilateral contract between the two firms would more than likely need to go to arbitration through the Idaho Association of REALTORS® since there is no privity of contract between Agent and seller. As for the buyer, he can go after the seller for damages incurred and would need to seek private legal counsel to see if it is worth moving forward.

CONTRACTS

Does an addendum supersede the Purchase and Sale Agreement?

QUESTION: Seller and Buyer both signed an RE-11 Addendum stating that the earnest money is non-refundable. Buyer's lender did not provide a loan acceptable to buyer so buyer had to cancel the transaction. Now, lender is saying that buyer is entitled to their earnest money back. Broker questions whether or not this is correct, given that the addendum was fully executed by both parties.

RESPONSE: The Addendum form (RE-11) states in relevant part:

> This is an ADDENDUM to the □ Purchase and Sale Agreement □ Other ("Addendum" means that the information below is added material for the agreement {such as lists or descriptions} and/or means the form is being used to change, correct or revise the agreement {such as modification, addition or deletion of such terms}).
>
> **To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums and Counter Offers, these terms shall control…. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.** (Emphasis added).

Given the facts stated to the Hotline, if both parties signed the addendum, the addendum clearly supersedes the default provisions of the RE-21 and the earnest money is non-refundable. Broker is correct in her advice to her client. The Hotline does not resolve earnest money disputes, and broker should advise buyer to seek private legal counsel.

Can a party be forced to perform under the contract?

QUESTION: Agent co-listed vacant land. The sale fell through at the last minute because buyer allegedly changed his mind. Agent would like to know what seller's rights are in this situation and wonders if seller can make buyer perform through specific performance.

RESPONSE: If a buyer defaults on the agreement, Section 25 of the RE-24 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 or remedy to which SELLER may be entitled… If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred… on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of brokerage fee, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees.

As stated above, if the seller chooses to proceed under the second option, the buyer could be responsible for the costs incurred before the contract was terminated, likely including the survey that was done at seller/agent's expense. Further, seller can likely go after buyer for specific performance. However, such cases are difficult to prevail upon, as courts will generally look to contractual (monetary) damages first. Only if there is no proper contractual remedy may a court impose the equitable damage of specific performance.

The Hotline does not resolve disputes between buyer and seller. Agent's client should seek private legal counsel to determine his or her rights and responsibilities in the current default situation.

In a short sale, is the accepted RE-21 enough to have a binding contract or does it not become valid until the RE-44 is signed by both parties?

QUESTION: When dealing with a property as a short sale, agent questions if the buyer and seller have a contract when the Purchase and Sale Agreement (RE-21) is signed by both parties or if it is not a valid contract until the Short Sale Addendum (RE-44) is also signed.

RESPONSE: In contract formation, the parties must mutually assent to the contract. Mutual assent, or a "meeting of the minds," generally is some form of negotiation, during which one party makes an offer and the other agrees to it. Each party is bound to the terms that were agreed upon by both parties. No other arrangements made outside of the contract document will become part of the contract unless both parties also assent to the inclusion of additional terms.

The parties memorialize their assent by placing their signatures on a document or documents. The moment a Seller signs the Buyer's RE-21 the parties would have a valid contract that does not include the terms of the Short Sale Addendum. Unless of course the Seller conditioned his acceptance on the Buyer's assent on the RE-44. The checkbox on line 406 of the RE-21 was included for this very purpose.

The Hotline does not resolve disputes between Buyers and Sellers, and agent should advise client to seek private legal counsel if this is a dispute between parties.

Do the parties have a binding contract if the signature page was not received, but the rest of the contract was?

QUESTION: Agent represents buyer, and they tendered an offer and sent it over to the seller for their acceptance. Seller accepted the offer, but when seller's agent faxed the contract back, the last page never came through. Seller's agent also confirmed acceptance orally and by changing the MLS listing. Now seller is trying to change terms of the contract. Agent wants to know if they still have a binding contract.

RESPONSE: Given the facts presented to the Hotline, they likely still have a binding contract. The Restatement of Contracts § 50(1) defines acceptance of an offer as "a manifestation of assent to the terms [in the offer] made by the offeree in a manner invited or required by the offer." Assuming the Buyer conditioned the acceptance upon a returned fax containing the identical terms from the offer, then the initials on each page and the delivery of the majority of the executed contract indicate a manifestation of assent even though the Seller mistakenly did not send the last page with a signature.

More importantly, the so-called "Mailbox Rule" codified in the Restatement of Contracts § 63(a) states that "[u]nless the offer provides otherwise, an acceptance made in a manner and by a medium by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, *without regard to whether it ever reaches the offeror"* (emphasis added). The only real question is whether the acceptance is deemed to have left the offeree's possession when they intended to fax the last page with the rest and it was lost.

This question is clearly answered in the comments of § 63, specifically in Comment b, which squarely addresses acceptances "loss or delay in transit." The comment states that the rule embedded in § 63 "extend[s] to cases where an acceptance is lost or delayed in the course of transmission." Further, Comment c states "Nor…does the actual recapture of acceptance deprive it of legal effect." Therefore, even though the Seller in this instance still has possession of the last page of the acceptance and it was lost in transit, legally it is still considered an acceptance since they attempted to put the acceptance out of their possession to the Buyer per § 63.

Notwithstanding the above, the Hotline does not get involved in disputes between buyers and sellers and the advice tendered herein is to assist Broker, and is not to be relied upon by either party. Agent should advise client to seek private legal counsel and should avoid providing legal advice to the client.

Does a buyer have Right of First Refusal if the bank decides to put the short sale property up for auction?

QUESTION: Buyer and seller are or were involved in a short sale transaction. Buyer requested that the Seller not continue to market the property and accept other offers. Lender did not approve of that term, nor did Lender provide Lender Consent as that term is defined in the RE-44. Lender and Seller decided to auction the property and ended up accepting an offer from the highest bidder. Buyer's broker questions if they have a legal Right of First Refusal in this situation.

RESPONSE: The Short Sale Addendum (RE-44) Section 3 does include a Right of First Refusal:

> If the parties agree that Seller may accept offers from other buyers, or if the creditor requires that Seller must continue to market the property, then the Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ___ (3 days, if left blank) to submit an offer under this Right of First Refusal.

However, Section 2 states that the Short Sale Addendum and all underlying transaction documents are entirely contingent upon Lender Consent. It states in relevant part:

> The Purchase and Sale Agreement referenced above, any addendums, and/or counter offers are all contingent upon the Seller obtaining written consent from Seller's creditor(s) for the Short Sale and Seller's acceptance of any conditions imposed by Seller's creditor(s) ("Lender Consent"). Seller shall have ____ (90 days, if left blank) after mutual acceptance of this Addendum to obtain Lender Consent…. **If Seller's lender does not consent within the timeframe stated above or imposes terms unacceptable to Seller then immediate notice shall be given to the Buyer and this Addendum, the Purchase and Sale Agreement referred to above and any addendums and/or counter offers shall terminate** and the Earnest Money, if deposited, shall be refunded to the Buyer. Buyer and Seller acknowledge that Seller has limited control over whether Seller's creditor(s) will consent to the sale and when such consent will be given. Emphasis added.

Given the information presented to the Hotline it does not sound like the lender consented to the transaction, yet Buyer is still relying on the Right of First Refusal claiming it is a binding agreement between Buyer and Seller with or without Lender Consent. The Hotline has never seen a circumstance where Buyer's position has been attempted and cannot interpret or predict if

buyer would prevail in a court of law. However, if Buyer does wish to assert this provision, Buyer must exercise their right in writing within 3 days.

Regardless, the Hotline does not resolve disputes between buyer and seller, and cannot weigh in on contracts with third party lenders. Both buyer and seller's brokers should recommend that their clients seek private legal counsel due to the complexity of the situation.

Can a seller be found in breach of contract for not honoring an addendum accepted by both parties?

QUESTION: Agent represents the buyer. The seller submitted an addendum regarding the purchase price, stating that the price would be "X or the appraisal price, whichever price is lower." Both parties signed this addendum. Once the appraisal came in, it was significantly less than price X but now seller wants out of the transaction. Agent questions whether or not this would be a breach of contract.

RESPONSE: Given the facts presented to the Hotline, if both parties accepted and signed this addendum, they have a legally binding contract. If seller backs out of this transaction, seller will most likely be in breach of contract and will have defaulted in their performance of the agreement. However, the Hotline does not resolve disputes between buyer and seller. Agents on both sides of this transaction should advise their respective clients to seek private legal counsel to determine each party's rights.

When does the earnest money become non-refundable when using the RE-24?

QUESTION: Broker questions if the RE-24 – *Vacant Land Real Estate Purchase and Sale Agreement* – creates a binding contract between the parties executing the document, and if so, when does the Buyer's earnest money become non-refundable, specifically in relation to the Buyer satisfaction language contained in Section 6.

RESPONSE: Yes. When two parties execute an RE-24, it becomes a legally binding contract; the parties are notified of this fact with a clear and conspicuous warning in the box at the top of the form. However, the contract is conditioned on certain circumstances. The two most prominent conditions are seller financing (enumerated is Section 3) and Seller satisfaction (enumerated in Section 6).

On an "all cash" contract, the financing contingency does not come into play as Paragraph 3(C) is not applicable. The other main contingency is enumerated in Section 6 of the RE-24 and allows the Buyer to cancel the contract within a certain amount of time, based upon Buyer's satisfaction, it states:

> (1) If BUYER **does not** within the strict time period specified give to SELLER written notice of disapproved items or written notice of termination of this agreement, BUYER shall conclusively deemed to have: (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to

> proceed with the transaction and (c) assumed all liability, responsibility and expense for repairs or corrections other than for items which SELLER has otherwise agreed to in writing to repair or correct. (Emphasis added).

The contract goes on to state that if Buyer does terminate the agreement within the strict time period, then "the parties will have no obligation to continue with the transaction and the Earnest Money shall be returned to BUYER." (Line 122).

According to facts presented to the Hotline, the contract was executed by the last party on March 13, 2014, which would trigger the 30 business day contingency which would then expire on April 24, 2014. If Buyer did not, before this date, provide Seller with a document that would constitute "written notice of termination," Buyer's earnest money becomes non-refundable and if Buyer thereafter breaches the agreement, the earnest money may be forfeited under the liquidated damages clause. (Section 29).

The specific RE-24 provided to the Hotline by Broker included additional language that stated:

> BUYER to have 15 day due diligence period to review all documents that the SELLER has regarding the development, including but not limited to the following: site engineering plans, community well information, etc.

This additional term appears to create a due diligence period for Buyer to conduct various document reviews, but in any event, does not cancel out the inspection terms provided in Section 6. If the parties had intended to limit the Buyer satisfaction period of Section 6, there is a blank on line 110 which is to be specifically used for that purpose. Since the parties did not fill in an alternate number, the Buyer had the default 30 business days to cancel the contract.

Notwithstanding the above, the Hotline review of this matter was limited to the specific sections inquired into by Broker and does not provide legal advice to either Buyer or Seller in real estate transaction disputes. Each party should be advised to obtain their own private legal counsel to instruct them on their respective legal rights.

Can a party terminate the contract when they have had no communication from the other side?

QUESTION: Agent represents the seller. Buyer had until 5 pm on Friday, May 16, 2014 to provide lender approval to seller. They have not heard anything from buyer. Agent questions if seller can legally terminate this agreement since they have had no communication from the buyer.

RESPONSE: Section 3(C) of the RE-21 states in relevant part:

> Within ___ business days (ten [10] if left blank) of final acceptance of all parties, BUYER agrees to furnish SELLER with a written confirmation showing lender approval of credit report, income verification, debt ratios and evidence of sufficient funds and/or proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. **If such written confirmation 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.** (Emphasis added).

Given the facts presented to the Hotline, the timeframe for the buyer to submit their lender approval was up on Friday at 5. If they did not receive anything from the buyer's, seller has three days (or the number of days decided by the parties) to notify the buyer that they will not continue the transaction. Agent should notify the buyers that seller is terminating the agreement.

Buyer terminated within their timeframe but the RE-20 did not get sent to the seller on time. Was the contract legally terminated?

QUESTION: Agent represents the buyer. During the inspection timeframe, the buyer decided to terminate the agreement. Buyer signed an RE-20 and timely sent an email to the seller. The RE-20 was not attached to the email, but the body of the agent's email clearly conveyed the intent to cancel the transaction. The seller did not receive the RE-20 during the timeframe to terminate, and now seller does not want to honor the cancellation of the contract. Agent questions if the contract was legally terminated even though the RE-20 did not get to the buyer in the strict time allotted.

RESPONSE: Section 10(A) of the RE-21 states in relevant part:

> BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items **or written notice of termination of this Agreement** based on an unsatisfactory inspection. (Emphasis added).

Given the facts presented to the Hotline, if the buyer's agent sent the email within the timeframe, clearly notifying the seller that the buyer was terminating, they most likely legally cancelled the contract regardless of the RE-20 not being received. The above stated section of the Agreement states that buyer must give notice to the seller. It does not require any specific language, form or agreement, just that written notice must be given.

However, the Hotline does not resolve disputes between buyer and seller. Agent should advise client to seek private legal counsel to determine their rights in this particular case.

Can a seller terminate because they don't like that the buyer has co-signers?

QUESTION: Broker represents the seller. The buyers were not able to obtain financing so they added co-signers to the loan and were approved. Seller is not fond of the idea that there are two new co-signers on the contract and Broker questions if this is enough reason to terminate the agreement.

RESPONSE: The RE-21 Financial Terms section states in relevant part:

> (C). This Agreement is contingent upon BUYER obtaining the following financing…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… and evidence of sufficient funds and or/proceeds necessary to close transaction in a manner acceptable to the SELLER(S) and subject only to satisfactory appraisal and final lender underwriting. If such written confirmation 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.

Given the facts presented to the Hotline, seller has not cancelled the agreement within the three business days allotted, and therefore cannot rely on the financing contingency to get out of the contract. The Hotline does not resolve disputes between buyers and sellers and broker may wish to advise her client to seek private legal counsel to determine their rights.

Is an inspection performed by a gas company sufficient for termination based on and unsatisfactory inspection?

QUESTION: Broker represents the buyer. Buyers sent over their Notice to terminate the contract after finding things in the home that were deemed unsatisfactory. They did this within the inspection time frame. Seller has put the home back on the market but is refusing to sign the RE-20. The title company is holding the earnest money and will not release it until both parties agree. Broker questions what the options are for his buyers.

RESPONSE: Section 10A of the RE-21 states in relevant part:

> BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies and BUYER'S expense. BUYER shall, within ___ (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

Given the facts presented to the Hotline, the buyers had found certain items to be unsatisfactory after inspecting the home. They were within the contract's strict time period when they gave seller their written notice of termination. 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 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 terms of the contract at issue and the Supreme Court's previous interpretation of similar contracts, it is likely that the Purchase and Sale Contract can be terminated by buyer for any slight item or condition which is not satisfactory to buyer. However, the unsatisfactory item or condition must be based on some sort of inspection. There is no requirement that inspections need to be performed by professional home inspectors and may be performed by the BUYER themselves.

The Hotline does not resolve disputes between buyer and seller. Brokers may wish to advise clients to seek private legal counsel.

What is the validity of a verbal contract?

QUESTION: Broker represents the seller. An offer was made verbally by a proposed buyer. Broker prepared the documents and sent them to the buyers. Broker has not received the signed contracts back from the buyers, but did receive oral notification that they would like to accept the offer. Broker questions if seller can continue to accept other offers.

RESPONSE: Yes, seller can accept other offers. Idaho Code § 54-2051 states in relevant part:

(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

(g) A legal description of the property. (Emphasis added).

Generally speaking, an offer to purchase must be in writing and must contain signatures in order for it to be a binding contract. Given the facts presented to the Hotline, the buyers did not sign the RE-21 and had only made a verbal offer. Since there is no document with both the buyer's and seller's signatures, they do not have a binding contract and seller can continue to accept offers.

When does the inspection timeframe start when a transaction has many counter offers and addendums?

QUESTION: Agent represents the seller. According to seller's broker, buyer submitted an offer on October 30. On November 1 all parties came to an agreement on Counter Offer #2. Once the buyers had previewed the property on November 8, buyer's agent sent over Counter #3 changing the purchase price. The parties went back and forth until both signed Counter #5 on November 10. On November 14 buyer terminated contract based on an unsatisfactory inspection. Broker is under the impression that the inspection timeframe started when Counter #2 was signed and questions if his interpretation is right.

RESPONSE: The RE-21 states in relevant part that "BUYER shall, within ___ business days (five [5] if left blank) of acceptance, complete these inspections." (Section 10, emphasis added). It also states "On this date, I/We hereby approve and accept the transaction set forth in the above Agreement and agree to carry out all the terms thereof." (Section 44, emphasis added).

Given the facts provided to the Hotline, it appears that acceptance was accomplished on November 1 when the parties signed Counter #2. The "counter offers" circulated after the execution of the Purchase and Sale Agreement and Counter #2 were technically addendums.

The Hotline does not resolve legal disputes between Buyers and Sellers. Broker should advise clients to consult private legal counsel in regards to their specific rights and obligations in these matters.

Can a seller revive a contract by singing the original RE-10 after buyer has terminated based on an unsatisfactory inspection?

QUESTION: Agent represents the buyers. According to the agent, beginning on Wednesday, November 12th buyers had ten business days to complete inspections. On the 19th buyers' agent sent over an RE-10 with a list of requested repairs. On the 21st seller countered back agreeing to fix some but not all of the requested items. On the 25th buyers terminated the contract. Later that same day sellers signed the original RE-10 stating that they will fix all of the requested items. Buyers no longer want property and agent questions if the seller is able to revive the contract once it has been cancelled.

RESPONSE: Given the facts presented to the Hotline, and given the specific timeline of events, it appears the buyers cancelled the contract within the time stated in Section 10 of the Purchase and Sale Agreement and more specifically, subsections (B)(3) and (B)(4) since both parties did not come to a consensus of items to be corrected before the contract was terminated. The seller's act of signing the original RE-10 was an attempt to revive the contract which cannot be done unilaterally; it requires all parties' consent.

The Hotline does not resolve disputes between buyers and sellers and all parties involved in this transaction should seek private legal counsel to determine their rights and responsibilities in this matter.

DISCLOSURE

Can a buyer hold a seller responsible if a foundation issue was not discovered until after closing?

QUESTION: Broker represented a seller on a property that closed a week ago. Before closing, heavy rain filled the window wells and caused water to leak through to the basement. Seller paid for clean-up and also offered to pay for exterior drainage. Buyer decided that seller could pay for the emergency clean-up service, but they would take care of the drainage system once they own the property. Now, while working on some of these drainage issues, buyers have found a crack in the foundation and want seller to pay for repairs.

RESPONSE: Idaho Code § 55-2507 states:

> MANDATORY REQUIRED DISCLOSURE STATEMENTS. To comply with the provisions of this chapter, a form shall set forth a statement of purpose of the form, including statements substantially similar to the following:

> (1) The form constitutes a statement of the conditions of the property and of information concerning the property actually known by the transferor.
> (2) That unless the transferee is otherwise advised in writing, the transferor, other than having lived at or owning the property possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee.
> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) That the statement is not a substitute for any inspections.
> (5) That the transferor is familiar with the particular residential real property and each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.
> According to I.C. § 55-2507, Seller is required to disclose the condition of the property and any information actually known by the Seller. Further, any disclosure statement made by the Seller regarding the property condition is not a substitute for any inspections performed at the request of the Buyer.

Given the information provided to the Hotline, the seller was unaware of the issue with the foundation, and therefore did not disclose this information. Therefore, seller may have performed their disclosure of the property honestly and in good faith. Also, any disclosure made by the seller was not a substitute for an inspection, and buyer was given the opportunity to have the seller pay for the costs of the drain system yet buyer refused. Buyer was also given the opportunity to have these things inspected and in fact is encouraged to do so in Section 10 of the Purchase and Sale Agreement.

Is a mobile home owner exempt from filling out the RE-25 since it is not a permanent structure?

QUESTION: Broker would like to know if sellers of mobile homes are exempt from filling out the RE-25 since it is not a permanent structure.

RESPONSE: No. Idaho Code § 55-2504 states in part:

> Any person who intends to transfer any residential real property, including nonowner occupied rental property…by any of the methods as set forth herein shall complete all applicable items in a property disclosure form prescribed under section 55-2508, Idaho Code. Except as provided in section 55-2505, Idaho Code, this chapter applies to any transfer by sale, exchange, installment sale contract, a lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real

> property improved with or consisting of not less than one (1) nor more than four (4) dwelling units. (Emphasis added).

Idaho law defines "residential real property" as:

> Real property that is improved by a building or other structure that has one (1) to four (4) dwelling units or an individually owned unit in a structure of any size. This also applies to real property which has a combined residential and commercial use.

Every transfer of residential property requires a Property Disclosure Form to be filled out. A mobile home is "residential real property" according to the legal definition above. The only exceptions are listed in Idaho Code § 55-2505 and selling a mobile home does not fall under the list of exemptions.

Does a seller need to disclose that the neighboring property has a cockroach infestation?

QUESTION: Agent is representing the seller. The seller disclosed to agent that the home next door has a cockroach infestation. Sellers have had pest control come out to spray the area in between the homes so that the infestation will not migrate over to the listed property. Agent wants to know if this infestation next door is something the agent needs to disclose when they list the home.

RESPONSE: Idaho Code § 55-2506, which discusses the required disclosures under the Property Condition Disclosure Act, states in relevant part:

> Seller shall disclose "material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances."

In addition, Idaho Brokerage law, Idaho Code § 54-2086(1)(d), requires agents to disclose all adverse material facts known to the licensee. Broker and seller will need to decide whether or not the infestation rises to the level of an "adverse material fact", and for that matter if the infestation is even a condition related to the property being listed. The Hotline cannot act as a substitute for providing sellers legal advice, and only advises Brokerages on Brokerage duties. If seller is unable to make a decision, seller should consult seller's own legal counsel.

Is emailing the Property Disclosure Form a valid form of delivery?

QUESTION: Broker noticed that Idaho Code § 55-2510, which deals with property disclosure delivery requirements, does not mention email as a valid form of delivery.

RESPONSE: Idaho Code § 55-2510 states in relevant part:

> The transferor's delivery…of a property disclosure form…and the prospective transferee's delivery of an acknowledgment of that form shall be made by personal delivery to the other party or his agent… by ordinary mail or certified mail, return receipt requested or by facsimile transmission.

Broker was right to question this statute. The Uniform Electronic Transactions Act (Idaho Code § 28-50-107) states:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.
> (e) If a law requires any notice or other record to be sent by certified mail, the record may, with the express consent of the recipient, be transmitted electronically.

Given the facts presented to the Hotline, if the delivery of this form was made via email, and the other party acknowledged its receipt, that is most likely the express consent of the recipient as mentioned above. However, Broker should contact IREC about this specific statute to ensure compliance and could recommend that it should be amended to include electronic mail.

Should it be disclosed that the sale is contingent upon the sale of another home?

QUESTION: Broker represents the seller. Broker states that buyer had the water company come out to inspect the property and buyer was made aware that the water system did not meet federal regulations. Broker questions if brokerage's agent could be liable for not disclosing this information.

RESPONSE: Idaho Code § 54-2087 4(a) states in relevant part:

> Brokerage and its licensees owe the following agency duties and obligations to a client: "disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee."

Given the facts presented to the Hotline, if Broker's agent was not aware of an issue with the backflow system, agent could not disclose this information and therefore the agent and broker would not be held responsible. Further, agents are under no obligation to perform inspections on listed property.

The seller could be liable if they knew about the issue with the water system and did not disclose the situation to buyer. However, the Hotline does not solve disputes between buyers and sellers, and broker should advise client to seek private legal counsel to determine their rights in this matter.

Does a seller need to disclose if the roof has been repaired during the course of the listing?

QUESTION: Agent represents the seller. The property was listed for over two years. During the course of the listing the roof was repaired to fix a leak but it was not disclosed on any forms. The property sold and now the new owner discovered that the roof is leaking. Was seller obligated to disclose that the roof was repaired?

RESPONSE: The seller's responsibilities regarding the delivery of the disclosure form are:

> 55-2509. DELIVERY OF DISCLOSURE FORM AND ACCEPTANCE. Every transferor shall deliver, in accordance with section 55-2510, Idaho Code, a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) days of transferor's acceptance of transferee's offer. Every prospective transferee of residential real property who receives a signed and dated copy of a completed property disclosure form as prescribed under section 55-2508, Idaho Code, shall acknowledge receipt of the form by doing both of the following:
> (1) Signing and dating a copy of the form;
> (2) Delivering a signed and dated copy of the form to the transferor or his agent or subagent.

Given the facts presented to the Hotline, even though the disclosure form was filled out prior to the roof leak and repair, seller has an obligation to deliver an updated and correct Property Disclosure Form to the offeror within 10 days of accepting the offer.

The Hotline does not resolve disputes between buyer and seller. Agent may wish to advise her clients to seek private legal counsel to determine their rights and responsibilities in this matter.

DUTIES TO CLIENT & CUSTOMER

Does a broker have a duty to disclose radon testing?

QUESTION: Brokerage is acting as a dual agency in a transaction. Broker is the listing agent for a seller she had worked with 2 years ago when he was buying the property that is now listed. When the seller bought the home, he had radon testing done but the results were low and apparently not at an alarming level. Now he is selling the property, but did not mark anything

down in the RE-25 about radon. Buyer decided to have his own radon testing done, however he signed off on the inspection contingency before the results of the testing came back. Now that the results are in and are positive for radon, buyer wants seller and broker to pay for the testing and broker questions if she and seller are liable.

RESPONSE: Idaho Code § 54-2087 4(a) states in relevant part:

> Brokerage and its licensees owe the following agency duties and obligations to a client: "disclosing to the client all adverse material facts actually known or which reasonably should have been known by the licensee."

Given the facts presented to the Hotline, if broker was not aware of the radon testing and had never seen the results from her client, broker would have no reason to disclose the radon testing and broker would not be held responsible. The seller could be liable because he had the radon testing done previously and may have been required to disclose it to the new buyer. However, the Hotline does not solve disputes between buyers and sellers, and broker should advise both parties to seek private legal counsel to resolve this issue.

Is a licensee required to closely inspect the title report with their client?

QUESTION: Agent has a client who wants to sell his home. Agent also represented the client when he bought the same property. Now, they have discovered that there is an easement across the property that was not disclosed or known when he bought the property ten years ago. Agent questions if he is at fault for not reading through the title report with his client.

RESPONSE: Given the facts presented to the Hotline, the easement was defined in the title report. Buyer may not have been aware of the easement as it was on the last line of the report. Agents have no affirmative duty to inspect title documentation and/or walk through the report step-by-step with their client. If the buyer received the title report which disclosed the easement when he purchased the home, legal action by the buyer against any other entity will likely fail.

Does listing agent have any duty to disclose multiple offers to the buyer?

QUESTION: Listing Agent would like to know if it is required by law to disclose all multiple offers to Buyer and Buyer's agent.

RESPONSE: Idaho Code § 54-2083(6) defines confidential client information:

> (6) "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and

> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code…

Idaho Code prohibits Agents from disclosing confidential client information to third parties. Offers to purchase are not a matter of public record, could potentially be detrimental to the client if disclosed, and are not required to be disclosed under any particular statute. Therefore, unless there is a contractual provision stating that all offers are to be disclosed to Buyer and Buyer's agent, offers should not be disclosed without client approval, as these purchase offers may be considered confidential client information.

What are a dual agent's responsibilities if a dispute arises after closing?

QUESTION: Broker represents the seller. Another agent in the office represented the buyer, so they are in a limited dual agency situation. The buyer needs a new furnace because there was an issue with the old one. Broker has been trying to help find a solution but has yet to succeed. The buyer called to inform her of a possible lawsuit to get the furnace situation resolved. She questions what her next step should be.

RESPONSE: Broker's efforts to help buyer and seller find a solution are admirable. However, given the facts presented to the Hotline, this is a post-closing dispute between the buyer and the home warranty company and/or the seller. Brokerage should inform buyer and seller that Broker can no longer assist the parties and advise each to seek private legal counsel.

EARNEST MONEY

Can the earnest money be released to the seller if they feel as though the buyers did not explore other financing options?

QUESTION: Agent represents the buyer in a transaction on a condo. Her offer was accepted by the seller and the buyer proceeded to apply for financing. Ultimately, buyer was unable to obtain financing because the lender did not like the fact that one investor owned several of the condos. There is a potential earnest money dispute as agent states the seller feels like the buyer did not explore other financing options. Agent would like to know who is entitled to this earnest money.

RESPONSE: The RE-21 Financial Terms section states in relevant part:

> (C). This Agreement is contingent upon BUYER obtaining the following financing… In the event BUYER in unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request.

Given the facts presented to the Legal Hotline, the buyer was not able to obtain financing. If the buyer exercised good faith efforts to obtain the funds, then according to the terms of the contract the buyer is entitled to a return of their earnest money. However, if seller has made claim to the earnest money then the responsible broker has three options in an earnest money dispute. Idaho Code § 54-2047 states:

> DISPUTED EARNEST MONEY.
> (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall: (a) Notify each party, in writing, of the demand of the other party; and (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.
> (2) The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.
> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

Similar language is contained in the RE-21 Section 30. The Hotline does not resolve disputes between buyer and seller. Agent should advise client to seek private legal counsel to determine their rights in this matter.

What happens to the earnest money in the event of a party's default?

QUESTION: Broker represents seller in a sale that did not close. The buyer's financing was initially approved, though on the day of closing, the lender contacted the broker stating that the buyer had not been honest on his loan application forms so the loan had been denied. Buyer's broker and lender have tried several times to reach out to buyer but have received no response. The contract ended on January 31st, and broker questions if she can release the earnest money to her sellers, because she believes the buyer did not act in good faith.

RESPONSE: Idaho Code § 54-2047(2) states:

> 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.

The RE-21 explains what happens if either party defaults. Section 29 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.

Given the facts presented to the Hotline, if broker feels that buyer did not use good faith then broker can release earnest money at broker's own discretion, and if the buyer has defaulted in the agreement, seller can elect either of the two options outlined in Section 29 of the RE-21. If seller chooses option 1, broker can rely on that clause to distribute the money to seller.

The Hotline does not provide opinions on earnest money disputes. Broker should instruct clients to seek private legal counsel to determine client's rights and responsibilities.

What should the responsible broker do in an earnest money dispute?

QUESTION: Broker is acting as a dual agent in a transaction. The buyer's loan was contingent on the house appraisal price, therefore when the home appraised for $20,000 less than the asking price, the financing fell through. Broker questions what to do with the earnest money. Pursuant to Section 3C of the RE-21, buyer is entitled to the earnest money when the appraisal is less than the purchase price, however the buyer and seller are currently disputing $1000 of the earnest money.

RESPONSE: Idaho Code § 54-2047 states:

> (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 the facts presented to the Hotline, broker can carry out any of the three options stated above. However, the Legal Hotline does not make determinations regarding Earnest Money disputes, and broker should advise both buyer and seller to seek private legal counsel to determine each party's rights and responsibilities.

What is the necessity of signing the RE-20 for release of earnest money?

QUESTION: Buyer's broker questions if she can release the earnest money to the buyer, even though the sellers have not signed a written release (RE-20). Broker has been trying to get the sellers to sign it for weeks, but they will not do it. Do the sellers need to sign the release, or can she go ahead and release the earnest money back to the buyers?

RESPONSE: Given the facts presented to the Hotline, broker does not believe there is an earnest money dispute in this case. The sellers are not disputing the earnest money; they are simply refusing to sign to release it. The parties do not need to sign the Release of Earnest Money in order for the earnest money to be returned to the buyer. The purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may assert. It is always best practice to obtain one, but one is not required.

The broker should write a letter to the sellers stating that unless they make broker aware of an earnest money dispute, the earnest money will be released back to the buyer within 5 days. Broker should note in her file that she tried many times to get the sellers to sign the release form, and keep a copy of the letter sent to the sellers for her records.

FORMS USE

Who is responsible for payment when the Costs Paid By Section (Section 17) of the RE-21 is marked "N/A?"

QUESTION: Broker represents the seller on a cash only transaction. Section 17 of the RE-21 is filled out stating the seller agrees to pay up to $500 of closing costs, lender fees and prepaid costs. Everything in the box is checked as N/A except for Title insurance. Buyer wants seller to pay HOA dues, but seller's broker questions if they need to pay for that when it is not covered anywhere in this section.

RESPONSE: Section 17 of the Purchase and Sale Agreement states:

> **Upon closing SELLER agrees to pay up to EITHER _____& (N/A if left blank) of the purchase price OR $_____ (N/A if left blank) of lender-approved BUYER'S closing costs, lender fees,**

> **and prepaid costs which includes but is not limited to those items in BUYER columns marked below.**

Given the facts stated to the Hotline, the seller is only responsible for the items checked in the table. If all are checked as N/A, seller is not responsible. There is nothing in the table that mentions HOA dues, so seller does not have an obligation to pay for those. Seller will have to pay for closing costs and anything checked as "SELLER" in the table in Section 17. If the total amount of closing costs, lender fees and prepaid costs is less than $500, seller is only obligated to pay up to the total amount of those costs.

What form is appropriate to use when a licensee represents both the buyer and the seller?

QUESTION: Broker is from Washington and has recently become a broker in Idaho. He questions what the proper forms are to use in the event that a broker is representing both the buyer and the seller.

RESPONSE: The Representation Agreement Forms (RE-14 and RE-16) have sections specifically for dual agency situations. Section 8 in the Buyer Representation Agreement (RE-14) and Section 18 in the Seller Representation Agreement (RE-16) are both titled "Consent to Limited Dual Representation and Assigned Agency." When a broker is acting as a limited dual agent, both the buyer and seller in the transaction must initial these sections. If broker does not have consent from all parties in the transaction, broker cannot act as a limited dual agent. Broker should also read Idaho Code § 54-2088 very thoroughly before entering into a limited dual agent agreement so broker is aware of his duties and obligations to both clients.

When is it appropriate to initial the late approval acceptance in the RE-21?

QUESTION: Buyer and Seller were to close on an offer by 5:00 p.m. on a Friday. However, Buyer and Agent did not receive acceptance from Seller until Saturday. Agent questions when it is appropriate to initial the late approval acceptance in paragraph 41 of the RE-21 Purchase and Sale Agreement.

RESPONSE: Paragraph 41 of the RE-21 states:

> **41. ACCEPTANCE**: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) his A.M. P.M. If acceptance of t offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE _____. **If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER**. (Emphasis added.)

Buyer is able to proceed with an accepted offer subsequent to the allotted time for acceptance if they so choose. When negotiating the contract, the parties may agree on a specific amount of

time allowing the Buyer to approve of a late acceptance, or the time will be 3 calendar days if left blank. If the Buyer decides to move forward within the allotted time, the initialed copy must *immediately* be sent to the Seller.

Given the information provided to the Hotline, Buyer received a late acceptance on Saturday. If Buyer approves this late offer, Buyer should initial the appropriate area and immediately deliver the approval of late acceptance to Seller. Immediately delivering the approval may mean that an initialed copy is faxed, emailed or hand delivered directly following the Buyer's approval of the late acceptance.

It is not necessary for Buyer to initial the late approval when preparing the offer; because the section should only be initialed if and when Buyer chooses to approve a late acceptance. Paragraph 41 of the RE-21 is designed to provide the Buyer with the option of either approving a late offer by initialing the contract and returning it immediately to Seller or by terminating the contract and not initialing since Seller submitted an offer past the allotted time frame for acceptance.

In this instance, Buyer received a late offer on Saturday. Therefore, if Buyer still wishes to accept Seller's offer, Buyer has a specific time frame to initial and promptly return the agreement to Seller. If Buyer does not wish to accept the late offer because Seller did not meet the specified deadline, Buyer does not initial paragraph 41 of the RE-21.

Do the Idaho Association of REALTORS® forms allow for a buyer or seller to complete a transaction without disclosing their identity?

QUESTION: Broker has a client who would like to purchase a home but does not want to disclose who they are on any of the forms. He questions whether or not this is something that can be done.

RESPONSE: In Idaho, any entity can own real property, including Trusts, LLCs, Corporations, etc. Buyer can form a business entity to enter into this transaction without divulging personal information. If this is how the buyer would like to proceed, Broker should make sure that the Assignment section (Section 37) of the RE-21 is checked that the Agreement can be transferred or assigned.

When should counter offers and addendums be used?

QUESTION: Agent would like to know the proper use of Addendums and Counter Offers and the appropriate time to use each form during a transaction.

RESPONSE: The RE-11 states:

> "Addendum" means that the information below is **added** material for the agreement {such as lists or descriptions} and/or means the form is being used to **change, correct or revise** the agreement {such as modification, addition or deletion of a term}.

Typically, Counter Offers are used prior to the seller's acceptance of the RE-21 and are commonly used to change the purchase price and/or other terms of the Purchase and Sale Agreement before the parties sign the RE-21. After the RE-21 has been signed by both parties, the Addendum form should be used to modify the Purchase and Sale Agreement.

Can a seller use non-IAR forms in a transaction?

QUESTION: Broker is involved in a transaction in which the clients do not want to use IAR Forms. They have their own Forms and would prefer to use those. Broker questions what he should do in this situation and if there are any repercussions for not using the IAR Forms.

RESPONSE: Given the facts presented to the Hotline, the seller is a corporate entity selling a commercial property. It is not uncommon for corporations to insist on using their own forms in a commercial real estate transaction. There is no rule that mandates REALTORS® to use a specific form. It is best practice to use the IAR Forms, however if a client insists on using their own there is no law from stopping the broker from using these forms. It would be prudent to confirm in writing with client that broker is not familiar with the client's forms and therefore assumes no responsibility for their use, appropriateness or legality. If the client wants to use their own Representation Agreement, it is important that broker run it by his legal counsel for review. Brokerage can always refuse to take the client's business if client insists on documents that broker is not comfortable with.

If a seller is exempt from filling out the RE-25, do they still need to initial each page?

QUESTION: Agent questions what the best practice is for contracts in which seller is exempt from filling out the Property Disclosure Form. Do the parties need to initial every page in the document, or will just initials on the first page and signatures on the last page suffice?

RESPONSE: From a legal standpoint, a contract that only has the signature page signed but did not have any initials would be sufficient. However, the Hotline has been informed by the Idaho Real Estate Commission that having pages that are missing initials can be problematic from their point of view. IREC prefers that every page be initialed and that both buyer and seller sign the contract. Therefore, it is best practice to advise agents to have all parties initial each page and sign all pertinent parts of the contract.

What form should be used to revive an expired Representation Agreement?

QUESTION: Broker represents the sellers. The home was shown to buyers during the term of the representation agreement. The same buyers put in an offer after the agreement had expired. Broker questions what paperwork is required to revive the representation agreement.

RESPONSE: Broker can extend the representation agreement in order to receive the commission. The sellers can sign a RE-16A to extend the original contract. The document should be prepared to include language in the "Other" Section that reads "This agreement specifically revives and continues the Original Broker's Representation Agreement referenced above."

ADVERTISING/MARKETING

A licensee has creative marketing ideas in which she could end up personally purchasing some properties. Does she need to disclose her license and brokerage name if it is personal?

QUESTION: Agent is thinking of some creative marketing ideas including properties that she wants to personally buy. She questions whether she still has to disclose that she is a licensee and her brokerage information when it is a personal transaction.

RESPONSE: Based upon the facts provided to the Hotline, agent should be advised that as a licensee, agent must conduct all real estate transactions through the brokerage and fully disclose her status as a real estate licensee. Idaho Code § 54-2055 Paragraph 3 states:

> Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the brokerage with whom he/she is licensed, whether or not the property is listed.

Although agent wants to conduct a personal transaction in order to purchase a property, agent still has to disclose and conduct all business through the brokerage she works for. In addition, licensee should review the applicable law relating to advertising and be aware that the Idaho Real Estate Commission keeps a close eye on all advertising. It would be strongly advised for agent to run the proposed marketing tactics by the State to avoid negative consequences.

Can Craigslist be used to advertise real estate?

QUESTION: Seller would like agent to advertise her real estate property on Craigslist. Agent would like to know if there are specific advertising requirements she must follow in order to utilize Craigslist.

RESPONSE: Idaho Code §54-2053 requires the following:

> (1) Only licensees who are actively licensed in Idaho may be named by an Idaho broker in any type of advertising of Idaho real property, may advertise Idaho property in Idaho or may have a sign placed on Idaho property.
> (2) All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.
> (3) All advertising by licensed branch offices shall contain the broker's licensed business name.
> (4) No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a

> distinct probability that such information will deceive the persons whom it is intended to influence.

Electronic venues such as Craigslist are not prohibited means for real estate property advertisement. Therefore, agent must adhere to Idaho Law as cited above when advertising seller's property on Craigslist.

MISCELLANEOUS

Does the lease transfer when an investment property sells?

QUESTION: Agent represents seller of an investment property in foreclosure, where only half of the duplex is listed and would like to know if the current lease would have to be carried over to the new buyers and respect the terms of the lease or can the tenant be evicted immediately?

RESPONSE: Idaho Code § 55-208 (1) states in relevant part:

> Termination of tenancy at will. A tenancy or other estate at will, however created, may be terminated:
> (1) By the landlord's giving notice in writing to the tenant, in the manner prescribed by the code of civil procedure, to remove from the premises within a period of not less than one (1) month, to be specified in the notice;

In this instance, Agent asked if the landlord needed to respect the current tenant's lease or if they could evict the tenant immediately. Unless stated otherwise in the previous lease agreement, the new owner of the duplex wouldn't have a lease agreement with the current tenant. Therefore, tenant likely is considered a tenant at will under the new owner. As stated above, Idaho Code requires that the landlord give notice in writing to the tenant within a period of not less than one month to terminate the tenancy.

Can a Trustee list the property if their role as the Trustee is being challenged?

QUESTION: Agent has a client who is a Trustee, and is attempting to sell a property. There is a dispute between the siblings because they do not approve of the Trustee. A lis pendens was filed but the judge threw it out. The siblings have since appealed the issue, and agent questions whether or not this appeal hinders the sale of the home.

RESPONSE: Given the facts presented to the Hotline, the appeal filed on the trust will not affect the Trustee's ability to list the property or to sell it. Rule 13 of the Idaho Appellate Court Rules states:

> Temporary Stay in Civil Actions Upon Filing a Notice of Appeal or Notice of Cross-Appeal. Unless otherwise ordered by the district court, upon the filing of a notice of appeal or notice of cross-appeal

> all proceedings and execution of all judgments or orders in a civil action in the district court, shall be automatically stayed for a period of fourteen (14) days. Any further stay shall be only by order of the district court or the Supreme Court.

If the lower court has not entered a further stay, Trustee is free to list the property after 14 days.

The Hotline does not weigh in on disputes between parties, and broker should advise seller to seek private legal counsel to determine their rights and responsibilities, and seller should consult seller's trial counsel to confirm the Hotline's facts and assumptions and to ensure no stay has been obtained by the siblings.

Are one seller's signatures enough if the other seller is not physically capable to sign her name to anything?

QUESTION: Agent represents an older couple in selling their home. Agent states that the wife has suffered many strokes and finds it difficult to sign documents. The husband signed everything for her. There is no power of attorney, so agent is wondering if the husband's signatures are enough to list and sell the home.

RESPONSE: The listing contract can be signed by only one owner of community property, although it is best practice to always obtain both signatures. However, to transfer ownership of the property both owners' signatures are necessary. Agent's clients should get a power of attorney to ensure that the husband can legally sign the deed for both parties.

Can lenders seek deficiency judgments?

QUESTION: Agent represents a client whose property was foreclosed. Agent questions the legality of a lender seeking to recover the monetary difference between the amount owed on the property versus the amount recovered at a foreclosure sale, otherwise known as a deficiency judgment.

RESPONSE: In Idaho, deficiency judgments are legal both under mortgages (Idaho Code § 6-108) and deeds of trust (Idaho Code § 45-1512). However, several factors come into play in determining the amount which may be claimed under a deficiency judgment. Generally speaking, the amount must relate back to the "fair market value" of the property. Obviously this term varies from market to market and from house to house. Agent should advise client to seek legal counsel if client needs advice specific to client's property, loan or deficiency. In addition, on deeds of trust the lender has only three months from the sale to initiate an action for collection.

Further, if the lender chooses to discharge or write off some of the indebtedness, another situation may come into play which agent's client may want to be aware of. The IRS requires a creditor to file a Form 1099-C when a debt is cancelled by an identifiable event, such as "a discharge of indebtedness under an agreement between the creditor and the debtor to cancel the

debt at less than full value." However, Form 1099-C states, "This form is provided for informational purposes only."

When a buyer receives a Form 1099-C for a discharged debt from a creditor, receipt of the 1099-C does not prohibit the creditor from later obtaining a deficiency judgment against the debtor. The 1099-C is provided for informational purposes, and the creditor is required by the IRS to send out the form to the IRS and to the debtor. In some circumstances, the discharged debt can be treated as income of the debtor on the debtor's individual income tax return.

However, in 2007 Congress passed the Mortgage Forgiveness Debt Relief Act, which allows some debtors to forgive the "income" from the written off debt. Currently this act has expired but it is believed Congress will revive it in the coming months. Debtors should watch this issue closely. Nonetheless, whether a debtor qualifies under this act is a factually specific question. Agent's client may wish to consult an accountant or private legal counsel to determine her responsibilities, rights, and remedies regarding deficiency judgments and relief under the Mortgage Debt Relief Act.

Would a weather vane be considered an included item as defined in the Purchase and Sale Agreement Form?

QUESTION: Broker represents the sellers. Upon closing, the sellers took the weather vane because it was a family heirloom. Its inclusion or exclusion had not been discussed with the buyers. Buyers assumed it was included with the purchase because it was attached. Broker questions if weather vanes would be considered an attached fixture.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100."

Determining whether a particular item is attached to the property has to be done on a case by case basis. Given the facts presented to the Hotline, if the weather vane was bolted down it is most likely an attached fixture.

If there is any question about what is included in the purchase, it is the best practice for buyer or seller to specifically address the matter in the blank lines immediately following Section 5 of the RE-21. Nevertheless, the Hotline does not resolve disputes between parties.

Are curtains and curtain rods considered "window coverings" in Section 5 of the RE-21?

QUESTION: Agent called asking if curtains and curtain rods were considered window coverings as noted in the RE-21 Section 5, and asked for clarification of a previous Hotline response.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are **INCLUDED IN THE PURCHASE PRICE** (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100." (Emphasis added.)

According to RE-21 Section 5 above, if the existing curtains and curtain rods are "attached" to the real property or are considered "window coverings" they are included in the purchase of the home unless excluded in Section 5(B).

Determining whether a particular item is attached to the property has to be done on a case by case basis. For example, if the curtains are fabric material draped over the curtain rods and can be easily removed without damaging the property or the attached rods, the hanging curtains are most likely not fixtures. However, if the curtains are blinds, roller shades, wood paneled, etc., and cannot be removed without damaging the property, those would most likely be considered attached fixtures. Each case also depends on what the parties would consider "window coverings."

If there is any question, buyer or seller should specifically address the matter in the blank lines immediately following Section 5 of the RE-21. That is what they are there for. The Hotline does not resolve disputes between parties. Brokers may advise clients to seek legal counsel to determine what would be considered permanent fixtures in this particular case.

If Section 37 (Prorations) of the RE-21 is checked "No," who has rights to the fuel in the tank?

QUESTION: Agent represents buyer. The Prorations Section (37) of the RE-21 was checked "No." Now, after closing, there is a dispute as to who has rights to the fuel in the tank. Agent questions what the correct interpretation of Section 37 is.

RESPONSE: Section 37 of the Purchase and Sale Agreement states:

> **PRORATIONS:** Property taxes and water assessments (using the last available assessment as a basis), rents, interest and reserves, liens, encumbrances or obligations assumed, and utilities shall be prorated as of _____. BUYER to reimburse SELLER for fuel in tank ☐ Yes ☐ No (Not Applicable if left blank). Dollar amount may be determined by SELLER's supplier.

If the "No" box is checked, buyer does not reimburse seller. Assuming the fuel was owned by the seller at closing and seller did not ask to be reimbursed, then buyer would have acquired the fuel through the purchase of the property.

However, if there is a contract with the fuel company that contract may affect all parties' rights to the fuel. Buyer should be advised to hire legal counsel to review the gas company contract and determine buyer's rights in this situation.

The Hotline Top Questions

THE LEGAL HOTLINE

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Idaho Association of REALTORS®

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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 Association of REALTORS® (IAR) and, in that capacity, operates the Legal Hotline to provide general responses to the IAR regarding Idaho real estate brokerage business practices and applications. A response to the IAR which is reviewed by any REALTOR® member of the IAR 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 IAR, which consent may be withheld in their sole discretion. For legal representation regarding specific disputes or factually specific questions of law, IAR 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 IAR.

Note on Legislative Changes

The responses contained in the 2013 "Hotline Top Questions" are based on the law in effect at the time, and the IAR forms as printed in 2013. 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 2014 legislative session. In addition, IAR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2013 "Hotline Top Questions." Before relying on the information contained herein, Licensees should review legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which may reflect the 2014 legislative changes to the law.

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AGENCY

Can Agent list property if Seller does not hold the title?

QUESTION: Agent has been contacted by a potential Seller to list a number of pre-sale new construction properties. However, the Agent has been contacted by the builder, who is not listed on title, but who is under contract with the developer to purchase the lots. Agent questions if she may list the properties when the Seller does not actually hold the title to the lots.

RESPONSE: The Idaho Real Estate Commission has indicated that it permits licensed agents to market and have clients enter into binding contracts for real property in which the Seller possesses only "equitable title." This means that a Seller may list a property that they are contracted to buy, prior to actually purchasing the property. Additionally, The Hotline is unaware of any Idaho statute or case law that expressly prohibits a potential Seller from entering into a contract for the sale of property in which the seller holds "equitable title." With complete disclosure to all parties, it may be possible to market and sell properties under "equitable title" and still remain in compliance with Idaho law.

Given the information provided to the Hotline, it is likely that the builder of the structures has "equitable title" of the property, in that he may be in a pending transaction with the developer to purchase the lots. If this is indeed the case, then the Seller and the Seller's Agent may market and procure a Buyer for the property, contingent upon the Seller obtaining fee simple title in the future.

However, it should be emphasized that until the builder of the property closes on the first transaction with the developer and the deed is delivered to him, he will not be able to legally convey the property to any other party. Agents should take caution to ensure that full disclosure has been made to all parties that the Seller possesses "equitable title" and will be unable to pass clear title to the Buyer until the Seller closes the first transaction.

Do personal transactions need to be conducted through the brokerage?

QUESTION: An agent inquired about buying and selling personal properties both by themselves, with their spouse, and through a company. Agent also inquired whether there were any restrictions as to simultaneous closings, pocket listings, or selling by owner. Agent questions which of these types of transactions must be conducted through her brokerage.

RESPONSE: Idaho Code § 54-2055 Licensees Dealing with Their Own Property states in relevant part that:

> (2) "A licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or

> any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.
>
> (3) "Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed." (Emphasis added)

According to this statute, a licensed agent must disclose their status and conduct transactions through their brokerage on all personal transactions, even if the property is not listed.

The Idaho Real Estate Commission (IREC) issued Guideline #24 that addresses the applicability of the aforementioned statute. In short, the Guideline states that all real estate transactions in which the licensee, in her personal name, has an ownership interest must be conducted through her brokerage. However, if the property is being bought or sold by a business entity, in which the licensee owns an interest, said transaction, is not required to be conducted through the licensee's brokerage.

In this instance, the licensee is interested in buying and selling personal properties, most likely in order to "flip" the property for a profit. If the licensee or their spouse wants to buy or sell property personally, the transaction should be processed through the brokerage which the agent is licensed. However, if a company (which does not hold a real estate license), with whom either licensee or spouse is associated, were to buy or sell property, the transaction would not need to go through the brokerage. Personal transactions are not required to be listed with MLS and can be sold by owner. However, that does not change the requirement that the transaction be processed by the brokerage.

How does a brokerage co-list with another brokerage?

QUESTION: Agent has a friend that owns property in Salmon, Idaho. The friend has already engaged a brokerage in Salmon that has listed the property for over a year now. In an attempt to broaden the advertisement base for the property, the friend approached agent to see if she was able to list the property on other MLSs. Agent contacted the Salmon brokerage and negotiated terms for commission splits and allowing agent to list the property on the other MLSs. However, agent would like to know if she needs a representation agreement with her friend or if there is some type of co-listing agreement she could enter into with the Salmon brokerage.

RESPONSE: Idaho Code 54-2054(2) deals with real estate licensees' ability to split commissions with other licensees, and states in relevant part as follows:

Fee-splitting with unlicensed persons prohibited. Unless otherwise allowed by statute or rule, a real estate broker, associate broker or salesperson licensed in the state of Idaho shall not pay any part or share of a commission, fee or compensation received in the licensee's capacity as such in a regulated real estate transaction to any who is not actively licensed as a real estate broker in Idaho or in another state or jurisdiction. The Idaho broker making the payment to another licensed person is responsible for verifying the active licensed status of the receiving broker.

Applying the facts given to the Hotline, it appears that agent has entered into a written contractual relationship with the Salmon brokerage for a commission split and permission to list the property under Agent's brokerage. However, it is assumed that the friend already entered into an exclusive representation agreement with the Salmon brokerage. It would therefore be inappropriate for agent to enter into another representation agreement with the friend. Nevertheless, as agent is an active licensee in the state of Idaho, it is permissible to split the fee between the Salmon brokerage and the agent.

Please note that the Hotline is unaware of local MLS rules and regulations. Agent is encouraged to check her local MLS rules and regulations to ensure that her activities of listing her friend's property on her MLSs can be done without a representation agreement. Other than Idaho Code § 54-2054(4), which prohibits interference with another brokerage's agreement, the Hotline is unaware of any Idaho statue or case law that would prohibit agent from listing the friend's property on other MLSs without a representation agreement.

Agent may wish to consult private legal counsel concerning her rights and obligations regarding both her commission split agreement and her friend's representation agreement.

Can an agent bring clients from an old brokerage?

QUESTION: Broker has a new agent who had clients sign a buyer representative agreement at old brokerage and put a zero on the cancellation fee provision for if clients decided to go to another agent or brokerage. Broker wants to know if it is acceptable for the clients to follow the agent to her brokerage because the cancellation section states zero.

RESPONSE: Idaho Code § 54-2056 (5) states in relevant part:

> (5) Property of the broker. Upon termination of the business relationship as a sales associate licensed under a broker, the sales associate shall immediately turn over to the broker all listing information and listing contracts, keys, purchase and sale agreements and similar contracts, buyer brokerage information and contracts, and other property belonging to the broker. A sales associate shall not engage in any practice or conduct, directly or indirectly, which encourages, entices or induces clients of the broker to terminate any legal business relationship with the broker unless he first obtains written permission of the broker.
>
> Idaho Code § 54-2054 (4) states in relevant part:
> (4) Interference with real estate brokerage agreement prohibited. It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client. Communicating a company's relocation policy or benefits to a transferring employee or consumer shall not be considered a violation of this subsection so long as the communication does not

> involve advice or encouragement on how to terminate or amend an existing contractual relationship between a broker and client.

Given the facts provided to the Hotline, the Broker has a new agent coming to her brokerage and wants to know if Agent's clients can follow her since they signed a buyer representative agreement at the old brokerage with zero cancellation fees. However, client representation agreements are with the brokerage and not the Agent. Per the above quoted statutes, it is unlawful for Agent to encourage clients to cancel their representation agreements. Unless the old broker gives written permission for the clients to be released from the old agreements, Agent should perform no act that could be interpreted as encouraging the clients to cancel or breach their brokerage representation agreements.

Should an agent represent a dealer in options?

QUESTION: Realtor questions whether he can represent an investor who plans to sell a property when the investor does not own the property but simply has an option. Realtors should be very cautious when representing an investor participating in this type of transaction.

RESPONSE: Realtor's potential customer would likely be considered a "dealer in options" which is defined in Idaho Code §54-2004(19) as:

> "Dealer in options" means any person, firm, partnership, association or corporation who shall directly or indirectly take, obtain or use options to purchase, exchange, lease option or lease purchase real property or any interest therein for another or others whether or not the options shall be in his or its name and whether or not title to the property shall pass through the name of the person, firm, partnership, association or corporation in connection with the purchase, sale, exchange, lease option or lease purchase of the real property, or interest therein.

The Idaho Real Estate Commission has been critical of investors engaging in this type of activity and has issued a formal guideline which details some of the common pitfalls. A copy of the Idaho Real Estate Commission Guideline #18 is attached hereto.

Further, Idaho Code §54-2050(1)(e) requires Broker seller representation agreements to contain "The signature of the owner of the real estate or the owner's legal, appointed and duly qualified representative, and the date of such signature." It does not appear that Broker can achieve this signature in the circumstances described to the Hotline.

In addition, Realtors should also check with the rules of the local multiple listing services as many have strict requirements pertaining to listing property not owned by the seller. In any event, Realtors should always disclose in any advertising and/or conversations regarding the property that his customer does not in fact own the property.

Can a Broker Representation Agreement state that seller must renew with brokerage after the listing has expired?

QUESTION: Agent wanted to know if her office listing agreement language was illegal when it states that the seller must renew with the Agent after the listing has expired, cancelled, or withdrawn or the seller will have to pay a fee.

RESPONSE: Idaho Code § 54-2050 (3) states in relevant part:

> Brokerage representation agreements
> (3) Prohibited provisions and exceptions -- Automatic renewal clauses. No buyer or seller representation agreement shall contain a provision requiring the party signing the agreement to notify the broker of the party's intention to cancel the agreement after the definite expiration date, unless the representation agreement states that it is completely nonexclusive and it contains no financial obligation, fee or commission due from the party signing the agreement.

In this instance, Agent asked if the office listing agreement language was illegal when requiring sellers to sign an agreement containing a clause that makes the seller pay a fee if the listing agreement is withdrawn, expired, or cancelled. As stated above, Idaho Code states no buyer or seller representation agreement shall contain a provision requiring the party signing the agreement to notify the broker of the party's intention to cancel the agreement after the expiration date. Due to the fact that the listing agreement at issue requires seller to renew, or pay a penalty, after the expiration date, the listing agreement is likely illegal and would need to be removed in order to be in compliance with the above Idaho Code.

Can an agent sign with a client who has an expired agreement with another brokerage?

QUESTION: Agent represents Seller in a real estate transaction. The Buyer has an expired Buyer Representation Agreement with Agent. Since the representation agreement has expired, Buyer wanted to enter into a new representation agreement with the Listing Agent. Agent completed and closed the transaction between Seller and Buyer. Subsequent to closure, Buyer's prior Agent contacted the Listing Agent stating that he had no legal right to represent Buyer. Listing Agent would like to know if his subsequent representation of Buyer was in violation of Idaho license law.

RESPONSE: Idaho Code §54-2054 states in relevant part:

> (4) Interference with real estate brokerage agreement prohibited. It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client. Communicating a company's relocation policy or benefits to a transferring employee or consumer shall not be considered a violation of this subsection so long as the communication does not

> involve advice or encouragement on how to terminate or amend an existing contractual relationship between a broker and client. (Underline Added).

Given the facts provided to the Hotline, Agent and Buyer entered into a contractual agreement following the expiration of Buyer's initial Buyer Representation Agreement with the other Agent. Buyer's first Agent is demanding that said action was in violation of Idaho law, as he believes there was contractual inference. However, it is deemed interference only when the agreement still exists. As Buyer has indicated, the Buyer Representation Agreement had expired. Since Buyer made this information known to Seller's Agent and brokerage, it is not likely that the Listing Agent has unlawfully interfered with a previously made contractual agreement.

Can an agent write their own Representation Agreement?

QUESTION: Agent has an out-of-state customer who is moving to Idaho and wants to retain Agent's services. However, Customer is apprehensive about the language and length of the RE-14 Buyer Representation Agreement. Customer has asked Agent to write an alternative, less complex agreement to establish the relationship. Agent questions if it is lawful for him to write an alternative agreement.

RESPONSE: Idaho Code § 54-2050(2) states in relevant part:

> Buyer representation agreements. Each buyer representation agreement, whether exclusive or nonexclusive, must contain the following provisions:
> (a) Conspicuous and definite beginning and expiration dates;
> (b) All financial obligations of the buyer or prospective buyer, if any, including, but not limited to, fees or commissions;
> (c) The manner in which any fee or commission will be paid to the broker; and
> (d) Appropriate signatures and their dates.

The above-quoted language states the minimum requirements for a buyer representation agreement in Idaho. The RE-14 Buyer Representation Agreement contains all conditions required by law in addition to the exclusive right to represent Buyer. However, given the facts provided to the Hotline, Customer does not want to utilize the RE-14 form and has requested Agent to draft a less complex agreement.

It is imperative to note that a licensed real estate agent is not likely a licensed Idaho attorney and therefore is not permitted to draft contractual agreements. If Agent and Customer wish to have an alternative representation agreement, they may wish to seek private legal counsel.

Also, there is an alternative to the RE-14 Buyer Representation Agreement. The RE-15 Compensation Agreement with Buyer form contains all necessary provisions for a contractual relationship between Customer and Agent under Idaho Code, yet is less complex and does not provide for the exclusive right to represent Customer. Instead, the RE-15 simply establishes an

agreement between Customer and Agent that compensation will be provided. Therefore, an RE-15 allows Customer and Agent to form a contractual agreement in which Agent is still able to receive compensation for his work.

Is it necessary to sign the RE-41?

QUESTION: Agent is representing a buyer in a real estate transaction. The brokerage representing the seller is requesting an RE-41 Agency Disclosure form, because the buyer is using a HUD Purchase Contract. The agent has established and signed a buyer representation agreement. Agent would like to know the precise requirements for a RE-41and if signing this contract is necessary.

RESPONSE: Idaho Code § 54-2051(4) outlines specific requirements for a valid offer to purchase, which are stated as follows:

> (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
> (g) A legal description of the property.
> (5) All changes made to any offer to purchase or other real estate purchase agreement shall be initialed and dated by the parties to the transaction.

Since a HUD Purchase Contract is being utilized instead of an RE-21 Purchase and Sale Agreement, which contains all the aforementioned requirements, there is a need to utilize and sign a RE-41 to supplement the terms of the HUD agreement. As a HUD Purchase Contract does not likely have all the statutory requirements for a valid offer under Idaho Law, it is necessary to use the RE-41 to supplement the terms of the HUD contract to make it a valid offer.

COMMISSIONS & FEES

Can an online company request a referral fee?

QUESTION: Broker has an agent who is being contacted by an online company based out of California demanding referral compensation. The California company alleges that since an individual submitted a form online, which permits the company to contact agent, the company is now legally entitled to a referral fee. Broker would like to know if this is a valid, binding contract and if she should pay the referral fee to the company.

RESPONSE: Idaho Code §54-2054(8) states in relevant part:

> (8) After-the-fact referral fees prohibited. It shall be unlawful for any person to solicit or request a referral fee or similar payment from a licensed Idaho real estate broker or sales associate, for the referral of a buyer or seller in connection with a regulated real estate transaction, unless the person seeking the referral fee has reasonable cause. "Reasonable cause" shall not exist unless:
> (a) The person seeking the referral fee has a written contractual relationship with the Idaho real estate broker for a referral fee or similar payment; and
> (b) The contractual relationship providing for the referral fee exists at the time the buyer or seller purportedly referred by such person signs a written agreement with the Idaho broker for the listing of the real estate or for representation by the broker, or the buyer signs an offer to purchase the real estate involved in the transaction.

Given the facts provided to the Hotline, there was no written contractual agreement between the online company and the agent and/or brokerage. In fact, Broker asserted that there has never been any agreement between Broker and this California company, particularly in regards to referral fees.

Therefore, Idaho Law deems that the California company's request for referral fees is potentially unlawful. Barring some written agreement between Broker and the company, Broker is likely under no obligation to pay a referral fee to the company.

Can an agent make a commission for finding rental property?

QUESTION: Agent represents out-of-state clients looking for a property to rent. Agent questions whether her clients or the property owner should pay her commissions once she finds a property for her clients to rent.

RESPONSE: Agent's only contractual relationship is with her out-of-state clients. Unlike when a property is listed for sale on the MLS, where the listing brokerage offers to share commissions with a cooperating brokerage, Agent is searching for rental properties that are not

likely listed on an MLS. Therefore, Agent's only contractual right to commissions is with her clients. Only if a property owner were to agree to pay Agent's commissions would the owner be obligated for said commissions.

The Hotline does not resolve disputes between parties or commission disputes. Agent may wish to consult private legal counsel regarding her contractual obligations and rights to commissions.

Should commissions be paid to an inactive agent?

QUESTION: Broker has an agent that is planning to transfer their license to inactive status. However, Agent is currently referring clients to another Agent in the brokerage. Broker would like to know if the other agent sells real property after Agent is inactive should Broker pay inactive Agent referral fees.

RESPONSE: Idaho Code § 54-2054(9) states:

> All fees must be paid through broker…A broker may pay a former sales associate for services performed while the sales associate was actively licensed with that broker, regardless of the former sales associate's license status at the time the commission or fee is actually paid.

In Idaho, both buyer and seller representation agreements are between the client and the broker. In addition, all fees must be paid through the broker. In this case, Agent is attempting to establish an agreement with another agent within the same brokerage to receive compensation after Agent's license goes inactive. This however is likely not a viable solution, as the representation agreements with any buyer or seller is with the broker, and not with Agent.

Moreover, both agents likely have a commission agreement with the broker, as commissions must be paid through the broker. However, because Agent currently maintains an active license, Agent is likely able to establish an agreement with Broker so that it is still possible for Agent to receive commission splits even with an inactive license. This commission agreement should be with Agent's broker and not the other agents.

Can a broker accept a commission from a client if they have not formally entered into a Representation Agreement?

QUESTION: Broker has represented Buyer over an extended period. However, Broker and Buyer have never established nor executed a representation agreement. Buyer recently purchased property that was for sale by owners. Broker did not show the property to Buyer nor assist Buyer in the transaction. Subsequent to the Buyer purchasing the property, Broker received a check in the amount of 3% commissions from Buyer. Broker would like to know if it is legal and appropriate to accept the check from Buyer.

RESPONSE: Idaho Code § 54-2054(9) stated in relevant part:

> All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker with whom the sales associate is licensed…

Given the facts provided to the Hotline, Broker received a check from Buyer for 3% commissions. As stated above, Idaho Code requires that all fees must be paid through broker. Since Buyer presented the check to Broker, there does not appear to be a violation of Idaho licensing law. However, because Broker does not have a contractual right to compensation and did not assist Buyer in the transaction, it is unclear whether the payment is a commission or a gift.

Regardless, the Hotline is unaware of Idaho case law or statute that would prohibit Broker from accepting the check. However, Broker may wish to contact the Idaho Real Estate Commission to obtain clarification on Broker's obligations and prohibitions, if any, while accepting gifts or unearned commissions.

Can an agent be paid a commission for introducing a seller and buyer but not assisting in the transaction?

QUESTION: Agent introduced Buyer to the owners of a manufactured home park. Buyer eventually purchased a manufactured home without Agent's further assistance. However, the owners of the manufactured home park want to pay Agent $2,500 for bringing Buyer to the owners. Agent would like to know if it is appropriate to accept the $2,500 and if so is Agent required to split the compensation with her broker.

RESPONSE: Idaho Code § 54-2054(9) states in relevant part:

> All fees must be paid through broker. No sales associate shall accept any commission, compensation or fee for the performance of any acts requiring a real estate license from any person except the real estate broker with whom the sales associate is licensed…

Furthermore, Idaho Code § 54-2004(35)(a) defines "Real estate broker":

> Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others…

Given the facts provided to the Hotline, Agent received $2,500 from a manufactured homes park owner for introducing Buyer to the park. Manufactured homes are considered personal property until they become affixed to real property. Idaho law only requires a real estate license when dealing with real property. In this case, because the manufactured home is not

attached to real property, Agent was likely not in violation of Idaho law and may be able to accept the $2,500. Furthermore, Agent is likely not required to split the $2,500 with her broker because fees are only required to be paid through a broker for the performance of any act requiring a real estate license. In this instance, introducing Buyer to a manufactured home does not likely require a real estate license. Therefore, Agent may accept the fee from the owners and is not likely required to split it with the brokerage.

Are agents entitled to compensation if the sale of the property does not go through?

QUESTION: Agent represents buyer who performed under the contract all the way up to closing. Right before closing, seller didn't show up and refused to deliver warranty deed, causing the deal to fall through. Agent wants to know if the brokerage can go after the seller for its commission and also if the buyer can get monetary damages from the seller because the purchase fell through.

RESPONSE: Idaho law provides that "the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of a contract." *The Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 260 (1993). "[This rule] does not, however, alter the obligation to pay the commission if the sale is not completed due to the fault of the seller….if the failure of completion of the contract results from a wrongful act or interference of the seller, the broker's claim is valid and must be paid." *Id*. at 260.

Additionally, Idaho Code § 54-2046(4) states:

> No disbursement of any portion of the broker's commission shall take place without prior written, signed authorization from the buyer and seller or until copies of the closing statements, signed by the buyer and seller, have been delivered to the broker and until the buyer or seller has been paid the amount due as determined by the closing statement.

Given the facts provided to the Hotline, the buyer performed fully on the contract all the way up to closing and the seller didn't show up and failed to deliver a warranty deed. Since it was solely the sellers' fault this transaction didn't close, the brokerage would need to go through the seller's broker in order to try to get a commission. The unilateral contract between the two firms would more than likely need to go to arbitration through the Idaho Real Estate Commission since there is no privity of contract between Agent and seller. As for the buyer, he can go after the seller for damages incurred and would need to seek private legal counsel to see if it is worth moving forward.

CONTRACTS

Does partial performance satisfy obligations of a contract?

QUESTION: Agent questions whether "partial performance" satisfies obligations in a real estate contract. The example given by Agent was if they had an inspection contingency list and only half of the items were fixed.

RESPONSE: RE-10 Inspection Contingency Response states:

> If the buyer requests repairs, **the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing**, as set forth in the Purchase and Sale Agreement. BUYER reserves the right to have only the items which are specifically set forth in this paragraph re-inspected prior to closing to satisfy the BUYER that such service, repair or replacement is acceptable to the BUYER. BUYER shall not unreasonably withhold acceptance of such service, repair or replacement. (Emphasis modified.)

If only "partial performance" has occurred, then the seller has not satisfied his obligation because all items were not fixed by the seller.

Can an anonymous buyer execute a contract?

QUESTION: Agent represents Buyer and would like to know if it is legal to put the Buyer on the contract anonymously.

RESPONSE: Idaho Code § 54-2051 (4) states in relevant part:

> (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
(g) A legal description of the property.

In this instance, Broker asked if it was legal to list Buyer as an anonymous person. As stated above, Idaho Code requires that the contract has all appropriate signatures, which likely requires that the buyer be named on the offer. However, the Buyer can list the name of an LLC or trust account as a Buyer instead of his individual name. Buyer may wish to consult private legal counsel concerning his rights and obligations when submitting an offer to purchase real property in Idaho.

Can a party be forced to perform under the contract?

QUESTION: Agent represents buyer who received a counter offer from a seller. The acceptance deadline on the counter offer was 12:00 P.M., but seller's Agent did not even deliver the counter offer until 12:04 P.M. The buyers accepted the counter offer and delivered the fully executed agreement to seller's Agent at 2:30 P.M. the same day. The seller's Agent then told the buyer's Agent that they had already sold the property to another buyer. Buyer's Agent wants to know if the buyers can force seller to perform under the contract.

RESPONSE: Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.2d 291, 294 (2006). "The inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement due to the uniqueness of land." In addition, the Idaho Supreme Court has also stated, "the remedy [of specific performance] is equally available to both vendors and purchasers, and additionally, the appropriateness of specific performance as relief in a particular case lies within the discretion of the trial court." *Perron v. Hale*, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985).

Applying the case law cited above, it seems as if both buyers and sellers may bring an action for specific performance. However, an action for specific performance will only be successful in an instance where the buyer or seller can show the uniqueness of the property and that other remedies would be inadequate. For example, a seller might be entitled to specific performance if he developed real property in compliance with a buyer's specific directions, and then buyer failed to perform under the contract. See *Perron v. Hale* cited above. On the other hand, a buyer might be successful in an action for specific performance when the buyer contracts to buy a specific and unique piece of real property. See *Kessler v. Tortoise Development, Inc.*, 134 Idaho 264, 1 P.3d 292 (2000).

Given current Idaho case law, both buyers and sellers can bring a specific performance cause of action against the other. However, such cases are difficult to prevail upon, as courts will generally look to contractual damages first. Only if there is no proper contractual damage may a court impose the equitable damage of specific performance.

Is a contract valid if closing date has passed but the sale did not occur?

QUESTION: Buyer and Seller have entered into a real estate contract with a specific closing date. Forty-five (45) days into the contract, the Seller became concerned because the appraisal had not been ordered. As a result, the Seller entered into a back-up agreement, which is contingent upon the first transaction being cancelled or failing to close. The first Buyer has now requested that the Seller sign an extension to the contract, which Seller refused because back-up agreement is substantially better for the Seller. Agent questions if Seller is required to give the first Buyer an opportunity to close even though the closing date has passed and transaction did not occur.

RESPONSE: The RE-21 Purchase and Sale Agreement states:

> 35. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) _____.

Given the facts provided to the Hotline, Buyer and Seller have a signed purchase and sale agreement establishing a fixed date and time closing will occur. During the process, Seller became troubled by Buyer's delay in ordering an appraisal. For this reason, Seller obtained back-up agreement which was contingent upon failure to close or the cancellation of the first contract. First Buyer requested Seller is extend the closing date. However, Seller objected as she is not obligated to sign an addendum. Therefore, in the absence of an addendum to extend the closing date, the Purchase and Sale Agreement becomes voidable after the closing date has lapsed. It is likely that Seller may now sign the back-up agreement and close with second Buyer.

Are there any risks to using electronic signatures?

QUESTION: Broker is receiving contracts with e-signatures without supplementary attachments and/or documentation to prove the individual who signed electronically actually provided the signature. Broker is concerned that there is no documentation or e-signature service legally identifying the Buyer with the provided signature and disclosure form. To ensure brokerage had information to connect the action with the process, Broker requested Buyer resend the disclosure form in an email stating signatures were made on the attached disclosure and listing contract. Broker would like to know if this is an appropriate action to validate electronic signatures and if there are additional risks in accepting them.

RESPONSE: Idaho Code § 28-50-102(8) states:

> "Electronic signature" means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Further, Idaho Code § 28-50-107 states in relevant part:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

Additionally, Idaho Code § 28-50-105(b) states:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

According to I.C. § 28-50-102(8), an electronic signature is a sound, symbol or process that a person uses to execute a contract. I.C. § 28-50-107 provides that a contract or record cannot be denied legal enforceability because it was signed electronically, and that electronic signatures satisfies Idaho law. Finally, I.C. § 28-50-105(b) states that an electronic signature is only effective if the parties agree to conduct the transaction electronically.

Given the information provided to the Hotline, Idaho law grants electronic signatures the same legal status as written signatures. However, the parties must agree to conduct a transaction by electronic means in order for an electronic signature to be acceptable. Therefore, electronic signatures on Idaho Association of REALTOR® ("IAR") forms, as well as on any other contracts or forms requiring signatures in Idaho, are valid as IAR Purchase and Sale Agreements contain an agreement that the transaction be conducted electronically.

Furthermore, the Hotline is not aware of Idaho statute or case law requiring supplemental documentation be provided in order to validate electronic signatures. In this instance, it is likely not necessary for brokerage to request verification of electronically signing contracts and forms.

Is a text message an appropriate way to renew a lease agreement?

QUESTION: Agent has a client who leased a property for a year and signed a contract with the landlord. After the lease was up, he received a text message from the landlord stating that he would renew the lease for another year. Agent wants to know if the text message is a legal extension for the lease.

RESPONSE: Idaho Code § 9-505 states in relevant part:

> Certain agreements to be in writing. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> 4. An agreement for the leasing, for a longer period than one (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Given the facts provided to the Hotline, Agent has a client who leased a property for a year and signed a contract with the landlord. The landlord then sent a text message to the tenant stating that he will renew the lease for another year. Agent wants to know if the text message is a legal extension for the lease. In this situation, it would be up to the Court to determine if the text message would hold up as a written agreement since the only writing is an unsigned text message. The Court will have to consider whether the text message is a valid written extension even though it is not signed by landlord, since leases for a term of longer than one year must be in writing and signed by the landlord.

If lender approval is contingent on seller paying closing costs yet seller will not agree to that, does the contract become void or did someone default?

QUESTION: Agent represents Buyer. Buyer signed an RE-21 Purchase and Sale Agreement, which was subsequently accepted by Seller. Initially, Buyer did not request coverage for closing costs. However, Buyer's lender has since demanded that Buyer obtain coverage for closing costs or financing will be revoked. Seller has refused to cover closing costs and requested receipt of earnest money if Buyer defaults on the purchase. Agent questions whether Seller has a right to the earnest money since Buyer has been forced to terminate the contract due to a failure to obtain financing.

RESPONSE: The language in the RE-21 states in relevant part:

> This agreement is contingent upon BUYER obtaining… financing…In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request.

The contract, considered as a whole, dictates the rights and remedies of the parties. The parties must perform each term of the contract in good faith. In this case, it is unknown to the Hotline whether the Buyer has exercised good faith efforts to obtain alternate means of financing to cover closing costs. However, if a good faith attempt has been made but Buyer is unable to secure financing, the contingency is not met and the agreement is void. Therefore, the Buyer may be entitled to a return of the Earnest Money if Seller will not cover the closing costs and

lender subsequently refuses to fund the transaction. However, if the Buyer did not make a good faith attempt to obtain financing and another lender would have funded without closing costs being covered, the other terms of the contract still control and Seller may be able to find Buyer in default and will be entitled to any remedies provided for in the contract.

Can a contract be assigned if no box has been checked?

QUESTION: Buyer A and Seller executed an RE-21 Purchase and Sale Agreement. Buyer A wishes to assign the contract to Buyer B. However, section 37 of the RE-21 Assignment did not indicate whether the contract may or may not be assigned. Therefore, Broker questions whether the contract may be assigned to Buyer B by Buyer A if neither box for may or may not be sold, transferred, or otherwise assigned has been marked.

RESPONSE: Idaho Law establishes that contracts are freely assignable unless the contract states otherwise. In this instance, a purchase and sale agreement exists between Buyer A and Seller. However, the agreement does not indicate that it may not be assigned. Therefore, given the facts that it is not specified otherwise within the contract or through an addendum that the property cannot be assigned, Buyer A may likely assign the contract to Buyer B.

Can only a portion of a contract be assigned?

QUESTION: Buyer A signed a purchase and sale agreement for two parcels of land, one vacant and one with a home. However, Buyer A only wants to keep the vacant land and assign the home portion of the contract to Buyer B by utilizing the RE-29 Assignment of Buyer's Interest form. Agent would like to know if Buyer A can lawfully assign a portion of the contract to Buyer B.

RESPONSE: Idaho law establishes that contracts are freely assignable unless the contract states otherwise. In this instance, the purchase and sale agreement states that it is assignable. Buyer A only wants to purchase the vacant lot and assign the purchase of the home to Buyer B. However, a contract can only be assignable in its entirety, and in this case the sale and purchase of the land and home is listed under one contract. Therefore, Buyer A cannot purchase only the lot and assign the remaining portion of the contract to Buyer B to purchase the home.

Alternatively, Buyer A and Seller can close on the transaction in which Buyer A purchases both the land and home. Following the closing between Buyer A and Seller, Buyer A can then enter into a contractual relationship with Buyer B in which Buyer B would purchase the home and Buyer A would maintain ownership of the parcel of land. Since contracts can only be assigned in full, simultaneous closing is a potential remedy for both buyers.

Can a buyer or seller forgo signing the RE-21?

QUESTION: Agent is representing the buyer. The broker of the seller has advised its client not to sign the final page of the Purchase and Sale Agreement in response to buyer's counteroffer. The seller's broker states that a signature on the first page of the Counteroffer

Agreement is sufficient to create a binding contract. The agent would like to know if this advisement is accurate and a correct manner to proceed with the counteroffer transaction.

RESPONSE: The RE-13 Counter Offer Form states in relevant part:

> To the extent the terms of this Counter Offer modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, the terms of this Counter Offer shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums not modified by the Counter Offer shall remain the same.

Based on the above quoted language, the RE-13 incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with provisions of the Counter Offer. Since the counter offer incorporates all terms of the final accepted offer by parties, the buyer and seller signing only the counter offer likely creates a binding contract, which includes terms from the original Purchase and Sale Agreement. Although it is possible for the parties to also sign the original RE-21 subject to the counter offer, such as practice is likely not necessary to create a binding contract between the parties. Therefore, seller's broker's statement that only the counter offer need be signed by both parties is likely correct.

Can a buyer or seller change the date of closing after an RE-10 has been submitted?

QUESTION: Associate broker represents buyer in a transaction governed by Idaho Association of REALTORS® Form 21, the Purchase and Sale Agreement. Upon completion of buyer's inspection, a list of 18 items to correct was provided to seller. Seller responded proposing an addendum which addressed some of the items to be corrected, but also changed the closing date and other terms of the already executed Purchase and Sale Agreement. Associate broker questions whether seller has the legal right to propose changes to the Purchase and Sale Agreement, beyond the items listed for correction on buyer's list.

RESPONSE: At the time of executing the Purchase and Sale Agreement, the parties had a valid binding contract conditioned on the inspection terms enumerated in Section 10. After an inspection, the buyer had a right to demand that unsatisfactory items be corrected, and had the right to walk away if they were not corrected. When seller proposed an addendum with terms outside the inspection contingency items, the seller was essentially asking to amend the Purchase and Sale Agreement. Buyer had the right to reject the additional proposed terms and force seller to proceed to closing, or had the right to agree with seller's newly proposed terms.

In answer to associate broker's direct question: yes, any party to a transaction may ask for the terms to be changed at any time, however the other party is under no legal obligation to agree. Merely by having one party ask to change a contract does not render the contract any less effective.

Do the parties still have a contract if the seller accepted an offer from buyer after buyer had asked to terminate the contract?

QUESTION: Buyer and seller enter into purchase and sale agreement for property and buyer had the inspection done and provided written notice of disapproved items to seller in the strict time period. Seller responded initially that seller wouldn't fix any of the disapproved items. Eventually, buyer and seller negotiated that seller would give some credit at closing in lieu of fixing disapproved items. However, there was a disagreement as to the amount of credit, which caused the buyer to attempt to terminate the contract. In response, the seller accepted buyer's credit amount within the timeframe given for the parties to agree. Agent questions whether buyer's termination is effective or still in contract with seller.

RESPONSE: RE-21 Section 10 (C 3) states:

> "If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ____ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYER in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ____ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with the transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**" (Emphasis added)

Even though buyer sent over termination to seller, the parties were able to come to an agreement to the amount to be credited for items to be corrected in time. Buyer likely doesn't have a right to terminate during the inspection agreement timeframe and it is likely the buyer is still under contract with the seller.

DISCLOSURE

When does the RE-25 need to be delivered?

QUESTION: Broker questions when a party has to deliver the RE-25 Seller's Property Condition Disclosure Form and if the form was properly delivered when an Agent posts it on the MLS.

RESPONSE: Idaho Code § 55-2509 states:

> Delivery of disclosure form and acceptance. Every transferor shall deliver, in accordance with section 55-2510, Idaho Code, a signed and dated copy of the completed disclosure form to each prospective transferee or his agent within ten (10) days of

> transferor's acceptance of transferee's offer. Every prospective transferee of residential real property who receives a signed and dated copy of a completed property disclosure form as prescribed under section 55-2508, Idaho Code, shall acknowledge receipt of the form by doing both of the following:
> (1) Signing and dating a copy of the form;
> (2) Delivering a signed and dated copy of the form to the transferor or his agent or subagent.

Idaho Code § 55-2510 states:

> Delivery requirements. The transferor's delivery under section 55-2509, Idaho Code, of a property disclosure form as described under section 55-2508, Idaho Code, and the prospective transferee's delivery under section 55-2509, Idaho Code, of an acknowledgement of his receipt of that form shall be made by personal delivery to the other party or his agent or subagent by ordinary mail or certified mail, return receipt requested or by facsimile transmission. For the purposes of the delivery requirements of this section, the delivery of a property disclosure form to a prospective co-transferee of residential real property or his or her agent shall be deemed considered delivered to other prospective transferees unless otherwise provided by contract.

According to the Idaho Codes stated above, a signed and dated copy of the completed RE-25 must be provided to the buyer within ten (10) days of acceptance of an offer. The delivery of form RE-25 must be delivered by person, ordinary mail, certified mail, or by fax. The posting of form RE-25 on the MLS is not likely a proper form of delivery.

Can a contract be terminated based on the property disclosure form after the parties have signed the contract?

QUESTION: Agent represents a buyer who has a contract with a seller that was accepted by both parties. The Property Disclosure Form was not available at the time of acceptance and when buyer received the form, felt that the inspection was unacceptable. Agent is questioning if buyer can now cancel transaction and get earnest money returned.

RESPONSE: Idaho Code §55-2515 states in relevant part:

> 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.
> Subject to the provisions of section 55-2505, Idaho Code, a rescission of a transfer agreement may only occur if the transferee's written, signed and dated document of rescission is delivered to the transferor or his agent or subagent within three (3) business days following the date on which the transferee or his agent receives the property disclosure form prescribed under section 55-2508, Idaho Code. If no signed notice of rescission is received by the transferor within the three (3) day period, transferee's right to rescind is waived. (Emphasis added).

According to the statute quoted above, the buyer has three business days to rescind the agreement based on specific disclosures in the Property Disclosure Form. The rescission must be delivered to the seller stating that the disclosure was unacceptable and cite to specific disapproved disclosures. The buyer may then get his earnest money back and have no further obligations under the purchase and sale agreement.

Does a homicide that occurred on the property need to be disclosed?

QUESTION: Agent represents a Seller whose is aware of a homicide that occurred in the home. Agent questions whether he is required to disclose the homicide to potential buyers.

RESPONSE: Idaho Code § 55-2801, et seq. governs "psychologically impacted" property. That section states that:

> …'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 . . . [t]hat 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.

The act further states that "[n]o cause of action shall arise against an owner of real property or a representative of the owner for a failure to disclose to the transferee of the real property or a

representative of the transferee that the real property was psychologically impacted." Idaho Code § 55-2802.

Finally, the act states that:

> 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.

Agent should discuss with Seller whether they wish to disclose the homicide to the general public and only disclose the information if the Seller consents. If any potential buyers specifically state 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," Agent should again seek consent from Seller before disclosing the homicide. Idaho Code § 55-2803. If Seller refuses to disclose, Agent should notify the potential buyer that such information will not be disclosed. *Id.*

Does it need to be disclosed if methamphetamine production occurred on the property?

QUESTION: Agent represents an owner of a property which may have been used for the production of methamphetamines in the past. The agent understands in Utah that if the property has been remediated in the prescribed manner, disclosure to potential buyers is no longer necessary. The agent questions whether Idaho requires disclosure of such issues, and how remediation may affect disclosure requirements.

RESPONSE: Idaho Code § 54-2086(1)(d) and 54-2087(4)(a) require an Agent to disclose adverse material facts actually known or which reasonably should have been known by the licensee to a customer and/or their client. An adverse material fact is defined as "…a fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligation under a real estate contract." (Idaho Code §54-2083(1)).

A fact must be disclosed only if it would "significantly affect the desirability or value of the property to a reasonable person." According to the information provided to the hotline, if the agent knew or reasonably should have known, that the property had been used to produce dangerous substances such as methan1phetamines, that fact would likely have a "significant affect" on the desirability or value of the property. As such, it may be considered

an "adverse material fact" that Agent may a duty to disclose to potential buyers.

If appropriate remediation occurs, such as certified meth lab cleanup that will eradicate the property of any dangerous chemicals, the past drug production may no longer be considered an adverse material fact affecting the property and might not have to be disclosed. However, the Hotline is unaware of any Idaho statute or case law that directly addresses whether methamphetamine production property remediation obviates Agent's duties of disclosure. Unless Agent possesses direct evidence showing that the property has been remediated, it is likely that Agent should disclose the adverse material fact of methamphetamine production.

Is a seller exempt from filling out the RE-25 if they have not lived in the property in the last year?

QUESTION: The Agent questions whether a seller is exempt from completing and producing to the buyer the IAR RE-25 Seller's Property Condition Disclosure Form if the Seller has not lived in the home for one (1) year or more.

RESPONSE: Idaho Code Section 55-2505 exempts certain Sellers from completing a Seller's Property Condition Disclosure Form, such as newly constructed property that has not been previously inhabited. However there is no exemption for Sellers who have simply not lived in the property for one year or more. The exact exemptions referring to length of time the Seller may have lived in the home read as follows:

> (13) A transfer to a transferee who has occupied the property as a personal residence for one (1) or more years immediately prior to the transfer;
> (14) A transfer from a transferor who has both not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise.

Therefore, the fact that the Seller did not live in the home as their primary residence for one year prior to the sale does not exempt a Seller from completing a Seller's Property Condition Disclosure unless the property was also acquired by the Seller through inheritance or devise.

Is a bankruptcy trustee exempt from filling out the Property Disclosure Form?

QUESTION: Agent is representing a bankruptcy trustee who is selling a home from the bankruptcy estate. The trustee has no knowledge of the property. For this reason, agent would like to know how to complete the RE-25 Seller's Property Condition Disclosure Form.

RESPONSE: Given the information provided to the Hotline, a trustee is selling the real property from the bankruptcy estate. According to Idaho Code §55-2505(1), a transfer by a trustee in bankruptcy is a stated exemption from the Property Condition Disclosure Act. Therefore, the trustee need only check the applicable exemption on the first page of the RE-25

Seller's Property Condition Disclosure Form and sign the bottom of the first page to complete the form. As the trustee appears to be exempt from the Property Condition Disclosure Act, the trustee need not fill out the remaining portion of the RE-25.

Do ashes that have been buried on the property need to be disclosed?

QUESTION: Agent is representing the seller. The seller disclosed to agent that her property contains the buried ashes of a deceased relative. Agent would like to know if said information should be disclosed to buyers and/or included on a property disclosure form.

RESPONSE: Idaho Code § 55-2506, which discusses the required disclosures under the Property Condition Disclosure Act, states in relevant part:

> The form must be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances. (Emphasis Added).

The Property Condition Disclosure Act requires sellers of residential property to disclose of material matters relating to the physical condition of the property. Having a relative's ashes buried somewhere on the property is not likely to be considered a matter affecting the physical condition of the property. Therefore, it is not likely necessary for seller to disclose the fact that a relative's ashes are located on the property.

Moreover, the fact that a relative's ashes are located on real property potentially places the property within the definition of psychologically impacted property. Idaho Code § 55-2801 states in relevant part:

> ..."[P]sychologically 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…

Given the fact that the only impact that can be imagined from having a relative's ashes buried on the property would be the suspicion of ghosts or other unproven anomalies. Idaho Code provides that a seller is not required to disclose facts related to psychologically impacted property. Therefore, it is not likely that seller needs to disclose the fact that a relative's ashes are buried on the property.

Are sellers of inherited property exempt from filling out the RE-25?

QUESTION: Seller is in the process of selling inherited property. Agent would like to know if Seller is exempt from completing the RE-25 Seller's Property Condition Disclosure

Form. If so, is it appropriate for Seller to select the specified exemption box on the first page of the RE-25 and sign the bottom of the form.

RESPONSE: Idaho Code §55-2505 states all exemptions to the Property Condition Disclosure Act. In particular, I.C. §55-2505(14) states as follows:

> (14) A transfer from a transferor who both has not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise

Given the facts provided to the Hotline, the Seller has inherited property to which it has not been a resident of for one or more years prior to inheritance. Since Seller has both not occupied the property as personal resident for one or more years and acquired the property through inheritance, Seller is likely exempted from the Property Condition Disclosure Act. As Seller is likely exempted from the Act, there is no need to complete the entirety of the RE-25 Seller's Property Condition Disclosure Form. However, Seller should check the applicable exemption on the first page on the RE-25 and sign at the bottom of the page to certify that it is in fact exempt from the Property Disclosure Act.

Does a short sale that has never been occupied fall under the "New Construction" exemption?

QUESTION: Agent represents a seller who bought a property through a short sale that was constructed in 2007 and never occupied. Seller also never lived in property but fixed items discovered upon getting an inspection of the property. Agent wants to know if seller falls under the new construction exemption on the property disclosure form.

RESPONSE: Idaho Code §55-2505 (12) outlines the exemptions to the Idaho Property Condition Disclosure Act, which states in relevant part:

> A transfer that involved newly constructed residential real property that previously has not been inhabited, except that disclosure of annexation and city service status shall be declared by the sellers of such newly constructed residential real property in accordance with the provisions of section 55-2508, Idaho Code;

Since the seller was not the person who constructed the home and the ownership transferred on more than one occasion, the new construction exemption is likely lost. The new construction exemption is intended to apply only to a person who builds a home and then promptly sells the home to its first resident. The current seller purchased the home long after it was constructed. The seller will likely need to fill out the property disclosure form and needs to disclose everything they know about the property, including what was found during the seller's inspection when he purchased the home.

Is the buyer's identity an adverse material fact?

QUESTION: Agent questions whether she has a duty to disclose a buyer's actual identity to a seller when the buyer wants to remain anonymous and dealing with adverse material fact.

RESPONSE: Idaho Code § 54-2083 (1) states:

> "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.

According to the Idaho Codes stated above, adverse material fact does not likely include the buyer's identity. Since Agent's duty to disclose only includes adverse material facts, Agent does not likely owe a duty to a seller to disclose the actual identity of a buyer.

Is a seller responsible if mold has been discovered after closing?

QUESTION: Agent represented a Seller who recently sold their property, which was inspected by the buyer's inspector and was found to be satisfactory. After closing, the buyer claimed to notice an odor, and upon further investigation discovered mold. Agent questions which party is responsible for the costs of the repair.

RESPONSE: Idaho Code § 55-2507 discusses a Seller's responsibility to disclose information about a property to a potential Buyer and states in pertinent part:

> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) *That the statement is not a substitute for any inspections*.
> (5) That the transferor is familiar with the particular residential real property and *each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.* (Emphasis added.)

According to I.C. § 55-2507(4), disclosure statements are not a substitute for a professional inspection. However, I.C. 55-2507(5) states that all disclosures should be performed in good faith.

Given the information provided to the Hotline, if the Seller was aware of the mold, Seller may have breached its duty to disclose facts regarding the property in good faith to the Buyer. However, the Buyer had the property inspected in which the mold was not discovered, and Seller disclosures are not to be used as a substitute for inspection. Additionally, Seller only owes a duty to disclose information the Seller knew of about the property. If Seller truly was unaware of the mold, then Seller would have no duty to disclose.

If a seller inherits just a portion of a property, are they exempt from the Property Disclosure?

QUESTION: Seller is in the process of selling property he co-owned with his mother. Seller's mother recently passed away and Seller inherited the mother's portion of the property. Agent would like to know if Seller is exempt from the Property Condition Disclosure Act.

RESPONSE: Idaho Code §55-2505 states all exemptions to the Property Condition Disclosure Act. In particular, I.C. §55-2505(14) states as follows:

> A transfer from a transferor who both has not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise

Given the facts provided to the Hotline, the Seller owned half of the property while his mother owned the other half and resided in the property. Seller acquired the remainder of the property when his mother passed away. Although Seller did not occupy the property as a personal residence, Seller already was a co-owner of the property, likely as tenants in common, prior to inheriting his mother's interest in the property. Therefore, Seller is not likely exempt from the Act for the above-quoted reason. Since Seller is not exempt, Seller should complete the RE-25 Seller's Property Condition Disclosure form and make disclosures of all material facts known about the property.

DUTIES TO CLIENT & CUSTOMER

Are concessions considered confidential client information?

QUESTION: Broker would like to know if seller concessions are regarded as part of the sales price or if concessions are confidential client information.

RESPONSE: Idaho Code § 54-2083(6)(d) states:

> (6) "Confidential client information" means information gained from or about a client that:
> (d) The client would not be personally obligated to disclose to another party to the transaction…Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.

Generally, concessions are synonymous with reductions to the selling price and are agreed upon by both Buyer and Seller. Based on Idaho Code § 54-2083(6)(d), information generally disseminated in the marketplace is not confidential client information nor is a sold price of real property confidential client information. Since the concessions are known by both

Buyer and Seller they are not likely regarded as confidential client information. Additionally, because concessions are most often included in the closing costs they are likely reflected in the sold price of real property, which is also not confidential client information. Therefore, given the facts provided to the Hotline, Broker would likely not be violating client information by disclosing seller concessions.

Can an agent request something from old client on behalf of a title company?

QUESTION: Agent represented a Seller in a recently closed real estate transaction. At time of closing, the Buyer was to pay an additional $20,000 to a company for the placement of a tenant. However, the title company made a mistake and released the $20,000 to the Seller. Upon discovering the mistake, the title company had the Agent request that the Seller return the $20,000 that was not intended to be released to the Seller, as it was contractually stated that the title company was to release it to the third-party company. Agent now questions if he had any right to request the money back from Seller, as the Agent was representing Seller at the time.

RESPONSE: Idaho Code § 54-2094 states:

> Representation not fiduciary in nature. While this act is intended to abrogate the common law of agency as it applies to regulated real estate transactions, nothing in this act shall prohibit a brokerage from entering into a written agreement with a buyer or seller which creates an agency relationship in which the duties and obligations are greater than those provided in this act. However, unless greater duties are specifically agreed to in writing between the brokerage and a represented client, the duties and obligations owed to a represented client in a regulated real estate transaction are not fiduciary in nature and are not subject to equitable remedies for breach of fiduciary duty.

According to I.C. § 54-2094, an agency relationship that is created between an agent and client is not fiduciary in nature. This allows a licensed real estate agent to represent the interests of multiple parties in a real estate transaction, as they are not contractually obligated to be specifically and wholly responsible for the interest of one party.

Further, Idaho Code § 54-2086 states in relevant part:

> Duties to a customer. (1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are non-agents and owe the following legal duties and obligations:
> (a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;
> (b) To perform these acts with honesty, good faith, reasonable skill and care;

> (c) To properly account for moneys or property placed in the care and responsibility of the brokerage;
> (d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee…

According to I.C. § 54-2086, if the Buyer was not represented by Agent's brokerage or agent, that Buyer remains a customer and the brokerage and Agent still have a duty to the customer. This may mean that Agent had a duty to assist in the recovery of the $20,000 that was mistakenly released to the Seller, as the Buyer would be considered a customer. When performing these duties, a licensee must do so with honesty, good faith, and reasonable skill and care.

Additionally, the Idaho Supreme Court considered the application of the aforementioned statute in *Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 22 P.3d 105 (2001). In *Nordling*, the agent representing the seller failed to disclose the fact that the listed property was subject to a rule, which involved invalid discrimination under the Federal FHA. Although the buyer was represented by another brokerage, the Court held that all prospective buyers/sellers are either clients or customers. Additionally, it did not matter that the rule was invalid, but rather the agent should have been concerned with the rule's existence. Therefore, the Court ruled that the agent owed a duty to disclose the adverse fact to all prospective buyers, as they were customers of agent regardless of the fact that the buyers were represented by another agent.

The Idaho Supreme Court ruling in *Nordling* provides that an agent has a duty to any prospective buyer or seller regardless of whether they are represented by another brokerage. As such, it is likely that the Agent had a duty to the Buyer to request the return of the improperly distributed funds.

Does listing agent have any duty to disclose multiple offers to the buyer?

QUESTION: Listing Agent would like to know if it is required by law to disclose all multiple offers to Buyer and Buyer's agent.

RESPONSE: Idaho Code § 54-2083(6) defines confidential client information:

> (6) "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client; and
> (d) The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code…

Idaho Code prohibits Agents from disclosing confidential client information to third parties. Offers to purchase are not a matter of public record, could potentially be detrimental to the client if disclosed, and are not required to be disclosed under any particular statute. Therefore, unless there is a contractual provision stating that all offers are to be disclosed to Buyer and Buyer's agent, offers should not be disclosed without client approval, as these purchase offers may be considered confidential client information.

EARNEST MONEY

When can the earnest money be legally collected?

QUESTION: Agent is in a dispute with another brokerage regarding the timing for collection of earnest money on a lot being platted and developed. Agent believes earnest money cannot be legally collected until the plat is approved and recorded. Seller's brokerage believes earnest money can be collected and deposited at any time as long as both parties have signed the purchase and sale agreement. Agent would like to know the correct procedure to collect and deposit earnest money.

RESPONSE: Stated in relevant part on the RE-24 Vacant Land Purchase and Sale Agreement in Section 3(A) page 1:

> $_____ **EARNEST MONEY**: BUYER hereby deposits _____ DOLLARS as Earnest Money evidenced by: □cash □personal check □cashier's check □note (due date): _____ and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account □upon receipt or □upon acceptance by BUYER and SELLER or □other_____ and shall be help by: □Listing Broker □Selling Broker □other _____ for the benefit of the parties hereto.

Given the facts provided to the Hotline, Agent represents a Buyer purchasing a parcel of land that has yet to be formally platted. Because the land has not yet been platted, Agent believes that Buyer is not required to deposit earnest money until a final plat has been recorded.

The Hotline is unaware of any Idaho statute or case law requiring that an earnest money deposit should only be deposited after a final plat has been recorded. The RE-24 Vacant Land Purchase and Sale Agreement, as quoted above, specifies between the parties' intent as to when the earnest money shall be deposited. Therefore, Buyer's earnest money should likely be deposited based on the time frame stated in the Purchase and Sale Agreement.

Can earnest money be deposited in an out-of-state account?

QUESTION: It has been requested that Agent deposit earnest money into an out-of-state account. Agent questions whether this is a lawful practice in Idaho, and if so, what record and documentation is required.

RESPONSE: Idaho Code § 54-2041 states in relevant part:

> …For purposes of this section, moneys or property shall not be considered entrusted to the broker or to any licensee representing the broker when the parties to the transaction have instructed the broker or its licensees, in writing, to transfer such moneys or property to a third party, including, but not limited to, a title, an escrow or a trust company if upon transfer, the broker or its licensees have no right to exercise control over the safekeeping or disposition of said moneys or property.
>
> A licensed real estate broker shall not be responsible for depositing moneys into the broker's real estate trust account, nor responsible for creating a real estate trust account…when the parties to the transaction have instructed the broker or its licensees, in writing, to transfer such moneys to a third party, including, but not limited to, a title, an escrow or a trust company. Provided however, a broker shall be responsible for maintaining a record of the time and date that said moneys or property was transferred from the broker to a third party.

Given the facts provided to the Hotline, it has been requested of Agent to deposit earnest money into an account outside of Idaho. Based on the above-quoted language, which states the requirements for an Idaho broker to transfer funds to third parties, Agent is most likely able to deposit the earnest money into a third party out-of-state account. However, it is imperative that funds transfer to a third party is approved, in writing, by both parties to the transaction. Furthermore, it is important that Agent and its brokerage retain records of the transfer to the third party, including the date and time moneys were deposited.

What happens if a transaction fails due to financing, yet the New Loan Proceeds Section was left blank on the RE-21?

QUESTION: Transaction involves a buyer who made an offer on a condominium and on the RE-21, purchase to sell contract they had checked the not all cash offer box (3B) but left the terms of the loan area (3C) blank. The buyer received a counter offer from the seller 10 days later stating that the property would remain active on the MLS until a loan was secured by buyer from a lender and the buyer accepted the counter offer. Buyer was not qualified for the condominium loan, and therefore the transaction was unable to move forward. Buyer is requesting the earnest money back due to the failure to obtain financing. Seller is requesting the earnest money to cover some of the costs and damages they have incurred due to the transaction

failure. Both Brokers involved in the transaction contacted the Hotline and are questioning whether buyer should get full earnest money back.

RESPONSE: Initially the question presented appears simple. The RE-21 contains clear language as to what happens to the earnest money if a buyer is unable to obtain financing: it goes back to the buyer (see RE-21, page 1, line 36). However, the RE-21 is also clear as to what happens to the earnest money if it is an all cash offer and the buyer doesn't close: the seller keeps the earnest money (See RE-21 paragraph 29).

However, this initial clarity fades due to the facts of this circumstance which make it unclear and difficult to provide a simple resolution. The way the RE-21 was filled out could create an issue. Notably there were blanks left in the "New Loan Proceeds" section yet there was a checkbox indicating this is not an all cash offer. In reviewing the Purchase and Sale Agreement, it would appear to indicate the parties intended Section 3(C) to apply. This is further evidenced by the terms of the counter offer which repeatedly reference the buyer's lender. Yet Section 3(C) was not filled out leading to confusion and/or ambiguity. The applicable Idaho Code on disputed earnest money usually assists the Broker allowing him or her to rely on the Purchase and Sale Agreement:

> 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.

Yet as stated above, one can easily read both sides into the Purchase and Sale Agreement as parts were left blank. Therefore if Broker does not intend to rely on a written document, another aspect of Idaho Law provides assistance, at least to the Broker. Idaho Code § 54-2047(3) states:

> (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.

Further, I.C. § 54-2047(1) states:

> Disputed earnest money. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and

> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.

The Broker has the authority to disburse the earnest money to a party relying on the terms of the purchase and sale agreement. However, as both parties have made a demand for the earnest money, the Broker has a responsibility to notify the parties, in writing, of any actions taken. Further, if the Broker does not feel comfortable in disbursing the funds on his or her own accord, the funds may be held until the court orders them to be released to one of the parties. If Broker intends to do this he or she shall notify the parties in writing.

What is the necessity of signing the RE-20 for release of earnest money?

QUESTION: Buyer's broker questions if she can release the earnest money to the buyer, even though the sellers have not signed a written release (RE-20). Broker has been trying to get the sellers to sign it for weeks, but they will not do it. Do the sellers need to sign the release, or can she go ahead and release the earnest money back to the buyers?

RESPONSE: Given the facts presented to the Hotline, broker does not believe there is an earnest money dispute in this case. The sellers are not disputing the earnest money; they are simply refusing to sign to release it. The parties do not need to sign the Release of Earnest Money in order for the earnest money to be returned to the buyer. The purpose of the RE-20 is to protect the broker from any claims, actions or demands the parties may assert. It is always best practice to obtain one, but one is not required unless there is a dispute.

The broker should write a letter to the sellers stating that unless they make broker aware of an earnest money dispute, the earnest money will be released back to the buyer within 5 days. Broker should note in her file that she tried many times to get the sellers to sign the release form, and keep a copy of the letter sent to the sellers for her records.

Are buyers entitled to their earnest money if they failed to disclose a contingency of the loan?

QUESTION: Agent represents seller. Buyer of real estate property acquired a loan that was contingent upon buyer selling their first home. The buyer's loan contingency was not disclosed to the seller and seller's agent. The transaction was not completed because lender would not finance the transaction. Agent would like to know if seller was in violation of the RE-21 because they did not make their loan contingency known on the financial portion of the RE-21.

RESPONSE: RE-21 Section C states:

> …In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request…

The loan contingency relates to the financing agreement between the buyer and the financial lender; there is no requirement that the buyer must disclose the terms of a financing agreement to the seller or seller's agent. Therefore, given the facts provided to the Hotline, as long as buyer exercised good faith efforts to sell their first home in order to obtain the loan, yet were unable to sell it, they are not likely to be held in breach of the purchase and sale agreement. If the buyer is unable to obtain financing after using good faith efforts, buyer may be permitted to withdraw from the transaction and receive their earnest money.

Is there any claim to the earnest money once the inspection contingency has been released?

QUESTION: Agent represents sellers who have received an offer on a property, and the parties have filled out and signed all appropriate forms. Now the buyer is saying they are not satisfied with the location of the washer and dryer and would like them to be moved or they want their earnest money back. Buyer never filled out section 2 in the RE-10 stating that they want this done. The buyer checked section 1, which states that they accept the property condition and removal of inspection contingency. Are they now entitled to their Earnest Money?

RESPONSE: Section 10 of RE-21 states in relevant part:

> 3). If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ___ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYERS in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ___ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**

Given the facts presented to the Hotline, and assuming that the relocation of appliances was something that could be addressed in an inspection, the buyers did not include the washer and dryer on the list in section 2 of the RE-10. RE-10 Section 2 states in relevant part:

> Excepting only those items specifically set for below, BUYER hereby elects to proceed with the transaction and hereby waives the right to further inspection of the property… If the buyer requests repairs, the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement… BUYER shall not unreasonably withhold acceptance of such service, repair, or replacement.

Assuming both parties signed the RE-10 and accepted the property condition, the Purchase and Sale Agreement is legally binding and the buyer has agreed to continue with the transaction, and therefore is not entitled to the Earnest Money. However, the Legal Hotline does not resolve disputes between buyers and sellers, and Broker may wish to contact private legal counsel to determine each party's rights and responsibilities.

FORMS

Can a party rely on the terms of the original RE-21 even though there have been several addendums?

QUESTION: Buyer has an agreement with a building contractor who has repeatedly changed the date of closing. The original contract stated the closing date to be June 15, 2013. The second addendum made to the original contract deemed earnest money to be non-refundable. The final addendum stated the closing date to be July 5, 2013. Agent would like to know if Buyer can take action against contractor's changed deadlines by utilizing the original contract, instead of adhering to final addendum.

RESPONSE: RE-11 states in relevant part:

> To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this Addendum shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

Given the facts, there have been numerous addendums added to the original purchase and sale agreement. The addendums have established that the earnest money is non-refundable and the closing date has been moved from June 15, 2013 to July 5, 2013. Furthermore, it has been indicated that the contractor wishes to submit another addendum extending the closing date to July 15, 2013. Agent has expressed Buyer's dissatisfaction because of the repeatedly changed deadlines. Although Buyer wishes to take action against the contractor by enforcing the original closing date of June 15, 2013, Buyer will likely be unable to do so since Buyer agreed to later closing dates in subsequent addendums. Therefore, the initial purchase and sale agreement establishing the closing date of June 15, 2013 is superseded by the final addendum, signed by both parties, establishing the closing date as July 5, 2013.

What does the "Fuel in Tank" Section of the RE-21 mean?

QUESTION: Agent represents the buyer. Agent is in dispute with selling party over the interpretation of the RE-21. The agent would like to understand the application and meaning of checking the "seller" box for "Fuel in Tank" in Section 17, page 4.

RESPONSE: It is the intent of the "Fuel in Box" checkbox to indicate the party responsible for the cost of any fuel remaining in a fuel tank on the seller's property. If the seller box is checked, seller would be responsible for the cost of said fuel. As it is likely that seller previously paid for the fuel, seller would not likely be entitled to a reimbursement for the cost of the remaining fuel.

According to the RE-21 when do the repairs following the inspection need to be completed?

QUESTION: Paragraph 3 of Section 10C states that items should be "corrected by the seller within ___ business days (five [5] if left blank) of receipt of seller's response." Caller questions if this means that all of the items listed need to be corrected within 5 business days?

RESPONSE: No. The language in the RE-21 states in relevant part:

> If BUYER **does** within the strict time period specified give to SELLER written notice of disapproved items, **BUYER shall provide to SELLER pertinent section(s) of written inspection reports.** SELLER shall have ___ business days (three [3] if left blank) in which to **respond in writing.** SELLER, at SELLER's option, may correct the items as specified by BUYERS in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ___ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with transaction and proceed to closing. **This will remove BUYER'S inspection contingency.**

The agreement between the two parties is that of notice as to the items to be corrected, not of completion. The number of business days refers to the time in which both parties need to agree, in writing, as to which items are to be corrected. The completion of the items is expected to be ready prior to closing, as stated in RE-10. It reads as follows:

> If the buyer requests repairs, the SELLER agrees to service, repair or replace, in a good and workmanlike manner, the following items on or in the property prior to closing, as set forth in the Purchase and Sale Agreement.

If the seller agrees to correct the items that the buyer has listed on RE-10, they must be finished prior to closing. The buyer can have the listed items re-inspected, and if the buyer finds the inspection to be unsatisfactory, they can terminate the agreement.

When does the inspection time period begin?

QUESTION: Agent represents a buyer in a short sale. An addendum for the inspection contingency was written by the buyer's agent, but it did not get signed by both parties and returned until well after the time frame for the inspection contingency was up. Does this mean

the buyer cannot get their inspection completed, or does the time period start once both parties have signed the agreement?

RESPONSE: The RE-21 Inspection Contingency section states in relevant part:

> (A). **BUYER chooses** □to have inspection □not to have inspection. If BUYER chooses not to have inspection, skip Section 10C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at **BUYER'S expense**. BUYER shall, within ____ business days (five [5] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on an unsatisfactory inspection.

The timeframe established above is triggered by "acceptance." In Idaho, "acceptance" does not occur until the offeror, in this case the buyer, receives notice of acceptance. It is relevant to note that Section 41 of RE-21 states:

> ACCEPTANCE: This offer is made subject to the acceptance of the SELLER and BUYER on or before (Date)_____ at (Local Time in which PROPERTY is located)_____ □A.M. □P.M.
> If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within ___ calendar days (three [3] if left blank) by BUYER initialing HERE _____. If BUYER timely approves of SELLER'S late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER.

Broker should require agent to fill out this section of the Purchase and Sale Agreement. It can be helpful in determining exact dates of acceptance.

When is it appropriate to initial the late approval acceptance in the RE-21?

QUESTION: Buyer and Seller were to close on an offer by 5:00 p.m. on a Friday. However, Buyer and Agent did not receive acceptance from Seller until Saturday. Agent questions when it is appropriate to initial the late approval acceptance in paragraph 41 of the RE-21 Purchase and Sale Agreement.

RESPONSE: Paragraph 41 of the RE-21 states:

> **41. ACCEPTANCE**: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) ☐A.M. ☐P.M. If acceptance offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within

> _____ calendar days (three [3] if left blank) by BUYER initialing HERE _____. **If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER**. (Emphasis added.)

Buyer is able to proceed with an accepted offer subsequent to the allotted time for acceptance if they so choose. When negotiating the contract, the parties may agree on a specific amount of time allowing the Buyer to approve of a late acceptance, or the time will be 3 calendar days if left blank. If the Buyer decides to move forward within the allotted time, the initialed copy must *immediately* be sent to the Seller.

Given the information provided to the Hotline, Buyer received a late acceptance on Saturday. If Buyer approves this late offer, Buyer should initial the appropriate area and immediately deliver the approval of late acceptance to Seller. Immediately delivering the approval may mean that an initialed copy is faxed, emailed or hand delivered directly following the Buyer's approval of the late acceptance.

It is not necessary for Buyer to initial the late approval when preparing the offer; because the section should only be initialed if and when Buyer chooses to approve a late acceptance. Paragraph 41 of the RE-21 is designed to provide the Buyer with the option of either approving a late offer by initialing the contract and returning it immediately to Seller or by terminating the contract and not initialing since Seller submitted an offer past the allotted time frame for acceptance.

In this instance, Buyer received a late offer on Saturday. Therefore, if Buyer still wishes to accept Seller's offer, Buyer has a specific time frame to initial and promptly return the agreement to Seller. If Buyer does not wish to accept the late offer because Seller did not meet the specified deadline, Buyer does not initial paragraph 41 of the RE-21.

What is the importance of how addendums and counters are numbered?

QUESTION: Agent questions the importance of how addendums and counter offers are numbered. Agent represents the buyer, and he had written an addendum to the Purchase and Sale Agreement and called it "Addendum #1" and then received "Counter Offer #2" from the listing agent. Should the listing agent have used the addendum form?

RESPONSE: Yes. Given the facts presented to the Hotline, it appears the listing agent should be using the Addendum form (RE-11) because the Counter Offer Form (RE-13) is typically used before (or at the same time) the Purchase and Sale Agreement is executed and typically alters the price terms. However, the most important part of both RE-11 and RE-13 is the date and time in which the parties sign it. Once an addendum or counter offer is signed by both the buyer and the seller, it is made an integral part of the Purchase and Sale Agreement, and the number at the top does not typically matter.

Should the first page of the RE-25 be signed if the seller is not exempt?

QUESTION: Agent would like to know if a Seller is NOT exempt from completing the RE-25 Seller's Property Condition Disclosure form, whether they should sign the first page of the form.

RESPONSE: The RE-25 states at the bottom of page one, before the signature lines as follows:

> **If the referenced property herein is exempt from the Seller Property Condition Disclosure Act, Idaho Code section 55-2501 et seq., for any of the aforementioned reasons, Seller is not obligated to complete the remainder of this disclosure form in any manner. Seller certifies that he/she is exempt from the Seller's disclosure by checking the applicable box above and signing this form on the line(s) below.** (Emphasis added)

The signature lines on page one of the RE-25 are for those who are certifying they are exempt from the Seller Property Disclosure Act for any of the reasons mentioned on page one of the form. The first page should only be signed by those who are claiming to be exempt. Sellers who are not exempt should not sign the first page, but complete and initial each following page, then sign the last page to indicate the statements preceding are true.

What does the "release of brokerage" clause in the RE-51 entail?

QUESTION: Agent's client had its closing date postponed for a few months. However, client and sellers agreed client could move into the home and pay monthly installments toward the purchase price. Agent would like to understand the application of the RE-51 Rental Agreement clause concerning the release of real estate brokerages. Agent questions whether if by the client signing the form, agent is then no longer entitled to Agent's sales commissions under the purchase and sale.

RESPONSE: Section 9 of the RE-51 Rental Agreement states:

> Landlord and Tenant release all real estate brokerages, their licensees and employees, and agree to indemnify all brokers, their licensees and employees from any and all claims arising as a result of this Agreement or the Tenants possession of the Premises.

The above quoted language refers to the rental agreement only. The Rental Agreement is not tied to the Purchase and Sale, and therefore a signature on a RE-51 would not prohibit agent from collecting commissions under the purchase and sale agreement. They are two separate contracts. It should be noted the RE-51 does not require the existence of a purchase and sale agreement in order to be valid.

What if the RE-44 states that seller will not continue to market after an offer has been made?

QUESTION: Agent represented a seller who signed a RE-44 Short Sale Addendum agreeing not to continue to market or accept offers from other buyers. There has now been a second full-price offer made on the house and the Agent wants to know whether they are allowed to present the second offer to the Bank.

RESPONSE: RE-44 Short Sale Addendum Part 3 indicates whether the Seller may, or may not, continue to market or accept offers to purchase the property. This section also advises that some creditors require that the property continue to be marketed and offers be accepted to meet their obligation. This section goes on to say:

> ..The Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ___ (3 days, if left blank) to submit an offer under this Right of First Refusal.

While the Seller may have agreed not to market the property or accept offers, the creditor may require that they do. If the parties agreed that the seller may not continue to market the property, then later offers may only be accepted if the lender is requiring seller to market the property. Regardless of whether the seller is permitted to continue to market the property, when a second offer is made, the Agent shall give the original buyer notice of the offer and allow them at least three (3) days to match or exceed the second offer. The notice of the new offer, and the opportunity for the first buyer to use their "Right of First Refusal" should expire prior to seller accepting the second offer.

LICENSE LAW

Is it good practice to retain records for longer than IREC requires?

QUESTION: Broker asked whether it would be good practice to retain records longer due to the potential for future legal claims.

RESPONSE: Idaho Code §54-2049. Record Retention Schedules sets forth the statutory requirements for maintaining documents as follows:

> All records required in this chapter to be kept and maintained by a real estate broker, including trust account and financial records, transaction files and other records are to be kept in the broker's files according to this section. The following records must be kept by a broker for three (3) calendar years after the year in which the

> event occurred, the transaction closes, all funds were disburse, or the agreement and any written extension expired.

The statute of limitations for actions on written contracts is codified in Idaho Code §5-216 provides a five (5) year statute of limitations.

As the statute of limitations for an action on written contact is five (5) years, but brokers are only required to maintain records for three (3) years, broker may wish to retain records for longer than the statutorily required time. However, retention for five (5) plus years would be out of an abundance of caution, since most actions would be between buyer and seller and would not involve the brokerage.

Does seller have to disclose that they passed the licensing exam if they are not an active licensee?

QUESTION: Agent represents Seller. Seller has recently passed the real estate licensing exam, however does not currently hold an active license. Agent would like to know if it is required by law to disclose that Seller has passed this exam.

RESPONSE: Idaho Code § 54-2055 states:

> Licensees dealing with their own property. (1) Any actively licensed Idaho broker, sales associate, or legal business entity shall comply with this entire chapter when that licensee is buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction.
> (2) A licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.
> (3) Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed.

Given the information provided to the Hotline, Seller has recently passed the licensing exam, but is not actively licensed. Therefore, the statute would not apply to the Seller. If Seller was active per Idaho Real Estate Commission classification then it is required that the licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license.

Additionally, Agent and Seller may consider disclosing this issue regardless of whether Seller is active or not as there probably will not be any harm in doing so.

ADVERTISING/MARKETING

Can listing agent continue to market a property without terminating the contract with buyer?

QUESTION: Agent represents Buyer. Buyer and Seller have executed a purchase and sale agreement set to close in thirty (30) days. The transaction is contingent upon Buyer obtaining financing and selling his current home. However, Buyer has decided to terminate contract because it's believed the home will not sell in 30 days nor will Buyer obtain desired grant funds to finance the transaction. Buyer has signed and delivered the termination form. However, Seller refuses to sign the termination form and release earnest money to the Buyer. Seller's agent has since placed the property on the market. Buyer's agent would like to know if Seller's agent is able to market the property without terminating the contract with Buyer.

RESPONSE: Idaho law does not require both signatures on the termination form for the termination to be effective. General contract law does provide for the legal theory of *Anticipatory Repudiation* in which a promisor, prior to the time set for performance of his promise, indicates that he will not perform when the time comes. Anticipatory repudiation must be unequivocal wherein the promise of performance may be deemed rescinded and the contract is regarded as discharged.

In this instance, Buyer has provided Seller and Seller's agent with a signed termination form. Seller's agent may potentially recognize this as anticipatory repudiation as Buyer has indicated in writing that it is not intending on performing under the purchase and sale agreement. Since Buyer has given said indication of not performing, Seller's agent may be able to relist and market the property.

The Hotline does not resolve Buyer and Seller disputes. As a result, Agents, Seller and Buyer may wish to contact private legal counsel to determine the parties' rights and responsibilities under the contract.

Can Craigslist be used to advertise real estate?

QUESTION: Seller would like agent to advertise her real estate property on Craigslist. Agent would like to know if there are specific advertising requirements she must follow in order to utilize Craigslist.

RESPONSE: Idaho Code §54-2053 requires the following:

> (1) Only licensees who are actively licensed in Idaho may be named by an Idaho broker in any type of advertising of Idaho real property, may advertise Idaho property in Idaho or may have a sign placed on Idaho property.
> (2) All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or

> shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.
> (3) All advertising by licensed branch offices shall contain the broker's licensed business name.
> (4) No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a distinct probability that such information will deceive the persons whom it is intended to influence.

Electronic venues such as Craigslist are not prohibited means for real estate property advertisement. Therefore, agent must adhere to Idaho Law as cited above when advertising seller's property on Craigslist.

Can an agent advertise under two different brokerages?

QUESTION: Broker's company recently merged with a different brokerage. Broker is in the process of changing her license to the new company. In the interim, Broker maintains listings under old company name. Broker wants to advertise in local newspaper under the new company's name. Broker is aware she cannot list property under new company's name until her license has been changed. However, she wants to know that if she may advertise the new company if she places a disclaimer on the advertisement identifying that she is currently licensed and listing property under the old company name.

RESPONSE: Idaho Code §54-2053 states in relevant part:

> All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.

Given the facts provided to the Hotline, Broker would like to advertise under two brokerage names. However to remain in compliance with Idaho Code, Broker should advertise listings under her current licensed brokerage name. Additionally, it would be improper to advertise with the new brokerage name unless it has been approved by the commission, even if Broker inserts a disclaimer. Until Broker's license reflects the new company's name and is recognized and approved by the commission, Broker should likely advertise solely under current brokerage name.

Are "For Sale" signs considered personal property?

QUESTION: Agent called stating that he represented seller and placed for sale signs on a 30 foot road easement on a highway. The adjoining property owner keeps taking his for sale signs down and states he doesn't like where they are. The adjoining property owner has not destroyed any signs, only taken them down repeatedly. Agent questions if his for sale signs are

personal property and wants to know if he can tell the adjoining property owner to leave his signs alone since they are on the easement.

RESPONSE: Idaho Administrative Code 39.03.42 (200) (1) states in relevant part:

> To help preserve the highways as constructed and provide responsible growth where allowed, any individual, business, or other entity planning to add, modify, change use, relocate, maintain, or remove an encroachment on the state highway or use highway right-of-way for any purpose other than normal travel, shall obtain a permit to use state highway right-of-way. Encroachment permits approved by the Department are required for private and public approaches (driveways and streets), utilities and other miscellaneous encroachments.

According to the Idaho Administrative Code quoted above, the Agent must have obtained a permit to put his for sale signs on the highway easement through the Idaho Transportation Department prior to placing them on it. It is likely that the Agent needs to fill out an application for a permit before placing another for sale sign on the highway easement. Regardless, it is likely that the right to remove any signs inappropriately placed rests with the Idaho Transportation Department, not the adjoining property owner or any other private party.

Who can legally issue BPOs?

QUESTION: Agent would like to know, by law, whether or not a licensed real estate salesperson is permitted to issue a broker price opinion (BPO), or is an individual required to be a licensed appraiser or be a broker and/or associate broker in order to render BPOs?

RESPONSE: Idaho Code § 54-4105(3) of the Idaho Real Estate Appraisers Act states in relevant part:

> The provisions of this chapter shall not prohibit a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, whose license is active and in good standing, from rendering a broker's price opinion.

Based on the above quoted statute, which is an exception to the Appraiser Act, a licensed real estate salesperson cannot legally sign a broker price opinion (BPO). An individual must be a licensed broker or associate broker in order to issue and sign broker price opinions.

MISCELLANEOUS

Does the lease transfer when an investment property sells?

QUESTION: Agent represents seller of an investment property in foreclosure, where only half of the duplex is listed and would like to know if the current lease would have to be

carried over to the new buyers and respect the terms of the lease or can the tenant be evicted immediately?

RESPONSE: Idaho Code § 55-208 (1) states in relevant part:

> Termination of tenancy at will. A tenancy or other estate at will, however created, may be terminated:
> (1) By the landlord's giving notice in writing to the tenant, in the manner prescribed by the code of civil procedure, to remove from the premises within a period of not less than one (1) month, to be specified in the notice;

In this instance, Agent asked if the landlord needed to respect the current tenant's lease or if they could evict the tenant immediately. Unless stated otherwise in the previous lease agreement, the new owner of the duplex wouldn't have a lease agreement with the current tenant. Therefore, tenant likely is considered a tenant at will under the new owner. As stated above, Idaho Code requires that the landlord give notice in writing to the tenant within a period of not less than one month to terminate the tenancy.

What does the "window coverings" part of Section 5 on the RE-21 entail?

QUESTION: Agent called asking if curtains and curtain rods were considered window coverings as noted in the RE-21 Section 5, and asked for clarification of a previous Hotline response.

RESPONSE: RE-21 Section 5 states:

> "All existing fixtures and fittings that are attached to the PROPERTY are **INCLUDED IN THE PURCHASE PRICE** (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, storm windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. It is agreed that any item included in this section is of nominal value less than $100." (Emphasis added.)

According to RE-21 Section 5 above, if the existing curtains and curtain rods are "attached" to the real property or are considered "window coverings" they are included in the purchase of the home unless excluded in Section 5(B).

Determining whether a particular item is attached to the property has to be done on a case by case basis. For example, if the curtains are fabric material draped over the curtain rods and can be easily removed without damaging the property or the attached rods, the hanging curtains are most likely not fixtures. However, if the curtains are blinds, roller shades, wood paneled, etc., and cannot be removed without damaging the property, those would most likely be considered attached fixtures. Each case also depends on what the parties would consider "window coverings."

If there is any question, buyer or seller should specifically address the matter in the blank lines immediately following Section 5 of the RE-21. That is what they are there for. The Hotline does not resolve disputes between parties. Brokers may advise clients to seek legal counsel to determine what would be considered permanent fixtures in this particular case.

What are the seller's rights in a boundary line dispute?

QUESTION: Agent represents seller who is having a boundary line dispute with his neighbor who states that the seller's driveway is encroaching on his property. The driveway was built in 1942 and the current seller has lived in the property since 1995, the neighbor moved to his property in 2007. Agent would like to know if the seller can offer her property for sale with the driveway as her property.

RESPONSE: Idaho Code § 5-203 discusses adverse possession requirements:

> No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

To establish a case for adverse possession, "the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the [property]; (5) for the statutory period [which is 20 years]." *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003).

Therefore, the statutory time period requirement for adverse possession is 20 years. Due to the length of this statutory requirement, such claims are likely to be rare and difficult to prove. However, given the fact that the driveway has been in its current location since 1942, it may still be possible for seller to establish a claim for adverse possession. Agent may wish to consult private counsel regarding his rights and obligations under a claim for adverse possession.

Is there a limit on what a landlord can charge a tenant in Idaho?

QUESTION: Agent represents Renter in Kootenai County. Renter is undergoing a rental transaction. For this reason, Agent would like to know if Idaho and/or Kootenai County have a rental control ordinance.

RESPONSE: The Idaho Landlord—Tenant Guidelines state in relevant part:

> There are no federal or state rent controls or rent stabilization laws that apply in Idaho. As a result, there are no legal limitations on how much or how often a landlord can raise the rent.

Based on the above-cited guidelines, rental control ordinances do not exist in Idaho. However, the Hotline is unaware of any Kootenai County ordinances that may affect rental rates within Kootenai County. It may be beneficial for Agent and/or Renter to contact Kootenai County and/or applicable municipalities regarding ordinances that may directly affect tenants and/or impact rental agreements.

Does the security deposit get returned to the owner of the property or the tenant?

QUESTION: Agent stated that a property owner had a management contract with a property management company for one year. The property management company had a lease agreement with a tenant who signed a one year lease to rent the property and collected a security deposit at the time the lease was executed. When the one year contract expired, the property owner did not renew with the property management company. The property management company then returned the security deposit to the tenant. The Agent questions whether the security deposit should be returned to the owner of the tenant.

RESPONSE: Idaho Code §6-321 states in relevant part:

> Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement… Refunds shall be made within twenty-one (21) days if no time is fixed by agreement, and in any event, within thirty (30) days after surrender of the premises by the tenant. Any refunds in an amount less than the full amount deposited by the tenant shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit.

According to the Idaho Code stated above, the property management company may owe the affirmative duty to the tenant to return the security deposit upon the expiration of the lease. Because the lease agreement was between the property management company and tenant and not the owner and tenant, the owner likely had no right to collect the security deposit from the property management company. As the security deposit is property of tenant, unless the landlord makes a claim against it in writing, it was likely proper for the property management company to return the security deposit directly to the tenant.

Does IREC have the authority to request documents from an agent before they were licensees?

QUESTION: Agent states the Idaho Real Estate Commission ("IREC") has requested documents for a corporation and business Agent owned before becoming a licensed real estate agent. Agent wants to know if IREC has the right to ask for these documents.

RESPONSE: Idaho Code § 54-2058 (1) states in relevant part:

> Authority to investigate and discipline. (1) General authority to investigate. The commission may investigate the action of any person engaged in the business or acting in the capacity of real estate broker or salesperson in this state, **or any person believed to have acted as a real estate broker or salesperson without a license** in violation of section 54-2002, Idaho Code. Upon receipt of a written complaint from anyone who claims to have been injured or defrauded as a result of such action, or upon information received by the executive director, the executive director shall perform an investigation of the facts alleged against such real estate broker or salesperson or such unlicensed person. (Emphasis added).
>
> Idaho Code § 54-2058 (3) states in relevant part:
> (3) The commission also has the authority to investigate the action of any Idaho licensee as provided in this section. The licensee or broker shall answer all reasonable investigative questions of the commission, and **must make available, promptly upon request, any and all records to the commission at the licensee's own cost** and at the location or in the manner requested by the commission. (Emphasis added).

Given the facts provided to the Hotline, Agent has been asked by IREC to turn over documents from his construction and development corporation along with his brokerage, because IREC suspects he was acting as a real estate agent while not being licensed. IREC is able to examine any and all documents it feels is relevant to its investigation. It is the Hotline's recommendation that the Agent turn over everything requested by IREC, so that the Agent doesn't get reprimanded for non-compliance with IREC's request.