The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2022

Prepared by:

Jason S. Risch

RISCH ♦ PISCA, PLLC
LAW AND POLICY
407 W. JEFFERSON
Boise, ID 83702
Phone: (208) 345-9929
Fax: (208) 345-9928

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 2022 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms as printed in 2022. 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 2022 "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 2022 legislative changes to the law.

TABLE OF CONTENTS

AGENCY/LICENSE LAW

Can a Buyer have multiple representation agreements with different brokerages?

QUESTION: Broker questions if a Buyer is able to enter into multiple representation agreements with different brokerages if each agreement specifies a different address or location, etc.

RESPONSE: The Buyer Representation Agreement (RE-14) states:

> Buyer _____ retains _____ … 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 referenced below. Further, BUYER agrees, warrants and acknowledges that BUYER has not and shall not enter into any buyer representation agreement with another broker in the state of Idaho as a broker for BUYER during the effective term of this agreement, unless otherwise agreed to in writing by BUYER and above-listed Broker. BUYER agrees to indemnify and hold the above-listed Broker harmless from any claim brought by any other broker or real estate salesperson for compensation claimed or owed during the effective term of this agreement. By appointing Broker as BUYER'S exclusive agent, BUYER agrees to conduct all negotiations for property through Broker, and to refer to Broker all inquiries received in any form from real estate brokers, salespersons, prospective sellers, or any other source, during the time this Buyer Representation Agreement is in effect. BUYER desires to purchase, lease, or option the real estate described below:
> ☐Residential ☐Residential Income ☐Commercial ☐Vacant Land ☐Custom Build Job
> ☐Other _____
> Applicable City(s) _____, Idaho;
> Applicable County(s) _____
> Other Description: (i.e., geographical area, price, etc.) _____

The RE-14 is an exclusive right to represent; however, if Buyer and Brokerage fill in information that makes the RE-14 applicable to a specific city, county or address, Buyer **would be** able to enter into another RE-14 with a different brokerage for any properties that are not covered under the agreement with Brokerage 1. For example, Buyer and Brokerage 1 specifically list Ada County as the applicable county where Broker will help Buyer find and purchase a property, and no other check boxes are marked. Buyer could then sign a RE-14 with Brokerage 2 that only lists Gem County. This circumstance would not be considered interference with an existing representation agreement. The same would apply to the property type, ie. residential versus commercial.

However, if any broker or agent is approached by a Buyer who has an existing RE-14 with another brokerage, best practices would be to reach out to the other brokerage to make sure there is no issue with entering into an agreement with the same Buyer for a different address, location or type.

Can a non-Idaho licensed agent represent a client in an Idaho transaction?

QUESTION: Broker was retained by the personal representative of an estate and has listed the estate's real property; a residential dwelling. After being on market for several weeks, one of the family members related to the deceased is going to make an offer on the estate property. The family member desires to use their father who is a real estate agent in California to represent them as the Selling Agent/Buyer's brokerage. Listing Broker inquired with the Legal Hotline if there is an exception to allow this type of representation.

RESPONSE: Based on the facts and details conveyed to the Hotline, there does not appear to be an exception which would allow the California family member to represent the Buyers. Idaho law states:

> LICENSURE REQUIRED. No person shall engage in the business or act in the capacity of real estate broker or real estate salesperson in this state without an active Idaho real estate license therefor. Unless exempted from this chapter, any single act described within the definitions of "real estate broker" or "real estate salesperson" shall be sufficient to constitute "engaging in the business" within the meaning of this chapter. Any person who engages in the business or acts in the capacity of real estate broker or salesperson in this state, with or without an Idaho real estate license, has thereby submitted to the jurisdiction of the state of Idaho and to the administrative jurisdiction of the Idaho real estate commission and shall be subject to all penalties and remedies available under Idaho law for any violation of this chapter.
>
> Idaho Code § 54-2002.
>
> EXCEPTIONS TO LICENSURE — ACTIVE LICENSEES — TRANSACTIONS INVOLVING PERSONAL PROPERTY.
> (1) Exceptions to licensure. Except as otherwise stated below, an Idaho real estate license is not required for the following:
> (a) The purchase, option, exchange or sale of any interest in real property, or business opportunity for a person's own account or use;
> (b) The acquisition, exchange or other disposition of any interest in real property or business opportunity by its owner or a regular employee of the owner, acting within the scope of his or her employment;
> (c) The sale, exchange, purchase or other disposition of any interest in real property or business opportunity by a duly authorized attorney in fact

whose power of attorney is granted for the purpose of consummating a single transaction involving the conveyance of a single or undivided interest in a parcel of real property or in a business opportunity;

(d) The acquisition or other disposition of any interest in real property or business opportunity by the following parties only if such acquisition or disposition is undertaken in the performance of their duties as:

(i) A receiver, trustee in bankruptcy, legal guardian or conservator;

(ii) An administrator, executor or personal representative of an estate;

(iii) Any person selling pursuant to the default provisions of a deed of trust, or any duly authorized agent thereof.

(e) The acquisition or other disposition of any interest in real property or business opportunity by an attorney at law in connection with client representation, and if the attorney is not regularly engaged in the conduct or business of real estate broker or salesperson.

Idaho Code § 54-2003.

Idaho does not recognize cooperative associations in residential circumstances:

COOPERATIVE LICENSES.

…

(8) An out-of-state broker may cooperate with only one (1) Idaho broker and an Idaho broker may cooperate with only one (1) out-of-state broker per **commercial** real estate transaction. However, an out-of-state broker may obtain a cooperative license for more than one (1) **commercial** real estate transaction at a time.

Idaho Code § 54-2017(8). (Emphasis added).

COMMISSIONS & FEES

Is Buyer's agent entitled to commission if Buyer assigns the contract?

QUESTION: Broker represents a Seller who was interested in selling certain property. Broker has a signed Representation Agreement with Seller. The Representation Agreement with the Seller contained terms whereby, in the event Brokerage procured a purchaser, the Brokerage would be entitled to a commission based upon a certain percentage of the purchase price (x%). This agreement also acknowledged that one half of the total commission (½ x%) would be shared with any brokerage that brought forth a buyer to purchase the property. On behalf of the Seller the Broker listed the property in the local MLS which also offered a commission (½ x%) to any brokerages that procured a buyer for the property. Various offers were made relative to the property and eventually Seller accepted an offer from Buyer – who was also Brokerage's client. Brokerage also had a Representation Agreement with Buyer which stated that Buyer would pay Brokerage a commission (½ x%) of the purchase price.

At some point during the transaction Buyer assigned Buyer's rights under the Purchase and Sale Agreement, which was fully assignable. The Assignee is an LLC who has a real estate licensee as a member of the LLC. The Assignee does not want to pay Broker the selling agent (Buyer's side) commission and is instead claiming that the Buyer's side commission should be paid to their licensee member. Broker questions if his Buyer side commission was forfeited when the contract was assigned.

RESPONSE: Based upon the facts provided to the Hotline (as noted above), nothing in the transaction appears to have changed the Broker's contractual right to obtain the full commission on the transaction. Broker procured a Buyer to purchase the property. Broker has a clear contract with Seller for the full x% commission. Broker also has a contract with the original Buyer for ½ x% commission as the Broker found Buyer the property, and Buyer entered into a Purchase and Sale Agreement that legally requires him to complete the transaction. Depending on the rules of the MLS, Broker also could conceivably be considered a cooperating brokerage under the terms of the MLS which might also entitle him to the same ½ x% commission for procuring a Buyer.

Conversely, the licensee member of the LLC did not have a written contract with any party entitling her to a commission and she did not procure a Buyer under an offer of cooperation though an MLS. She may have brought forth an Assignee to step into Buyer's shoes but it does not appear that she procured a Buyer as that term is used in the representation agreements and the standard MLS rules.

Further, Idaho law also states:

> 9-508. REAL ESTATE COMMISSION CONTRACTS TO BE IN WRITING. No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative.

It is always best practice to address real estate commissions in assignment circumstances; according to the Brokerage the parties used an Assignment Agreement drafted by the parties or their legal counsel and the agreement did not address compensation or commissions.

Should changes to commission be included in the Purchase and Sale Agreement?

QUESTION: Broker entered into a RE-14 with Buyer. Buyer met with a builder who apparently used builder's agent to write an offer for the property. Once Broker was made aware of the situation, she notified the listing agent that she has a Representation Agreement with Buyer. The listing agent has allegedly refused to acknowledge Buyer is Broker's client, under the binding RE-14 she has with the Buyer. Further, the MLS listing stated 2% would be paid to the cooperating broker. When Broker finally saw a copy of the offer, the RE-21 contained language that reduced

the commission offered in the MLS to Seller only paying 2% to the listing brokerage and would pay nothing to the Buyer's brokerage. Broker questions 1) if the Purchase and Sale Agreement is the appropriate place to document commission changes and/or reductions, and 2) if the listing agent is interfering with her Representation Agreement with Buyer.

RESPONSE: Given the facts presented to the Hotline, the Buyer and Seller agreed to a reduction in commissions from what was offered in the MLS listing when they executed the Purchase and Sale Agreement. Commission negotiations should never take place in a Purchase and Sale Agreement because the brokerages (those entitled to commission either through contract or through MLS offers of cooperation) are not a party to the Purchase and Sale Agreement.

> The MLS is:
>
> [A] means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law)… Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of sale (or lease)." [NAR Handbook on Multiple Listing Policy, Page 7].
>
> In filing property with the multiple listing service, participants make blanket unilateral offers of compensation to the other MLS participants and shall therefore specify on each listing filed with the service the compensation being offered by the listing broker to the other MLS participants. This is necessary because cooperating participants have the right to know what their compensation will be prior to commencing their efforts to sell [Handbook, Page 39]"

The sprit and effectiveness of the MLS would be undermined if a Listing Broker were allowed to unilaterally change the compensation offered to a cooperating brokerage once a Buyer has been procured by said brokerage. If the MLS listed cooperating brokerage's commission at 2%, the only way it can change is by either amending the listing or if all parties execute a written agreement; like the RE-16A.

In response to Broker's second question regarding interference, the RE-14 is a legally binding contract between a buyer and a brokerage. Both Idaho law and the REALTOR® Code of Ethics have strict rules that prohibit interference with brokerage agreements:

> 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. [Idaho Code 54-2054(4)]

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

CONTRACTS

If an offer is contingent upon the sale of Buyer's home, is said contingency subject to Section 4 of the RE-21?

QUESTION: Broker represents a Buyer in a transaction who had made the transaction contingent upon the sale of Buyer's other property. Buyer was unable to sell said property and terminated the contract however, Buyer did not terminate prior to the deadline set forth in Section 4 of the RE-21 that automatically waives all contingencies 5 days prior to closing. Seller is demanding the earnest money as liquidated damages. Broker questions whether or not Buyer can use the contingency stated above to retain his earnest money.

RESPONSE: It is unlikely that Buyer will be able to retain Buyer's Earnest Money, due to the inclusion of Section 4 of the 2021 version of the RE-21 which states:

> **SATISFACTION AND/OR REMOVAL OF ALL CONTRACT CONTINGENCIES**: Unless specifically stated below all contingencies in this Agreement and in any counter offers, addendums or amendments are required to be satisfied, removed or exercised no later than ____ business days (five [5] if left blank) prior to the stated closing date or any extension thereof. Failure of either BUYER or SELLER to exercise any contingency by this deadline shall constitute an unconditional waiver of said contingency. Unless this Agreement is properly terminated under a specific provision of this Agreement prior to the contingency deadline stated above then all parties shall conclusively be deemed to have elected to proceed with the transaction and all Earnest Money shall become nonrefundable except upon an instance of SELLER's default. This contingency deadline shall not apply to the following contingency (ies):
>
> _____
>
> _____

According to the language stated above, ALL contract contingencies, unless specifically set-forth in the blanks are required to be "satisfied, removed, or exercised" no later than a certain amount of business days prior to closing. Pursuant to the facts presented to the Hotline, Buyer terminated the contract after the Section 4 deadline had passed and no contingencies were reserved in the stated in the blanks. Thus, according to the terms of the contract, Buyer no longer had a financial contingency, a contingency related to sale of his other home or any other contingency. In order for Buyer to have a contractual right to the return of his earnest money Buyer would have had to have exercised some contingency prior to it expiring. It appears Buyer failed to do so therefore; it

is unlikely the Buyer has a contractual right to receive a refund of his earnest money for terminating the agreement.

Given that both parties are demanding the earnest money 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.

While the Hotline can advise on contractual terms contained in the standard real estate forms it cannot advise buyer on what to do in an earnest money dispute since each determination needs to be made on a case-by-case basis under the facts of that particular transaction. Ultimately Broker is entitled to make that call.

What is a Buyer's recourse if a pipe bursts after primary inspections have been conducted?

QUESTION Buyers' broker questions what happens if a pipe bursts in the property after Buyers have conducted the primary inspection. Broker also asked if there is a statutory obligation to amend a property disclosure statement.

RESPONSE: The Seller has the obligation to deliver the property in the same condition it was in upon execution of the contract. The secondary walk though is designed to allow Buyer to view the property and ensure it is in the same condition:

> 23. 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 _____ 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. SELLER shall make PROPERTY available for the walk throughs and agrees to accept the responsibility and expense for making sure all the utilities are turned on for the walk throughs except for phone, cable and internet. 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.

In the event the property is materially damaged the Buyer has the ability to void the contract:

> 22. RISK OF LOSS OR NEGLECT: Prior to closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire, neglect, or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.

As to amending the property disclosure statement, Idaho Code 55-2513 states:

> 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.

Is the contract valid if Seller signed the counter offer but did not sign the Purchase and Sale Agreement?

QUESTION: Buyer tendered an offer, Seller countered, all parties signed the counter offer form and proceeded to closing. Seller initialed all pages of the original offer, yet did not sign the signature blocks. Is Seller required to sign the original Purchase and Sale Agreement?

RESPONSE: While it is always best practices to have all parties sign the Purchase and Sale Agreement and the Counter Offer, it is probably not legally required to evidence a meeting of the minds as the counteroffer states:

> The parties accept all of the terms and conditions in the above-designated Purchase and Sale Agreement with the following changes: (RE-13 Line 11).
>
> 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. (RE-13 Line 42-45).

What are a Buyer's obligations under the secondary inspection clause of the RE-21?

QUESTION: Broker represents Seller. Buyer waived the primary inspection but still wanted to conduct a secondary inspection of the septic system. The Buyer terminated based on an unsatisfactory septic inspection. Seller alleges that the Buyer did not technically conduct an inspection; Broker questions what Buyer's obligations are under the inspection clause. Broker also questions if a specific reason must be supplied by Buyer.

RESPONSE: Under the standard terms of the RE-21, a Buyer may terminate the agreement pursuant to a secondary inspection. The RE-21 states:

> 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 12(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
>
> RE-21, 12(B)(2).

Further, Section 12(C)(2) of 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.

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 Agreement 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. If Buyer did not conduct at least some sort of inspection based upon the septic system, it is unlikely that Buyer would be able to terminate based on an unsatisfactory inspection.

Is a Purchase and Sale Agreement valid if there is no legal description because lots have not been officially 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.

How is the contingency removal deadline (Section 4) calculated?

QUESTION: Brokers on both sides of the transaction called the Hotline. The transaction is set to close on Tuesday, May 10, 2022. Section 4 of the contract states that all contingencies must be waived no later than 5 business days prior to the closing date. There is a dispute over when Buyer needed to remove contingencies under Section 4 of the RE-21.

RESPONSE: Because the contract refers to a Business Day, both a date and time analysis is important.

Date Analysis

Section 4 of the RE-21 requires all contract contingencies to be satisfied or removed by a certain business day prior to closing. Section 30 of the RE-21 defines a business day as:

> 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 section referring to contingency removal states as follows:

> "Unless specifically stated below, all contingencies in this Agreement … are required to be satisfied, removed or exercised no later than ____ business days (five [5] if left blank) prior to the stated closing date…" (RE-21 Section 4).

Using the facts provided to the Hotline, the closing date is Tuesday, May 10, 2022. The first business day prior to the stated closing date would be Monday, May 9, 2022. The dates of May 7 and 8, being a Saturday and Sunday, are not business days pursuant to the definition. Therefore, the second business day prior closing would be Friday, May 6, 2022, and so on. Meaning that the fifth business day prior to closing would be Tuesday, May 3, 2022.

Time Analysis

Having determined the date, one must then determine the time. The contract states that a business day does not begin until 8:00 A.M. Thus, when something must be performed prior to a particular "business day," it must be performed prior to 8:00 A.M. on that day. Therefore, under this situation, all contingencies would have to be removed prior to 8:00 A.M. on Tuesday, May 3, 2022.

It is important to note that nowhere in the contract does it require a contingency to be removed **on** a business day, the language says it must be removed **prior** to a business day.

How does a Buyer recover expenses from a Seller who breached the contract?

QUESTION: Broker represents Buyer who is in a transaction which was improperly canceled by Seller. Buyer had expended money on repairs on the property's well and septic which were required just to get those systems to a point where they could be inspected. Buyer had an agreement with Seller to pay half of the expenses of those repairs. Now that Seller has breached the contract Broker questions if Buyer has an avenue to recover Buyers expenses.

RESPONSE: In the event of a Seller default, Section 33 of the RE-21 will control. It states:

> 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.

Pursuant to the language above and according to the facts presented by Buyer's Broker, Buyer has a right to receive a refund of Buyer's earnest money but Buyer may also have a claim against Seller for all of Buyer's damages which could include any expenses reasonably and proximately incurred as a result of Buyer believing that Buyer would have the option to purchase the property. Further, in Idaho specific performance is also allowed under the proper circumstances.

Like Brokers, the Legal Hotline does not provide legal advice to Buyers or Sellers, thus Broker should advise Buyer to immediately obtain competent legal counsel to advise Buyer of Buyer's rights.

If a contract specifies that the inspection is "for informational purposes only," is the entire inspection contingency section removed from the contract?

QUESTION: Will the language "for informational purposes only" inserted in a contract via a counter offer eliminate Section 12 of the RE-21 altogether?

RESPONSE: The language used is ambiguous, so it is unlikely it will eliminate the whole section, including the termination language. Best practice if eliminating a whole section of the Purchase Sale Agreement is to specifically state that fact in the counter offer.

Does an addendum that was not signed by all parties become part of the contract?

QUESTION: Broker called the Hotline asking if unsigned addendums are accounted for or incorporated in the contract between the Buyer and the Seller.

RESPONSE: No. An unsigned addendum is simply a document that memorializes the negotiations between a Buyer and a Seller. If the negotiations or terms contained an addendum are not agreed upon, they have virtually no bearing on a contract. Legally speaking, only the terms agreed to between the parties, referred to as a "meeting of the minds" create the contract.

In Idaho, the industry standard is that all addendums are numbered sequentially whether agreed upon or not. Therefore, a Purchase Sale Agreement may only legally include and incorporate a document titled Addendum To. Upon a review by someone else out of the industry, this may appear confusing. But so long as all the parties have an understanding of the process and precisely what was incorporated into the contract, there is nothing legally faulty with a contract that has no addendum 1. The same is true for counter offers.

It is important to note that whether or not an unaccepted addendum legally becomes part of a contract, has no relation or bearing upon the record retention required by the Idaho Real Estate Commission. Certain statutes require the retention of certain documents and if Broker has questions regarding those documents, Broker should confirm the same with the Idaho Real Estate Commission. For example, Idaho Code § 54-2049(1) states that all "accepted, countered or rejected offers" shall be retained in the Broker's file. This requires Brokers to keep rejected counter offers regardless of whether or not they become part of the legal contract.

Do all of the blank lines need to be filled out in the financing contingency section of the contract?

QUESTION: Broker contacted the Legal Hotline inquiring if it is best practices to fill out all of the blanks in Section 3(D), specifically the amount of interest, period of the loan and other loan details.

RESPONSE: Yes, it is always best practice to fill out every blank in a form in order to ensure that all parties have a meeting of the minds as to exactly what is being agreed to.

First off, in order to have a valid legal binding contract, all material terms must be included in the written contract and agreed upon. Secondly, in the event that some of the minor details relating to the loan Buyer is going to obtain, are not considered "material terms" and they should still be included. They assist the Seller in determining whether or not Buyer is going to have a difficult time obtaining a loan under Buyer's preferred terms. They also assist Buyer in that without them Seller may insist that Buyer could have qualified for a loan under other terms and Buyer's failure to do so eliminates Buyer's financing contingency.

It is important to note that while these terms may be filled in, Buyer is not locked into each of the terms as the Purchase Sale Agreement also includes a line that states: "Buyer may also apply for a loan with different conditions and costs and close the transaction provided all terms and conditions of this agreement are fulfilled, and a new loan does not increase the cost or requirements to the Seller." (RE-21, Lines 46-47).

Can a Buyer use the financing contingency to terminate the contract if Buyer lost their job after the Section 4 deadline passed?

QUESTION: Broker represents a Buyer in a transaction who unexpectedly lost his job less than five-days before closing. Because Buyer lost his job, his ability to qualify for financing changed. Buyer believes he was forced to terminate contract and Broker questions whether or not Buyer is able to recover Buyer's Earnest Money, especially in relation to the newly added Section 4 of the RE-21.

RESPONSE: It is unlikely that Buyer will be able to recover Buyer's Earnest Money, due to the inclusion of Section 4 of the 2021 version of the RE-21 which states:

> **SATISFACTION AND/OR REMOVAL OF ALL CONTRACT CONTINGENCIES**: Unless specifically stated below all contingencies in this Agreement and in any counter offers, addendums or amendments are required to be satisfied, removed or exercised no later than ____ business days (five [5] if left blank) prior to the stated closing date or any extension thereof. Failure of either BUYER or SELLER to exercise any contingency by this deadline shall constitute an unconditional waiver of said contingency. Unless this Agreement is properly terminated under a specific provision of this Agreement prior to the contingency deadline stated above then all parties shall conclusively be deemed to have elected to proceed with the transaction and all Earnest Money shall become nonrefundable except upon an instance of SELLER's default. This contingency deadline shall not apply to the following contingency (ies):
>
> _____
>
> _____

According to the language stated above, ALL contract contingencies, unless specifically set-forth in the blanks are required to be "satisfied, removed, or exercised" no later than a certain amount of business days prior to closing. According to the facts presented to the Hotline, Buyer lost his job after this deadline had past, thus according to the terms of the contract, Buyer no longer had a financial contingency. In order for Buyer to have a contractual right to the return of his Earnest Money based upon a failure to secure financing, Buyer would have had to have exercised the to the language stated above, ALL contract contingencies, unless specifically set-forth in the blanks are required to be "satisfied, removed, or exercised" no later than a certain amount of business days prior to closing. According to the facts presented to the Hotline, Buyer lost his job after this deadline had past, thus according to the terms of the contract, Buyer no longer had a financial contingency. In order for Buyer to have a contractual right to the return of his Earnest Money based upon a failure to secure financing, Buyer would have had to have exercised the Financial Contingency prior to it expiring. Therefore, it is unlikely the Buyer has a contractual right to receive a refund of his Earnest Money for terminating the agreement.

Can a Seller terminate if they feel a Buyer's proof of funds is unacceptable?

QUESTION: Broker represents Seller who is involved in a transaction that included a RE-27, Seller's Right to Continue to Market Property. 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 home being under contract. 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 and whether Seller can terminate if Seller feels the proof of funds is not acceptable.

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 and therefore Seller can terminate. Broker may wish to advise clients to seek independent legal counsel to advise them of their rights.

Is Buyer obligated to provide a list of unsatisfactory items when terminating due to unsatisfactory inspection?

QUESTION: Broker represents Buyer who ultimately terminated the contract due to an unsatisfactory inspection. Seller is allegedly refusing to acknowledge the termination, stating that Buyer is required to provide a list of unsatisfactory items, and Broker questions if that is correct.

RESPONSE: According to the facts presented to the Hotline, the parties used the Vacant Land Purchase and Sale Agreement (RE-24), which states:

> … BUYER shall, within ____ calendar days (thirty [30] if left blank) from 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.
>
> RE-24, Lines 130-132. (Emphasis added).

The language cited above indicates that Buyer must do one or the other; either provide a list of disapproved items or give written notice of termination. If Buyer chooses to terminate based on an unsatisfactory inspection, the contract states that it must be done in writing.

If an offer is contingent on the sale of another property, can Buyer terminate if their property did not sell at a high enough price?

QUESTION: Broker called regarding a transaction wherein an all cash offer was subject to the sale of another property and the cash proceeds were coming from another sale. Buyer allegedly sold their home for much less than they had planned and were ultimately unable to complete the transaction so Buyer terminated. Could Buyer still use the contingency of another sale to terminate even though they did in fact sell the property?

RESPONSE: According to the facts presented to the Hotline, the Purchase and Sale Agreement (RE-21) indicated that it was an all cash offer, cash proceeds were coming from the sale of another property and the offer was contingent on the sale of the said property. Buyer did sell the property, however it was for much less than Buyer anticipated and ultimately did not have enough cash to close the transaction.

There was a clear contingency listed in the contract – the selling of another home. It is also clear that there was no financial contingency in the contract. Buyer's right to terminate is going to depend on if the selling of the other home did or did not meet the contingency. The Hotline cannot comment on whether Buyer's home selling for less than anticipated gives Buyer the ability to make this determination, as each transaction is different and it would need to be analyzed on a case-by-case basis.

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. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

DISCLOSURE

Is not getting along with a neighbor something that needs to be disclosed to potential Buyers?

QUESTION: Broker represents Seller. Broker questions whether the fact that Seller and neighbor do not get along needs to be disclosed.

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. Agents 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. If this particular situation with the neighbor rises to the level of an adverse material fact, it needs to be disclosed to any potential buyers. If Seller is unable to make a determination, Seller should contact their own legal counsel.

Does a Seller need to disclose results of inspections from a previous transaction to subsequent Buyers?

QUESTION: Broker represents Seller and had a transaction cancel due to a Buyer inspection which included a potability test of the well on the property. Buyer provided Seller with the written findings of the laboratory that conducted the well test. Seller allowed Buyer to cancel the contract but does not believe the results of the test. Broker questions whether the information related to the well has to be disclosed to any new buyers.

RESPONSE: Seller is required to make certain disclosures about the conditions of the property most of which are found in Idaho Code 55-2508. Idaho Code 55-2508 does specifically require a Seller to "Specify problems with the…well." However, whether or not a fact requires disclosure can turn on whether or not the fact is true, justified and/or legitimate. This is a determination that must be made by the Seller, not the Broker. There may be circumstances where an inspection report leaves no question about the condition of a feature of a property but there may also be circumstances where those conclusions are not based on all the known facts or perhaps the inspector making the statement lacked the needed qualifications.

Similarly, the Brokerage is obligated to disclose any known adverse material facts, which are 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).

If the Broker believes that it is required to disclose a fact then Broker should discuss that with Seller and if a disagreement arises it may be in both parties' best interests for Seller to obtain a

different Brokerage. "A Seller cannot order a Brokerage not to make a disclosure required by law."

Whether or not any particular circumstance constitutes, and adverse material fact is something that must be determined on a case-by-case basis. The Hotline does not advise on whether or not something constitutes an adverse material fact.

Is there a timeline for a Seller to amend their property condition disclosures?

QUESTION: Broker's Seller has discovered a circumstance that may require an amendment to the property disclosures provided at the outset of the transaction. Broker questions whether there is a specific timeline in the statute that pertains to amendments.

RESPONSE: The only timeline in the statute refers to closing. The statute states:

> 55-2513. 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.

However, all parties to a contract have the obligation to deal with each other fairly and in good faith so the Seller should take care to amend in a manner that does not cause the Buyer harm.

Does a bonus commission need to be disclosed to all parties?

QUESTION: Broker is aware that certain builders in Broker's area are offering incentives for selling agents who bring buyers to buy builders' home. The bonus would be above and beyond the typical cooperating commission offered in the local MLS. Brokerage questions whether any particular disclosures are required in this circumstance.

RESPONSE: Yes, Broker is required to disclose the builder bonus to Broker's buyer client. Under the facts and circumstances presented to the Hotline, Broker will be compensated by the Buyer as well as receiving a bonus from the builder (Seller). Idaho law requires full disclosure in these types of circumstances. Idaho Code § 54-2054(7) states:

> COMPENSATION FROM MORE THAN ONE PARTY. No licensed real estate broker or salesperson shall charge or accept compensation from more than one party in any one transaction, without first making full disclosure in writing of the broker's intent to do so, to all parties involved in the transaction.

Because Brokerage will be representing Buyer as a client and receiving compensation from Buyer, the above cited statute requires a written disclosure to all parties.

Does a Seller need to disclose a fire on the property that happened prior to Seller owning the home?

QUESTION: Broker represents Seller. Broker questions whether the fact that the home suffered burn damage in 2010, prior to Seller owning the home, needs to be disclosed.

RESPONSE: Under Idaho law, real estate 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 based on all the factors of a particular transaction. Brokers and agents 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. If this particular situation rises to the level of an adverse material fact, it needs to be disclosed to any potential buyers. There are several ways to make the disclosure and in most circumstances disclosure should be made to Buyers or prospective Buyers' agents. Brokers should work with Seller to discuss the required disclosure and the proper time and method for doing so.

DUTIES TO CLIENT/CUSTOMER

Does Broker have any obligation to read or interpret CC&Rs on behalf of a client?

QUESTION: Does Broker have any obligation to read or interpret CC&Rs on behalf of a client?

RESPONSE: No. The Buyer Representation Agreement (RE-14) states:

> **Broker will not investigate the condition of any property including without limitation**: the status of permits, zoning, location of property lines, square footage, **marketability of title, applicability or enforceability of CC&R's**, possible loss of views and/or compliance of the property with applicable laws, codes or ordinances and BUYER must satisfy themself concerning these issues by obtaining the appropriate expert advice.

The language cited above clearly indicates that Buyer must do Buyer's own due diligence regarding the condition of the property, including the CC&Rs.

Further, given the facts presented to the Hotline, Broker is representing Buyer on a build job. The Hotline is uncertain as to whether the parties are using the Purchase and Sale Agreement (RE-21) or the Pre-Sold New Construction (RE-22) form; both forms contain language regarding the CC&Rs and Buyer's obligations and timeframe in which to review and object to any conditions contained therein.

EARNEST MONEY

What are the Responsible Broker's obligations in an earnest money dispute?

QUESTION: Broker represents Seller in a transaction and is the Responsible Broker. The Buyer to the transaction terminated the Purchase and Sale Agreement. Buyer is apparently no longer working with their agent and therefore Broker and Seller have limited information about why the contract was terminated but essentially Seller believes that it was not terminated under a legitimate contingency. The contract in question had limited Buyer's contingencies. Seller and Buyer eventually both made a demand for earnest money. Broker as the Responsible Broker for this transaction questions what his obligations are in event of an earnest money dispute.

RESPONSE: While highly encouraged, the RE-20 is not legally required for the return of earnest money. However not acquiring one may increase Broker's exposure to liability. 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.

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. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

Can Seller keep the earnest money and also pursue other legal remedies in the event of Buyer default?

QUESTION: Broker is involved in a transaction where the Buyer terminated a contract. Broker questions if Seller can take the Earnest Money and also sue Buyer for other damages.

RESPONSE: The RE-21 Default Section (Section 33) states in relevant part:

> 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.
>
> **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.** (Emphasis added).

In the event Seller retains the Earnest Money, it is unlikely that sellers are able to also pursue other remedies. The acceptance of the earnest money would be considered Sellers' liquidated damages. There are special circumstances to consider if the earnest money was considered non-refundable prior to Buyer's breach, but those did not apply to the facts as provided to the Hotline.

Can Seller still pursue other legal remedies if the earnest money was made non-refundable?

QUESTION: Broker's client is involved in a transaction where the earnest money had become non-refundable. Broker's Buyer client now wants to terminate. Broker questions if the non-refundable earnest money becomes liquidated damages preventing the Seller from seeking other damages.

RESPONSE: Section 33 of the RE-21 states in part:

> **33. DEFAULT: <u>If BUYER defaults</u>** 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. **However, in 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**. (Emphasis added)

Pursuant to the language above, non-refundable Earnest Money is not considered liquidated damages thus Seller is open to pursue other damages.

If a Seller accepts the earnest money as liquidated damages, can Seller go after Buyer for more money?

<u>QUESTION</u>: Broker represents Buyer. Buyer is terminating the transaction and is willing to surrender the earnest money. Seller has agreed to terminate and accept the earnest money. Broker questions if Seller can rightfully sue Buyer for more money if Seller accepts the earnest money.

<u>RESPONSE</u>: Typically, Seller would be barred from suing Buyer after accepting earnest money. The contract between the parties (RE-21) states:

> **<u>If BUYER defaults</u>** 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. However, in 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. 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.

The language above provides that forfeited earnest money acts as liquidated damages and that if Seller accepts said monies, it shall be Seller's only recourse.

Of course, if Buyer is concerned about the Seller suing, Buyer is free to draft or have an attorney draft a separate release document that pertains to the particular circumstances of Buyer's transaction. Broker should not draft such a release for Buyer as that would most likely constitute the practice of law.

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. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

PROPER FORM USE

What is the proper form to use to purchase farmland with no residential real property?

QUESTION: Broker has a Buyer looking to buy farmland that does not include a residence, but does include several significant items of personal property. Broker questions which Idaho REALTOR® Form would be more appropriate, the RE-23 (Commercial/Investment) or the RE-24 (Vacant Land).

RESPONSE: Either form may be appropriate for this type of transaction however one will probably be more applicable depending on the specific facts. Broker should sit down with Buyer and review the differences in the two forms and let Buyer determine which form they feel is best to use in conjunction with the offer Buyer wishes to make. In the event that neither form fits the

circumstance Broker should advise Buyer to consult an attorney to draft appropriate transactional documents.

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. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

MISCELLANEOUS

Is specific performance available to both Buyers and Seller?

QUESTION: Broker questions if specific performance is a remedy available to both Buyers and Sellers.

RESPONSE: Technically, 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. Specific performance cases on the seller side are difficult to prevail upon, as courts will generally look to contractual damages first.

The Idaho Supreme Court has stated that specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Fullerton v. Griswold*, 142 Idaho 820, 823 (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 (1985).

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. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

Can a Seller be forced to respond to an offer?

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

RESPONSE: Buyer is entitled to receive confirmation that his or her offer was submitted, 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.

However, neither Idaho real estate license law nor the REALTOR® Code of Ethics apply to Sellers and thus there is no way to force a Seller to respond to an offer.

Broker also had questions about FHA violations on behalf of this client. The Legal Hotline cannot provide legal advice to Buyers or Sellers, Broker should advise his client to seek independent legal counsel to advise him or her of their rights.

Is there an exposure to liability when using a transaction coordinator who is also employed at other brokerages?

QUESTION: Broker has agents who utilize transaction coordinators that are employed outside of the brokerage, and many times are employed with another brokerage. Broker questions if there is exposure to liability in using these individuals.

RESPONSE: Throughout the Idaho Real Estate License Law, specifically Chapter 20 Title 54 of the Idaho Code it makes numerous references to a brokerage and licensee obligations to maintain confidential client information. Any time that information is shared with an individual outside the brokerage there is exposure to liability. That risk becomes substantially higher when the third-party receiving the confidential client information works for another brokerage. This is because brokerages frequently find themselves in conflicting and competing circumstances in relation to regulated real estate transactions.

In the event brokerages wish to utilize a third-party individual, a broker should employ the use of robust legal agreements ensure the third-party individual maintains client confidences and appropriately assists brokerage in carrying out its other statutory obligations. Additional legal contracts can be created to have brokerage's clients authorize the use of these third-party individuals. However, it is important to note that although these types of legal contracts can limit liability, it is virtually impossible to eliminate risk altogether.

In addition, a broker may wish to review the Idaho Real Estate Commission Guideline No. 17, posted on the Idaho Real Estate Commission website which provides additional guidance in the use of unlicensed assistants and office staff.

Is recording the deed a requirement to legally transfer real property?

QUESTION: Broker questions if recording the deed is necessary to legally transfer real property.

RESPONSE: No, there is nothing in Idaho law that requires a deed to be recorded with the county in order to transfer property.

The Idaho Supreme Court has weighed in on what must take place in order for the transfer of real property to be effective:

> Before a deed can operate as a valid transfer of title, there must be a delivery of the instrument and it must be effected during the life of the grantor.
>
> *Crenshaw v. Crenshaw*, 68 Idaho 470, 475 (1948).
>
> According to **Bowers v. Cottrell,** 15 Idaho 221, 228–29, 96 P. 936 (1908), "delivery includes surrender and acceptance, and both are necessary to its completion." Also, "delivery must be the result of a contract, the meeting of two minds, the accord of two wills. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive." **Id.** Further, "it is essential to the delivery of a deed that there be a giving of the deed by grantor and a receiving of the deed by the grantee, with a mutual intent to pass title from the one to the other." **Crenshaw v. Crenshaw,** 68 Idaho 470, 475, 199 P.2d 264, 267 (1948). "The mere placing of a deed in the hands of the grantee does not necessarily constitute a delivery. The question is one of intention: whether the deed was then intended by the parties to take effect according to its terms." **Id.** In **Flynn v. Flynn,** 17 Idaho 147, 160, 104 P. 1030, 1034, this Court said: "It is held that the real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered."
>
> *Est. of Skvorak v. Sec. Union Title Ins. Co*., 140 Idaho 16, 21 (2004).

It is important not to confuse the legal transfer of property with the notice of the transfer. Recording a deed gives the world notice of the transfer but is not required for legal transfer.