

# **The Hotline Top Questions**

# **THE LEGAL HOTLINE**

**1-800-324-3559  
Idaho REALTORS®**

**2023**

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## WHEN SHOULD THE HOTLINE BE UTILIZED?

Questions should be submitted to the Hotline by the *Designated 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 2023 “Hotline Top Questions” are based on the law in effect at the time, and the IR forms as printed in 2023. 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 2023 legislative session. In addition, IR has made revisions to its forms. None of these changes are reflected in the responses contained in the 2023 “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 2023 legislative changes to the law.

## TABLE OF CONTENTS

	<b>PAGE</b>
<b><u>AGENCY/LICENSE LAW</u></b>	
Does an agent have to disclose their license status if they are purchasing or selling a property?	2
If a contract is assigned to a new Buyer, do the prior Representation Agreement and Blue Brochure also transfer to the new Buyer?	3
<b><u>CONTRACTS</u></b>	
Does the MLS Listing or the Purchase and Sale Agreement control included/excluded items?	3
Can a Buyer terminate the contract based on items found in a title report after Buyer's deadline to do so has expired?	5
Does the Section 4 deadline of the Purchase and Sale Agreement extend if the closing date is extended?	5
Can a Buyer force Seller to make lender required repairs after the inspection contingency deadline has passed?	6
What happens in a situation where contract deadlines overlap?	7
If Buyer does not terminate prior to the Section 4 deadline in the PSA, does the earnest money become liquidated damages?	8
Can a Seller refuse to allow Buyer's inspector into the home because Seller does not like the inspector Buyer chose?	9
Seller delivered an acceptance of offer after the deadline had passed. Do they still have a legally binding contract?	10
If a Buyer tries to negotiate a modified Seller RE-10 during their timeframe to do so, can Buyer go back and accept Seller's original RE-10 prior to the deadline?	11
Must the RE-20 be signed by both parties to effectively terminate the contract?	12
Do Representation Agreements have to be signed by both husband and wife?	13
<b><u>DISCLOSURE</u></b>	
Is a Trustee selling a home on behalf of a Trust exempt from making property condition disclosures?	14
What are the differences between several of the RE-25 exemptions?	14
How can uploading the RE-25 to the MLS affect both Seller and Buyer's rights?	15
<b><u>EARNEST MONEY</u></b>	
Buyer used the RE-10 to terminate the contract after the deadline to do so had passed. Is there any way Buyer is entitled to receive Buyer's earnest money back?	17
<b><u>PROPER FORM USE</u></b>	
Is having a RE-27 necessary in order for Seller to keep marketing the property and accept back up offers?	18
In an assignment situation, is it better to use the RE-29 or an addendum RE-11 Form?	19
Can a blank line in the contract be filled in with the word "market" instead of a number?	20
What is the proper use of the counteroffer form (RE-13) versus the addendum form (RE-11)?	20

<b><u>MISCELLANEOUS</u></b>	
What constitutes “public marketing” under the NAR Clear Cooperation Policy?	21

**AGENCY/LICENSE LAW**

**Does an agent have to disclose their license status if they are purchasing or selling a property?**

QUESTION: Broker’s agent is purchasing property. Broker noticed the agent did not disclose that he was a licensed agent by checking the box on Line 480 of the Purchase and Sale Agreement. Broker questions if they need to create an addendum to disclose that Buyer is also a licensee.

RESPONSE: Best practice would be to have all parties sign an addendum, or have the agent immediately and unequivocally notify Seller in writing that Buyer is also a real estate licensee. Idaho Code 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.

Idaho Code § 54-2055. Emphasis added.

While there are certain parts of a contract that may allow a Seller to presume the Buyer is a licensed real estate agent, it is always best to make this fact known and not rely on presumptions. It is for this reason the Idaho REALTOR® Form purchase and sale agreements contain a checkbox on the signature page. If this box is not checked, it may leave a doubt in Seller’s mind as to Buyer’s legal status as a licensee.

**If a contract is assigned to a new Buyer, do the prior Representation Agreement and Blue Brochure also transfer to the new Buyer?**

QUESTION: Broker represents Buyer who assigned the purchase and sale agreement to a subsequent Buyer. Broker questions what forms need to be signed in an assignment situation and also questions if Subsequent Buyer should sign a Representation Agreement and blue brochure if they plan to be represented by the brokerage.

RESPONSE: According to the facts presented to the Hotline, the contract in question was fully assignable. 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 REALTORS® provides the “Assignment of Buyer’s Interest” form (RE-29). Brokers involved with transactions where Buyers are assigning their interest are encouraged to use the RE-29.

Regarding the Representation Agreement and the blue brochure, those agreements do not transfer from Original to Subsequent Buyer, so best practice would be to have the new Buyer execute a new Buyer’s Representation Agreement and Agency Disclosure Brochure in order to protect the brokerage’s commission, said agreement should address prior Buyer’s commission obligations.

**CONTRACTS**

**Does the MLS Listing or the Purchase and Sale Agreement control included/excluded items?**

QUESTION: Broker questions what happens in the circumstance where a MLS listing makes reference to items that are included or excluded in the sale, however they are not listed in a purchase and sale agreement; specifically a washer and dryer.

RESPONSE: Generally speaking, in most circumstances, in order for personal property to be included or excluded in a sale, that personal property needs to be referenced in the purchase and sale agreement or an independent standalone document like a bill of sale. The Idaho REALTORS® Form RE-21, Section 6 lists boiler plate language stating what is included and excluded in the sale. This section very specifically states “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.” This language will likely be interpreted by a court to indicate that any personal property offered for sale in a MLS would have to be carried into a purchase and sale agreement in order to be binding. Best practices are for brokers to always use Section 6, subparagraphs A and B to specifically reference personal property that is important to their clients. Occasionally there can be considerations related to fraudulent advertising, but those cases would have to be determined on a fact by fact basis.

Like Brokers, the Hotline is not intended to be used as a resolution for disputes between Buyers and Sellers. Broker should advise client to seek legal counsel if they have questions concerning their rights in this matter.

QUESTION: Seller specifically stated that a chandelier was excluded from the sale in the MLS listing. However, the Purchase and Sale Agreement (RE-21) did not list the chandelier in the excluded items. Broker questions which language will control.

RESPONSE: While the Multiple Listing Service lists property for sale, the actual “offer” to purchase real estate is controlled by the terms of the Purchase and Sale Agreement, in this circumstance a RE-21. The RE-21 includes the following language:

**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, solar panels, 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 section 6(A) below is of nominal value less than \$100.

(A). ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE:

\_\_\_\_\_  
\_\_\_\_\_

(B). ITEMS SPECIFICALLY EXCLUDED IN THIS SALE:

\_\_\_\_\_  
\_\_\_\_\_

RE-21, Section 6. (Underline added for reference).

Pursuant to the terms of the legal contract between the parties, the terms of Section 6 will control. The best practice for Seller is to ensure any excluded items get listed in section 6(B) and if they are not listed in the offer, provide Buyer with a counteroffer that specifically sets forth the excluded personal property or fixtures.

## **Can a Buyer terminate the contract based on items found in a title report after Buyer's deadline to do so has expired?**

QUESTION: Buyer and Seller have entered into a contract where all of Buyer's contingencies have expired but Buyer has a serious concern about an item he just discovered on the title report. Buyer is claiming that Buyer has a right to terminate due to the title being an adverse material fact. Broker questions if Buyer has a legal way to terminate the Purchase and Sale Agreement.

RESPONSE: The Idaho REALTOR® Form Purchase and Sale Agreement provides various contingencies for Buyer to inspect the structure, review the condition of title, the CC&Rs and other aspects of the property. Buyer is strongly encouraged to conduct all these reviews to determine if the property is acceptable to Buyer. Buyer is also required to terminate within a certain timeframe if Buyer sees an issue. Buyer can also receive a refund of Buyer's earnest money if Buyer terminates on time.

However, if Buyer allows these timelines to expire, Buyer will not have the option to properly terminate the contract.

It is important to distinguish the contract between the Buyer and the Seller and the obligations of real estate licensees. The statute referring to "adverse material facts" (Idaho Code § 54-2086(1)(d) and (e)) imposes the obligation on licensees to disclose certain known facts about the property. This obligation does not have any tie to the contractual relationship between the Buyer and Seller. Even if a licensee failed to make a proper disclosure, the Buyer's recourse would be to seek discipline through IREC or possibly seek damages through a civil action from the listing Broker; not to terminate the Purchase and Sale agreement with Seller.

It is also important to point out that a Buyer or Seller always have other contract remedies which are not unique to real estate contracts, like failure of consideration, fraud in the inducement, etc., but an analysis of these case specific remedies is outside the scope of the Legal Hotline. Buyer's issue may also invoke the concept of "marketable title" which a Seller has an obligation to provide pursuant to Section 10 of the RE-21, however this legal concept is complex and also turns on the specific facts of each circumstance including an analysis of the nature of the cloud upon the title and how severely it affects the value of the property.

Like Brokers, the Hotline is not intended to be used as a resolution for disputes between Buyers and Sellers. Broker should advise client to seek legal counsel if they have questions concerning their rights in this matter.

## **Does the Section 4 deadline of the Purchase and Sale Agreement extend if the closing date is extended?**

QUESTION: Broker questions what happens to the Section 4 deadline when the closing date gets extended.

RESPONSE: Section 4 of the RE-21 Purchase and Sale Agreement 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 \_\_\_\_ calendar days (seven [7] 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. *In the event any contingency has been waived or a contingency deadline has expired and thereafter closing is extended or rescheduled to occur on a later date, said extension shall not reinstate the waived or expired contingency without a mutually executed written agreement containing language specifically reinstating the same.* (Underline and italics added).

The above underlined language automatically extends the Section 4 deadline so long as the closing date is extended prior to the Section 4 deadline. Given the facts presented to the Hotline, the contract in question was extended after the Section 4 deadline to waive contingencies had passed. In cases such as these, the italicized language above states that the Section 4 deadline does not reset unless agreed to in writing by all parties.

Like Brokers, the Hotline does not give advice to Buyers and Sellers and is not intended to be used as a resolution for disputes. Broker should advise client to seek legal counsel if they have questions concerning their rights in this matter.

### **Can a Buyer force Seller to make lender required repairs after the inspection contingency deadline has passed?**

QUESTION: Broker represents Seller. Buyer's lender is requiring certain repairs to the property in order to finance the home, however they are requesting the repairs after the inspection timeframe has passed. Broker questions if there is a contractual provision allowing Buyer to force Seller into making these lender required repairs.

RESPONSE: No, a Buyer can never force a Seller to complete repairs, even if they are lender required repairs. Buyers can always ask for certain repairs to be completed, but Seller has no obligation to do so, especially if the requests come outside of the inspection contingency timeframe. The only avenue to request repairs within the Idaho REALTORS® Purchase and Sale Agreement Forms is within the inspection contingency time period.

Further, the Costs Paid By Section (Section 19) of the RE-21 has the following language:

**SELLER agrees to pay up to \$\_\_\_\_\_ (\$0 if left blank) of lender required repair costs only.**

BUYER or SELLER has the option to pay any lender required repair costs in excess of this amount.

According to the facts presented to the Hotline, the blank line was filled in with a \$0 in this particular contract. Either Buyer or Seller has the option to pay lender required repairs costs in excess of the amount written into the blank line, but it is only an option and one side or the other cannot be forced to complete any repairs.

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.

### **What happens in a situation where contract deadlines overlap?**

QUESTION: Broker represents Seller. The parties went under contract on October 3 to close on October 11. The inspection contingency deadline was left blank and thus defaulted to 5 business days, giving Buyer until October 11 to complete inspections (Monday, October 9 was a holiday and not included in the calculations). The deadline in Section 4 was also left blank, defaulting to 7 business days prior to closing which would have made Buyer's date to waive all contract contingencies September 29, prior to the date the parties went under contract. Buyer ultimately terminated due to an unsatisfactory inspection and Broker questions whether Section 4 would allow Seller to retain the earnest money.

RESPONSE: Given the facts presented to the Hotline, it is likely that the quick closing date and the lack of attention to the other deadlines in the contract created an ambiguity. Best practice is to always fill in all blank deadlines with an actual number in order to eliminate any ambiguities. 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).

If a court finds an ambiguity in a contract it will attempt to ascertain the parties' intent. Leaving form blanks unfilled makes the parties' intent even more convoluted. Filling in blanks in form contracts is always best practice, and failure to do so can cause many difficulties for brokers and clients.

Like Brokers, the Hotline cannot make conclusive determinations as to the existence or interpretation of ambiguities, nor is it intended to be used as a resolution for disputes between Buyers and Sellers. Broker should advise client to seek legal counsel if they have questions concerning their rights regarding the earnest money or contract interpretation.

**If Buyer does not terminate prior to the Section 4 deadline in the PSA, does the earnest money become liquidated damages?**

QUESTION: Broker represents Seller. Buyer did not terminate the contract prior to the deadline listed in Section 4 and will not be closing on the property. Broker questions if by accepting the Earnest Money Seller can also pursue other legal remedies, or if the Section 4 Earnest Money is considered liquidated damages.

RESPONSE: Section 4 of the Purchase and Sale Agreement (RE-21) states in relevant part:

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 (seven [7] 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. ...

RE-21, Lines 72-77. Underline Added.

When the parties executed the contract, they agreed to make the Section 4 earnest money nonrefundable in the event that Buyer did not terminate the contract prior to the contingency deadline. The earnest money only becomes nonrefundable upon the expiration of the deadline listed in Section 4; in this case, 7 business days prior to closing.

The RE-21 also lists the remedies available to a Seller in the case of Buyer default in Section 33:

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. However, in the event the parties mutually agree in writing that any 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.

RE-21, Section 33. Underline Added.

When Buyer failed to terminate the contract prior to the deadline, the earnest money became nonrefundable and therefore it is not considered liquidated damages as stated in the Default section above. Seller would still have all remedies available to them in the case of Buyer defaulting under the contract.

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. Broker should advise client to seek legal counsel if they have questions concerning their rights or contract interpretation.

**Can a Seller refuse to allow Buyer's inspector into the home because Seller does not like the inspector Buyer chose?**

QUESTION: Can a Seller refuse to allow Buyer's home inspector access to the property because Seller does not like the home inspector that Buyer is using?

RESPONSE: There is no language in the contracts that allows seller to object to Buyer's choice of inspectors. The Purchase and Sale Agreement (RE-21) states in Section 12(A):

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

RE-21, Lines 170-171.

Regarding the Seller refusing to allow access to the property, the RE-21 also states in Section 12(A):

SELLER shall make the PROPERTY available for inspection...

RE-21, Line 173.

If Seller does not allow Buyer's home inspector access to the property, Seller could be in breach of the contract.

The Hotline does not get involved in disputes between Buyer and Seller. Broker may wish to advise client to seek private legal counsel if further issues arise.

**Seller delivered an acceptance of offer after the deadline had passed. Do they still have a legally binding contract?**

QUESTION: Broker represents Seller. Seller received an offer and signed the contract but did not deliver it to back to the Buyer right away, Seller was waiting until closer to the expiration of the offer to send it back in case they received other offers. The Buyer ultimately received the accepted offer after the offer had expired. Broker questions if the parties have a valid contract.

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 receive Seller's acceptance of the offer until the day after the offer expired. Regardless of the fact that Seller signed the Purchase and Sale Agreement during the allotted timeframe, delivery did not happen until the offer had expired. Both parties would need to agree to revive the offer in order to create a legally binding contract, or Buyer would need to utilize the Late Acceptance section if applicable. However, in this case, Broker alleges Seller revoked acceptance of the contract prior to Buyer initialing the Late Acceptance clause. Nevertheless, each transaction has to be analyzed on a case by case basis. Like Brokers, the Hotline does provide legal advice to Buyers and Sellers. Broker may wish to advise client to retain private legal counsel if further issues arise.

**If a Buyer tries to negotiate a modified Seller RE-10 during their timeframe to do so, can Buyer go back and accept Seller's original RE-10 prior to the deadline?**

QUESTION: According to the facts presented to the Hotline, the Buyer presented the Seller with a RE-10 (Buyer's Original RE-10) requesting correction of certain items/conditions pursuant to Section 12, the Inspection Contingency, of the RE-21. Seller then responded by agreeing to some of the Buyer's requests but rejecting others using a RE-10 (Seller's RE-10). Buyer is currently negotiating with the Seller to get Seller to modify Seller's response and did so with another Buyer's proposed RE-10 (Buyer's Subsequent RE-10). Broker questions the process if negotiations fail, specifically Broker questions if Buyer can still accept Seller's RE-10 so long as it is before the timeframe stated in 12(C)(4).

RESPONSE: The answer will turn on the precise language used by Seller when responding to Buyer's Original RE-10, but under typical standards of practice the Buyer can still accept sign and accept Seller's RE-10. This is because the Seller's RE-10 is irrevocable and further is most likely not considered an offer and thus the Buyer's Subsequent RE-10 would not constitute a counteroffer that rejects the Seller's RE-10. The pertinent part of the RE-21 states:

3)...If SELLER agrees in writing to correct the items/conditions requested by BUYER, then said agreement will become an 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 without consent of BUYER** and BUYER may proceed under 12(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 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. ...

*RE-21, January 2023 edition.*

Pursuant to the facts presented, Seller's RE-10 was only a partial rejection of a few of the terms on Buyer's Original RE-10, Seller agreed to some of Buyer's requests and rejected others. Seller's agreement to proceed with Seller correcting only certain items cannot be revoked, thus, Buyer can at any time during the stated time period continue under Option 2 and proceed "with the transaction without the Seller being responsible for correcting the disapproved items."

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. Most every real estate transaction involves unique facts and circumstances which require specific in-depth analysis to formulate a legal opinion. The Legal Hotline provides general guidance to Brokers and cannot serve as a substitute for legal advice from an attorney who has access to all the particular facts. Brokers should advise their clients and customers to seek legal counsel if they have questions concerning their legal rights or contract interpretation.

### **Must the RE-20 be signed by both parties to effectively terminate the contract?**

QUESTION: Broker questions whether the RE-20 needs both Buyer and Seller signatures to effectively terminate the contract.

RESPONSE: Having both Buyer and Seller signatures on the RE-20 is best practice, but it is not required. There are many contingencies within the various Purchase and Sale Agreements that state a party need only notify the other in writing to terminate the contract. In these instances, two signatures are not required in order to effectuate termination.

The Hotline is aware of many situations where the non-terminating party simply refuses to sign the RE-20, in which case Broker's file should reflect that the RE-20 was sent to the other

side's agent or other suitable documentation sufficient to notify the other party of termination. If a Broker is representing a Seller, Broker can relist the property without having both parties sign the termination.

If a situation arises where a Buyer or Seller receive a signed RE-20 from the other party but feel as though a breach has occurred, or wish to fight the termination, Broker should instruct client to retain independent legal counsel to advise them of their rights.

### **Do Representation Agreements have to be signed by both husband and wife?**

QUESTION: Broker has a Representation Agreement with Buyers who are married. Only the wife has signed the RE-14. Broker questions if the agreement is void since both husband and wife did not sign.

RESPONSE: No. A representation agreement pertaining to community property is not void simply because one spouse did not sign it. Idaho law states:

Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal.

Idaho Code § 32-912.

Given that a representation agreement is not a contract to sell, convey or encumber the property, only one signature is required.

The Idaho Supreme Court has also specifically stated:

Therefore we hold that at the time this agreement was executed, a brokerage commission contract for the sale of community property signed and executed by a husband was valid under I.C. 9-508, and the fact that the contract was not signed or ratified by his wife did not relieve him from potential liability. In recognition of the fact that I.C. s 39-912 has since been altered to extend management and control of community property to both husband and wife, it can also be reasonably concluded that under the terms of I.C. s 9-508 a brokerage contract involving community realty need only be signed and

executed by one spousal owner and is binding upon that party notwithstanding the absence of the signature of the other spouse.

*C. Forsman Real Est. Co. v. Hatch*, 97 Idaho 511 (1976).

### **DISCLOSURE**

#### **Is a Trustee selling a home on behalf of a Trust exempt from making property condition 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.

**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

Ultimately it is not up to the Brokerage to provide clients with legal advice as to whether they are or are not exempt from property disclosures. 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.

#### **What are the differences between several of the RE-25 exemptions?**

**QUESTION:** Broker questions the distinction between several of the exemptions afforded under Idaho Code § 55-2501 *et. seq.* (Idaho's Property Condition Disclosure Act).

**RESPONSE:** The exemptions referred to by the Broker can be found in the Idaho REALTORS® Forms RE-25 and RE-25A; however, the exemptions are a creature of statute and are found in Idaho Code § 55-2505. Because the language is codified under Idaho law it cannot be changed in the form. Several of the exemptions can be confusing because they overlap and several exemptions relating to transfers through inheritance or probate are repeated in numerous exemptions. The exemptions questioned by Brokerage were as follows:

A transfer pursuant to court order including, but not limited to a transfer ordered by a probate court during the administration of the decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for a specific performance of a contract or other agreement between persons

The exemptions listed in this section of the Code are all essentially transfers according to some sort of court order. The Court may have entered the order in a probate action, a bankruptcy action or similar action.

- A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship or a trust

The first part of this exemption is where we see the first overlap in that it makes a reference to transfers out of a decedent's estate; however, the transfers exempted under this section of the Code relate to a general transfer by some sort of fiduciary. The fiduciary can be a personal representative in a probate action, a guardian in a guardianship action, a conservator in a conservatorship action or a trustee of a trust. This exemption focuses on a transaction by a fiduciary rather than a court order which is what distinguishes it from the previous section.

- 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

This exemption is very specific and provides for an exemption from an individual who obtained the property through inheritance and has not lived in the property within one (1) year prior to selling it. While it relates to a probate transfer, it is more specific than the other exemptions.

- A transfer from a decedent's estate

This exemption is a general exemption applying to the transfer of property directly by a personal representative out of a decedent's estate. This exemption is distinguished from the prior exemption in that the property is not being sold by an heir but rather being sold by the personal representative directly out of the estate.

It is important to remember that although a Seller may be exempt from the statutory obligations of the act, they are not exempt from truthfully answering questions posed by a Buyer. Additionally, nothing in the exemptions relieves a real estate licensee from their obligation to disclose adverse material facts.

### **How can uploading the RE-25 to the MLS affect both Seller and Buyer's rights?**

QUESTION: Broker called the Hotline questioning some of the particulars of the proper use of the RE-25 Form and the property disclosures in general. Specifically, Broker questioned how the practice of a seller providing a RE-25 to a buyer in advance could affect sellers' and buyers' rights.

RESPONSE: The RE-25 is a property disclosure form that is used to address the mandatory disclosures found in Idaho Code Title 55 Chapter 25, known as the Property Condition Disclosure Act (hereinafter "the Act"). Most of the legal rights pertaining to sellers and buyers

are contained with the Act. The specific language affording a buyer the legal right to rescind an otherwise valid purchase and sale agreement is contained in Idaho Code § 55-2515:

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.

The Legal Hotline acknowledges an industry practice where sellers are completing a RE-25 along with their listing documents, and the completed RE-25 is posted on the MLS prior to ever receiving an offer on a property. While the intent of this practice was likely to provide future buyers with advanced knowledge relating to the property, it is important to note that this practice may have an effect on both sellers' and buyers' rights provided under the Act. The Act provides that the seller must deliver the completed form "within ten (10) days of transferor's acceptance of transferee's offer." (Idaho Code § 55-2509). In the event where an argument arises pertaining to seller's delivery, it is unknown whether a court will consider a form delivered prior to acceptance of an offer in compliance with the law. Further, buyer's rights under the Act state that a notice of rescission is to be "delivered to the transferor or his agent or subagent within three (3) business days following the date in which the transferee or his agent receives the property disclosure form..." (Idaho Code § 55-2515). Again, the practice of providing a RE-25 in advance could create confusion with a buyer's deadline to rescind a contract, in that buyer's timeline is triggered by receipt of the disclosure form from the seller. The date a buyer "receives" the RE-25 needs to be clear and unambiguous.

In addition, the Hotline is aware of some circumstances where a seller has attempted to limit buyer's right to rescission because a buyer knew at the time of making buyer's offer all the

information that was contained in the RE-25, having received an advanced copy. Seller's argument in this theory is that buyer was aware of the defects contained in the RE-25 and still chose to make an offer thus waiving buyer's right to rescind based on said defects.

Given that the property disclosure is an important part of any transaction, and further given that Idaho Code is very specific on certain dates and does not provide for delivery of the disclosure prior to entering into a Purchase and Sale Agreement, it is best practice that a RE-25, or an updated version of it, be delivered to buyer after buyer and seller have gone under contract.

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.

### **EARNEST MONEY**

**Buyer used the RE-10 to terminate the contract after the deadline to do so had passed. Is there any way Buyer is in entitled to received Buyer's earnest money back?**

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

RESPONSE: Section 12(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 12(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 10 business days to conduct inspections but did not sign and deliver the RE-10 terminating the transaction until after the inspection 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. Like Brokers, the Hotline does not provide legal advice to Buyers and Sellers and 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**

**Is having a RE-27 necessary in order for Seller to keep marketing the property and accept back up offers?**

**QUESTION:** Broker represents Seller who went under contract with a Buyer. The parties did not execute a RE-27. Seller requested Broker to continue to market the property in order to obtain backup offers. Broker questions whether or not an Idaho REALTORS® form RE-27 is required if Seller wants to continue to market the property and accept backup offers.

**RESPONSE:** No, Seller always has the right to market property until it is transferred to another party. Certain restrictions and limitations apply but generally a prospective Buyer's consent is not required. The confusion seems to arise from the title of the Idaho REALTORS® RE-27 which states, "Seller's Right To Continue To Market Property" however, it is important that the document be reviewed in its entirety which reveals it is not simply a right to continue to market the property but also a right to force a Buyer to remove a contingency. In the event there

is no RE-27 the Seller can still market the property but has no right to have Buyer remove a contingency.

Seller should be advised that Seller is under a legal contract with the Buyer and cannot breach that contract without consequences. In addition, Brokerages who continue to market property which is already under contract should exercise caution and ensure that proper disclosures are made. The fact that a property has a contract pending would most likely be considered an adverse material fact by the Idaho Real Estate Commission and thus would have to be disclosed by any real estate brokerage. In addition, failure to properly advise backup Buyers of the pending contract may violate the REALTORS® Code of Ethics.

In addition, the various MLSs throughout the state all have very particular rules pertaining to how property must be listed on their systems. So long as Brokerage follows the applicable MLS rules and said rules do not prohibit the continued marketing of property under contract, Brokerage is free to leave the property displayed on the MLS.

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. Most every real estate transaction involves unique facts and circumstances which require specific in-depth analysis to formulate a legal opinion. The Legal Hotline provides general guidance to Brokers and cannot serve as a substitute for legal advice from an attorney who has access to all the particular facts. Brokers should advise their clients and customers to seek legal counsel if they have questions concerning their legal rights or contract interpretation.

### **In an assignment situation, is it better to use the RE-29 or an addendum RE-11 Form?**

QUESTION: Broker is involved in a transaction where Buyer #1 is assigning his interest under the Purchase and Sale Agreement to Buyer #2. Broker believes it would be most appropriate to use an addendum to modify the original Purchase and Sale Agreement rather than to use the Idaho REALTORS® Form RE-29. Broker questions the legal significance between these two different methods of assignment.

RESPONSE: The Idaho REALTORS® forms library includes the RE-29 which will accomplish an assignment between Buyer #1 and Buyer #2. However, this form is not designed to relieve Buyer #1 from obligations under the Purchase and Sale agreement. While the RE-29 is acceptable for many circumstances, there are instances where a seller, original buyer or subsequent buyer may desire to reform the Purchase and Sale Agreement. The most common reason for choosing an addendum over the RE-29 is when Buyer #1 wants to be completely relieved from his obligations under the Purchase and Sale Agreement. In these instances, brokers would be better suited to employ the use of an addendum that modifies the Purchase and Sale Agreement rather than use the RE-29.

Like Brokers, the Hotline does not give advice to Buyers and Sellers and is not intended to be used as a resolution for disputes. Broker should advise client to seek legal counsel if they have questions concerning their rights in this matter.

**Can a blank line in the contract be filled in with a the word “market” instead of a number?**

QUESTION Broker has noticed offers coming in with the word “market” written in as interest rate on the loan application section. Broker questions how this might affect the contract and also how agents should proceed when receiving an offer with “market” instead of a number.

RESPONSE: Section 3(D) of the Purchase and Sale Agreement states:

§ \_\_\_\_\_ NEW LOAN PROCEEDS: If a number greater than zero appears in the preceding blank, then this Agreement is contingent upon BUYER obtaining the following financing: FIRST LOAN of \$ \_\_\_\_\_ not including mortgage insurance, through FHA, VA, CONVENTIONAL, IHFA, RURAL DEVELOPMENT, OTHER \_\_\_\_\_ with **interest not to exceed \_\_\_\_\_ %....** (Emphasis added).

According to the facts presented by Broker, some Buyer’s agents have been writing the word “market” on the bold blank line above, rather than a number. Best practice is to always fill in that blank line with an actual number in order to eliminate any ambiguities from the contract. 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 instruct her agents to go back to Buyer to get a proper interest rate for the financing section. Like Brokers, the Hotline cannot make conclusive determinations as to the existence or interpretation of ambiguities, nor does it get involved in disputes between Buyers and Sellers.

**What is the proper use of the counteroffer form (RE-13) versus the addendum form (RE-11)?**

QUESTION: Broker questions the best use of addendum and counteroffer forms.

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. 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.

### **MISCELLANEOUS**

#### **What constitutes “public marketing” under the NAR Clear Cooperation Policy?**

**QUESTION:** Brokerage contacted the hotline concerning an internal Brokerage policy where agents of the Brokerage learn of properties that are about to be listed on an MLS prior to them being listed. Broker questions whether or not this process violates the NAR “Clear Cooperation Policy.” Specifically, Brokerage is questioning what constitutes “public marketing.”

**RESPONSE:** The National Association of Realtors implemented specific policy language for MLSs in 2020. In summary the language states:

**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 if it is being publicly marketed, 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.**

Further nuances regarding the policy can be found at the following URL:

<https://www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy>

The Idaho legal hotline cannot make determinations as to what context specifically falls within the definition of “public marketing” but strongly encourages brokerages to review all materials disseminated by NAR and encourages brokerages to contact NAR or their local MLS directly with any pertinent questions.

In addition to the NAR Clear Cooperation Policy Brokerages are also advised to confirm business practices with the Idaho Real Estate Commission in that certain laws and rules that pertain to “pocket listings” can constitute a violation of the license law.

While certain conduct may not constitute “public marketing” or create a “pocket listing” Brokerages are advised to avoid any practices that provide opportunities to their Brokerages that are not provided to all other real estate agents. In other words, simply advising other agents in your Brokerage that a listing may be coming soon could be permitted however taking further steps, like allowing agents to view properties, can create violations.

Regardless of the above, it is best practice for Brokerages to always advise their clients as to precisely when and where the property information will be available and to whom. If Brokerages have concerns related to a specific business practice Brokerage should consult Brokerage’s legal counsel.