The Hotline Top Questions

THE LEGAL HOTLINE

1-800-324-3559
Idaho REALTORS®

2024

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WHEN SHOULD THE HOTLINE BE UTILIZED?

Questions must 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 IR regarding Idaho real estate brokerage business practices and applications. A response to IR which is reviewed by any REALTOR® member of IR shall not be taken as legal advice and shall it be used as a substitute for legal representation by counsel representing that individual REALTOR®. Responses are based solely upon the limited information provided and that information has not been investigated or verified for accuracy. As with any legal matter, the outcome of any particular case is dependent upon the facts associated with that particular matter. *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 as stated 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.

Note on Legislative Changes

The responses contained in the 2024 "Hotline Top Questions" are based on the law in effect at the time, and the IR forms applicable to the transaction at the time the call was made to the Hotline. The Idaho Legislature will typically enact changes to the laws that apply to real property and make changes to the Idaho Real Estate Licensing Law during the legislative session all of which may have varying dates of application. In addition, IR typically makes revisions to its forms on an annual basis. None of these changes are reflected in the responses reprinted in the "Hotline Top Questions."

TABLE OF CONTENTS

	PAGE
AGENCY/LICENSE LAW	
Can a Seller have a Compensation Agreement with one brokerage and a Representation Agreement with a different brokerages?	2
What are a dual agent's duties to a disputing Buyer and Seller after the transaction has closed?	2
CONTRACTS	
What happens if a counter offer is delivered to Buyer along with a signed Purchase and Sale Agreement, but the "Signature Subject to Acceptance of Attached Counter Offer" box did not get checked?	3
What are a Buyer's options if they cannot obtain a modification of Seller's inspection contingency response?	3
Would Section 4 of the RE-21 or an addendum regarding earnest money control?	4
Do the secondary inspection timelines run concurrently with the primary inspection timelines?	5
Is a Buyer obligated to proceed with the transaction if Seller lowers the purchase price after a low appraisal?	6
Can a Seller terminate the contract if they find out about a change in Buyer's circumstances when the parties have signed a RE-52?	7
What constitutes a valid legal description per Idaho law?	8
Can a RE-10 be revoked once it has been provided to the other party in a transaction?	12
When assigning a Buyer's interest under a Purchase and Sale Agreement, is it better to use the RE-29 assignment form or an addendum to change the Buyer's name?	13
Can a Buyer terminate a contract if something was discovered on the title report after all of Buyer's contingencies have passed?	14
DISCLOSURE	
Can each Seller fill out their own RE-25 Property Condition Disclosure?	15
NAR SETTLEMENT	
Does the cooperating commission need to be disclosed if a Seller does not want it to be?	15
What is the proper way to deal with an accepted offer that is paying the cooperating brokerage less than what is originally agreed to in the RE-16?	15
Can the commission amount listed in the RE-14 be amended for a specific property only?	16
Does a RE-14 need to be amended prior to making an offer if the commission numbers are different?	16
PROPER FORM USE	
Does a rejected offer need to be signed by Seller?	17
What is the proper form to use to terminate a Representation Agreement?	17
Does Buyer have to use a RE-10 to remove Buyer's inspection contingency?	17
What is the proper use of the RE-32 Multiple Counter Offer form?	18
MISCELLANEOUS	
Are HOA transfer fees a violation of Idaho law?	19

AGENCY/LICENSE LAW

Can a Seller have a Compensation Agreement with one brokerage and a Representation Agreement with a different brokerages?

QUESTION: Brokerage had entered into a Compensation Agreement with Seller (RE-12). Later, the same Seller entered into a Seller Representation Agreement (RE-16) with a different brokerage. Does the subsequent RE-16 invalidate the RE-12?

RESPONSE: No. The initial RE-12 is a valid binding contract between Brokerage 1 and Seller. Seller has contractual obligations to Brokerage 1 under said agreement including the obligation to pay compensation if Brokerage 1 procures a purchaser ready, willing and able to purchase the property. Seller cannot unilaterally cancel a contract, and even if Seller enters into a subsequent conflicting contract with another brokerage, it cannot nullify the promises of the first contract.

What are a dual agent's duties to a disputing Buyer and Seller after the transaction has closed?

QUESTION: Broker represented both Buyer and Seller on a transaction that has been closed. Buyers have discovered items that they believe were not disclosed to them by Seller and are trying to put agent in the middle of the dispute between the parties. Broker questions how best to handle this situation.

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

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

Additionally, the RE-14 and RE-16 contain similar language that states the contract terminates "upon closing of escrow." Further, the RE-14 and RE-16 also note that in circumstances of dual agency, the brokerage "cannot advocate on behalf of one client over the other" (RE-14, Line 101). When a property successfully closes, the brokerage's representation of the client is complete.

The Hotline does not provide advice to Buyers and Sellers. Broker should advise both Buyer and Seller that this is a dispute between them, that the brokerage cannot provide legal advice, and they should retain private legal counsel to advise them of their rights.

CONTRACTS

What happens if a counter offer is delivered to Buyer along with a signed Purchase and Sale Agreement, but the "Signature Subject to Acceptance of Attached Counter Offer" box did not get checked?

QUESTION: Broker called regarding a scenario wherein Seller signed the RE-21 and delivered it back to Buyer along with a counter offer. However, the "Signature(s) Subject to Acceptance of Attached Counter Offer" check box on Page 9 of the RE-21 was not checked. Buyer believes that since the box was not checked, Seller is bound by the original terms of the RE-21. Broker questions if delivering the signed RE-21 to Buyer at the same time as a counter offer would show Seller's intent that the acceptance of the RE-21 was subject to Buyer's acceptance of the counter offer.

RESPONSE: According to the facts presented to the Hotline, Seller neglecting to check the pertinent box was apparently an oversight and a clerical error. A clerical error typically will not override the otherwise clear intent of Seller conditioning acceptance on acceptance of the offer the counter offer.

Like Brokers, the Hotline does not provide legal advice to Buyers and Sellers. Broker may wish to advise client to seek independent legal counsel to advise them of their rights in this matter.

What are a Buyer's options if they cannot obtain a modification of Seller's inspection contingency response?

QUESTION: Broker questions the inspection contingency timelines, specifically what happens if a Buyer does not obtain a modification of Seller's response which rejects Buyer's requests.

RESPONSE: Section 12(C) of the RE-21 states in relevant part:

> 3). If BUYER does within the strict time period specified give to SELLER written notice of disapproved items/conditions, it shall end BUYER'S timeframe for that particular inspection and is irrevocable. BUYER shall provide to SELLER pertinent section(s) of written inspection reports upon request, if applicable. Upon receipt of written notice SELLER shall have ____ business days (three [3] if left blank) in which to respond in writing. SELLER, at SELLER'S option, may agree to correct the items as requested by BUYER in the notice or may elect not to do so. If SELLER agrees in writing to correct the 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 shall be irrevocable without consent of BUYER and BUYER may proceed under 12(C)(4) below. If SELLER does not respond in writing within

the strict time period it shall be deemed a SELLER response electing not to correct any disapproved items/conditions.

4). If SELLER does not agree to correct BUYER'S disapproved items/conditions within the strict time period specified, then within ____ business days (three [3] if left blank) of SELLER'S response, the BUYER has the option of 1) negotiating with SELLER to obtain a modification of SELLER'S response 2) proceeding with the transaction without the SELLER being responsible for correcting the disapproved items/conditions stated in that particular BUYER'S notice, or 3) giving the SELLER written notice of termination of this agreement in which case Earnest Money shall be returned to BUYER**. If within the strict time period specified in this paragraph BUYER does not obtain a modification of SELLER'S response or give written notice of cancellation, BUYER shall conclusively be deemed to have elected to proceed with the transaction without the repairs or corrections to the disapproved items/conditions stated in that particular BUYER'S notice.** BUYER electing to proceed with the transaction under BUYER'S Primary Inspection or any single inspection reserved under 12(B)(2) shall not affect BUYER'S rights regarding other inspections reserved in 12(B)(2). (Emphasis added.)

According to the facts presented to the Hotline, Buyer delivered the initial RE-10 to Seller and Seller responded with a Seller RE-10 which rejected some of Buyer's requests. The above-cited language allows Buyer three business days by default (or however many are allowed in the specific contract) to obtain a modified Seller's response or terminate. Buyer may negotiate with Seller during this additional time period, however as stated in the bolded text above, if Buyer does not obtain a modification of Seller's response, Buyer must terminate within the timeframe to do so or they are deemed to have elected to proceed with the transaction without Seller correcting disapproved items/conditions.

Note that according to the facts presented to the Hotline, Buyer submitted two additional or modified RE-10s to Seller. This fact is not considered in this response as per lines 187-188 of the RE-21, Buyer's timeframe for submission of RE-10s "shall end" once the initial RE-10 is submitted to Seller (except in circumstances involving a secondary inspection). This applies regardless of if Buyer submits a RE-10 before his or her deadline for doing so.

Like Brokers, the Hotline does not provide legal advice to Buyers and Sellers. Broker may wish to advise client to seek independent legal counsel to advise them of their rights in this matter.

Would Section 4 of the RE-21 or an addendum regarding earnest money control?

QUESTION: Broker questions whether an addendum that states the earnest money is to be released to Seller upon final underwriting approval would supersede Section 4 of the Purchase and Sale Agreement.

RESPONSE: According to the facts presented to the Hotline, the Buyer and Seller signed an addendum that released the earnest money to Seller upon final underwriter approval. Buyer ultimately did not get approved for financing after the Section 4 deadline passed, and the parties now disagree as to whether this addendum would supersede the language in Section 4 of the Purchase and Sale Agreement (RE-21). Section 4 of the RE-21 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.
> …
> This contingency deadline shall not apply to the following contingency(ies):
> _____.

Given the above referenced language, and the fact that the addendum executed by Buyer and Seller did not specifically address the timelines in Section 4, it is unlikely that the addendum would prevail over the language in Section 4.

Best practices would be for the parties to exclude the financing contingency using the blank lines provided in Section 4, or alternatively, specifically addressing the Section 4 deadlines in the addendum.

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Do the secondary inspection timelines run concurrently with the primary inspection timelines?

QUESTION: Broker questions if the secondary inspection timeframes begin when the primary inspection timeframe ends, or if they occur simultaneously.

RESPONSE: Section 12(B)(2) of 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. Once BUYER delivers written notice to SELLER it shall end BUYER'S timeframe for only that item/condition and is irrevocable regardless of if it was provided prior to the deadline stated below. Any notice provided under this subsection is unrelated to a notice provided under subsection 12(B)(1). BUYER shall be responsible for the cost of all indicated inspections unless otherwise noted in the Costs Paid By section or elsewhere herein. BUYER reserves the right to conduct the following inspections outside the Primary Inspection timeline:

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

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

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

□ Other Inspection #1: _____ which shall be completed and notice provided within ____ business days (ten [10] if left blank) **from acceptance**.

□ Other Inspection #2 _____ which shall be completed and notice provided within ____ business days (ten [10] if left blank) **from acceptance**. (Emphasis added).

The secondary inspections give Buyer the stated time in order to complete any specific inspections Buyer lists in this section. Because the timelines stated above are all "from acceptance," they all start ticking upon acceptance, not upon completion of the Primary Inspection timeframe. If Buyer does not specifically indicate additional time for the inspection, the bolded language above states that all inspections must be completed within the Primary Inspection timeframe.

Like Brokers, the Legal Hotline does not provide legal advice to Buyers or Sellers. Brokerage should advise its clients and customers to seek legal counsel if they have questions concerning their rights or contract interpretation.

Is a Buyer obligated to proceed with the transaction if Seller lowers the purchase price after a low appraisal?

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

RESPONSE: The RE-21 states in relevant part:

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

According to the language referenced above, if the property appraises for less than the purchase price, Seller can reduce the price to meet the appraised value at Seller's discretion. If Seller does reduce the price, Buyer is likely obligated to continue with the transaction. If Seller decides not to reduce the price, only then can Buyer terminate the transaction and receive their Earnest Money back.

Like Brokers, the Legal Hotline does not provide legal advice to Buyers or 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 terminate the contract if they find out about a change in Buyer's circumstances when the parties have signed a RE-52?

QUESTION: Broker represents Seller. The contract was contingent upon Buyer selling their home, and the parties executed the RE-52 Property Sale Contingency Addendum. Broker questions if a Seller can terminate the contract due to a change in circumstances with Buyer's property even though Buyer did not notify Seller of the change.

RESPONSE: Yes. Section 6 of the RE-52 states:

> **TERMINATION DUE TO CHANGE IN CIRCUMSTANCES.** Upon the occurrence of any circumstance identified in the preceding section 1) SELLER or BUYER may terminate the Agreement pertaining to Seller's Property and BUYER's Earnest Money shall be returned to BUYER **OR** 2) the parties may waive the right to terminate through a separate addendum executed by SELLER and BUYER; if new deadlines or circumstances are established in said addendum BUYER shall have the duty to notify SELLER as if those new terms are originally stated herein.

According to the facts presented to the Hotline, Seller learned that Buyer's property was no longer under contract which is a change in circumstances according to the RE-52. The above-cited language states that either the Seller or Buyer may terminate the contract upon the occurrence of a change in circumstances. This right is not conditional upon notice by Buyer.

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

What constitutes a valid legal description per Idaho law?

QUESTION: Broker questions what constitutes a valid legal description.

RESPONSE: A valid legal description should include, at a minimum, the Lot and Block numbers, subdivision name and the county wherein the property is located. An example of an unquestionable valid legal description could be:

> Lot 2, Block 6 of the Lyon Estates No. 2 Subdivision according to the official plat thereof, bearing Instrument Number 9873489, and filed in Book 28 of Plats at Pages 32-38, records of Valley County, State of Idaho, U.S.A.

Best practice to ensure a proper legal description is used in a contract is to obtain the legal description from the seller or a title company.

GENERAL SUMMARY OF THE LAW

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

The statute of frauds renders an agreement for the sale of real property invalid unless the agreement or some note or memorandum thereof is in writing and subscribed by the party charged or his agent. I.C. § 9–505(4). Agreements for the sale of real property that fail to comply with the statute of frauds are unenforceable both in an action at law for damages and in a suit in equity for specific performance. *Hoffman v. S V Co., Inc*., 102 Idaho 187, 190, 628 P.2d 218, 221 (1981) (citing 72 Am.Jur.2d Statute of Frauds § 285 (1974); 73 Am.Jur.2d Statute of Frauds § 513 (1974)). An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain a description of the property, either in terms or by reference, so that the property can be identified without resort to parol evidence. *Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003).

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

Five years after deciding *Kurdy*, in a case involving the sale of real property, this Court took up the question what constitutes a sufficient description of real property under the statute of frauds. *Allen v. Kitchen*, 16 Idaho 133, 100 P. 1052 (1909). In *Allen*, the contract described the real

property as "Lots 11, 12, and 13, in block 13, Lemp's addition," and "Lot 27, Syringa Park addition, consisting of 5 acres." *Id*. at 137, 100 P. at 1053. Absent from the description was the city, county, state, or other civil or political division or district in which any of the property was located. *Id.* The Appellant argued that the contract was sufficient to admit oral evidence showing the location of the real property. This Court disagreed.

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

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

The contract in *Garner* described the property as the " 'Bartschi Property, City___, Zip 83252, legally described as approx. 500 acres of mountain property.' " *Id*. at 434, 80 P.3d at 1035. An addendum to the contract further described the property as: "Acreage: As deemed by Bear River [sic] County Platt and Tax Notices to be 512 acres." *Id.* (quotations omitted). We held that this description did not satisfy the statute of frauds. *Id*. at 436, 80 P.3d at 1037. Because the contract referred to certain tax notices, we also analyzed the descriptions of the real property in the tax notices for compliance with the statute of frauds. The property descriptions in the tax notices were incomplete and did not allow someone to identify exactly what property the seller was conveying to the buyer. *Id*. at 435–36, 80 P.3d at 1036–37. Therefore, we concluded that the property descriptions referenced in the tax notices did not satisfy the statute of frauds. *Id*. at 436, 80 P.3d at 1037. We most recently addressed the sufficiency of a property description in a contract for the sale of real property in *Lexington Heights Dev., LLC v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004). In *Lexington Heights*, we relied heavily on the analysis from the *Allen* Court indicating that a contract must speak for itself and that parol evidence is not admissible to supply the terms of a contract. *Id*. at 281, 92 P.3d 526, 92 P.3d at 531. We also reaffirmed the rule we relied upon in *Garner* stating, "[a] description contained in a deed will be sufficient so long as quantity, identity or boundaries of property can be determined from the face of the instrument, or by reference to extrinsic evidence to which it refers." *Id.* at 281–82, 92 P.3d 526, 92 P.3d at 531–32 (quoting *Mission Mountain*, 135 Idaho at 244, 16 P.3d at 920).

…

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

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

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

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

INTENT IS NOT A FACTOR

Occasionally, a question arises into the parties' intent; the Supreme Court has also held the intent is irrelevant to the test:

> In order to be enforceable, "a description of real property must adequately describe the property such that it is possible for someone to identify 'exactly' what property the seller is conveying to the buyer." Whether a description is such that the property can be 'exactly' identified is an objective determination made by the court. This objective determination is not affected by the

> understanding or intention of the contracting parties at the time they drafted the property description. Such considerations are irrelevant. They do not aid the court in determining whether the document itself, standing alone (including with any outside materials directly referenced therein), meets the necessary qualifications.
>
> *The David & Marvel Benton Tr. v. McCarty*, 161 Idaho 145, 151 (2016). Internal citations omitted.

PARTIAL PERFORMANCE EXCEPTION

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

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

USING A DEFECTIVE DESCRIPTION AS A SWORD

Recently the Supreme Court has called into question whether or not a seller can use a faulty legal description as a sword against a buyer to invalidate a contract. The discussion by the court was dicta, and this only academic, as it did not reach a solid conclusion. But the case may signal a future ruling under similar facts. The Court stated:

> As to the merits of the defense, the district court ruled that the statute of frauds is satisfied by the legal description contained in the PSA here. We agree. But before we reach that point, we voice our concern whether the statute of frauds is even available to the [the seller] Estate as a defense in this case. "By its plain language, [section 9-505] governs contracts or agreements .... Its purpose is to prevent false or fraudulent contract claims by forbidding disputed assertions of certain types of contracts without any written memorandum of the agreement." *McKoon v. Hathaway*, 146 Idaho 106, 111, 190 P.3d 925, 930 (Ct. App. 2008). The statute of frauds "is to shield persons with interests in land from being deprived of those interests by perjury, not to arm contracting parties with a sword they may use to escape bargains they rue." *Flight Sys., Inc. v. Elec. Data Sys. Corp*., 112 F.3d 124, 128 (3rd Cir. 1997); *see also Gibson v. Arnold*, 288 F.3d 1242, 1247 (10th Cir. 2002) ("[T]he purpose of the statute of frauds is to shield persons with interests [covered by the statute] from being deprived of those interests by perjury, not to arm contracting parties with a sword they may use to escape bargains they rue."). The interest and purpose of the statute of frauds is not served by the Estate using it as a sword against *Tricore* to escape its own breach of contract. It is telling that the Stockton PSA uses nearly the identical property description as contained in the PSA between the Estate and *Tricore*. Even so, *Tricore* failed to raise this question directly, and our concerns do not underpin the decision we announce today. They are noted simply as an additional impediment to the statute of frauds being used in the manner sought by the Estate.
>
> *Tricore Invs., LLC v. Est. of Warren through Warren*, 168 Idaho 596, 612, 485 P.3d 92, 108 (2021)

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

Can a RE-10 be revoked once it has been provided to the other party in a transaction?

QUESTION: Broker represents the Buyer. Buyer submitted an Inspection Contingency Notice (RE-10) requesting repairs to Seller within Buyer's timeframe to do so. Seller responded in writing not accepting Buyer's RE-10 and proposing different terms. Seller then attempted to revoke the proposal stating Seller would make no repairs and give no concessions. Broker questions whether Seller's response can be revoked, and if using the RE-10 is required when negotiating during the inspection contingency.

RESPONSE: It is not a requirement to use the RE-10. Section 12(C)(3) of the Purchase and Sale Agreement (RE-21) states:

> If BUYER does within the strict time period specified give to SELLER written notice of disapproved items/conditions, it shall end BUYER'S timeframe for that particular inspection and is irrevocable. BUYER shall provide to SELLER pertinent section(s) of written inspection reports upon request, if applicable. Upon receipt of written notice SELLER shall have business days (three [3] if left blank) in which to respond in writing. SELLER, at SELLER'S option, may agree to correct the items as requested by BUYER in the notice or may elect not to do so. If SELLER agrees in writing to correct the 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 shall be irrevocable without consent of BUYER and BUYER may proceed under 12(C)(4) below. If SELLER does not respond in writing within the strict time period it shall be deemed a SELLER response electing not to correct any disapproved items/conditions. (Underline added).

The language above only states that the response must be in writing, it does not say that it needs to be delivered on a RE-10.

Seller's email would likely be considered Seller's response to Buyer's RE-10, therefore Seller would not be able to revoke the proposal that was made to Buyer, and Buyer would then have three days (or however many days were written into the contract in question) to proceed under Section 12(C)(4) of the RE-21.

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When assigning a Buyer's interest under a Purchase and Sale Agreement, is it better to use the RE-29 assignment form or an addendum to change the Buyer's name?

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.

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Can a Buyer terminate a contract if something was discovered on the title report after all of Buyer's contingencies have passed?

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 statue 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.

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DISCLOSURE

Can each Seller fill out their own RE-25 Property Condition Disclosure?

QUESTION: Broker represents Sellers of an investment property. One Seller is an individual who has knowledge about the property, the other Seller is an Estate that has no knowledge. Broker questions if she can have each Seller fill out separate RE-25 forms, given that the Estate is exempt from making disclosures.

RESPONSE: According to the facts presented to the Hotline, each Seller has different statutory obligations regarding disclosure. The Estate Seller is exempt from making disclosures under Idaho Code § 55-2505(16), so the Estate Seller should fill out and sign a Seller's Property Condition Disclosure Form for Exempt Property Only (RE-25A). The individual Seller is required under Idaho Code § 55-2504 to make disclosures, so he should fill out the standard Seller's Property Condition Disclosure Form (RE-25). Broker should make sure only the Seller who is filling out the form has their respective name listed at the top of the form, and that each form does not list both Sellers. Further, Broker should make necessary disclosures to prospective Buyers as to why there are two different RE-25 forms for this property.

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NAR SETTLEMENT

Does the cooperating commission need to be disclosed if a Seller does not want it to be?

QUESTION: Broker questions whether the listing brokerage has to disclose the full amount Seller is willing to pay to a selling brokerage if the Seller has instructed them not to disclose it to potential buyers.

RESPONSE: No. If a Seller has specifically instructed the listing brokerage to not disclose the full amount the Seller would be willing to pay to a cooperating brokerage, it would become confidential client information per Idaho Code § 54-2083(6) and the listing brokerage can withhold that information. However, it is important to note that the default provisions of the 2025 RE-16 (Idaho REALTORS® Seller Representation Agreement) requires disclosure, so a modification would be required to withhold it.

What is the proper way to deal with an accepted offer that is paying the cooperating brokerage less than what is originally agreed to in the RE-16?

QUESTION: Broker questions what to do in a scenario where the RE-16 states Seller will pay a cooperating brokerage X%, but that information was not disclosed anywhere, so an offer from a Buyer comes in with the third box in Section 20 of the RE-21 checked with a request for something less than X% as the selling brokerage compensation. Does the RE-16 need to be amended?

RESPONSE: According to the scenario presented to the Hotline, there is a surplus percentage that needs to be accounted for. This is because the RE-16 states "Of the total brokerage fee ___% or $_____ shall be shared with a cooperating brokerage…" (RE-16, Line 48). In this case, the listing broker would need to come to an agreement with Seller to ascertain how that surplus percentage is going to be accounted for. Once it has been determined what Seller wants to do, best practice would be for Broker to ensure that the change is documented in writing. Broker can utilize a RE-16A to amend the commission structure in the original Seller's Representation Agreement. The RE-16A is designed for quickly making changes to brokerage agreements.

NOTE: The 2025 version of the RE-16 modifies this response.

Can the commission amount listed in the RE-14 be amended for a specific property only?

QUESTION: A RE-14 is signed with "X" commission, but Buyer finds a property where Seller is only paying "something less than X." Can they create a RE-16A specific to that particular property that changes the brokerage fee from "X" to "something less than X?" If this transaction fell apart would the original RE-14 still be binding since the RE-16A was property specific?

RESPONSE: Yes, a selling brokerage is free to have contracts with distinct amounts or types of commission, not only for different properties but also for different offers/transactions. The only requirement is that the compensation be objectively ascertainable for each property.

Does a RE-14 need to be amended prior to making an offer if the commission numbers are different?

QUESTION: Once a selling brokerage enters into a Buyer Representation Agreement for a certain amount, can the brokerage accept a lower amount if the seller is offering less than that which was agreed upon? If so, is there a deadline when such an agreement has to be memorialized; specifically, does it have to be done before a Purchase and Sale Agreement is executed?

RESPONSE: The agreement with a selling broker and a Buyer can always be amended so long as there is mutual consent of both parties.

There are no legal deadlines for when such an amendment needs to be executed. In the circumstance where a selling brokerage is voluntarily dropping a prior agreed upon commission to meet the Buyer's side commission negotiated between the Buyer and the Seller, best practice would be to document that as soon as possible but it does not need to be before, or contemporaneously with, the execution of the Purchase and Sale Agreement.

QUESTION: If a Buyer and Selling Broker enter into a Buyer Representation Agreement (RE-14) and agree to a compensation amount, then Selling Broker finds a property from a Seller that is willing to pay more than the agreed upon amount, can the RE-14 be amended, and does it need to be amended prior to making an offer on the property?

RESPONSE: Yes, so long as a Buyer is freely making the decision to amend with full disclosure of all the facts, the Buyer Representation Agreement can be amended at any time. Best practice would be to amend the RE-14 with a RE-16A prior to making an offer on the property, however the Representation Agreement can be amended at any time prior to closing. It is important to note that a selling Brokerage can never receive more compensation than that agreed to by Buyer.

PROPER FORM USE

Does a rejected offer need to be signed by Seller?

QUESTION: Broker questions if an offer that has been rejected needs to be signed by the Seller, or if an email to a buyer's agent stating that the offer has been rejected is sufficient.

RESPONSE: There is no law in Idaho that requires a seller to reject an offer in writing. Licensees are authorized to communicate on behalf of their clients, so an email from the listing agent to buyer's agent stating that the offer was reviewed by Seller and was rejected is an appropriate, and common, way to convey a rejection.

What is the proper form to use to terminate a Representation Agreement?

QUESTION: Broker finds himself in a circumstance where he needs to terminate his representation agreement with a client and questions the proper procedure for doing so.

RESPONSE: The RE-16 Sellers Representation Agreement is a bilateral, legally binding contract between the brokerage and the client. In order to terminate a contract, absent a breach, both parties have to agree to do so.

Should the parties agree, the RE-16A was designed to accomplish this task. Broker should check off the appropriate box and provide the RE-16A to his client who can sign it. Upon mutual execution of the RE-16A the representation will end.

The Legal Hotline does not provide legal advice to Buyers or Sellers. Brokerage should advise its clients to seek legal counsel if they have questions concerning their rights under a representation agreement.

Does Buyer have to use a RE-10 to remove Buyer's inspection contingency?

QUESTION: Broker represents Buyer. Buyer had an inspection period and allowed the timeframe to pass without submitting a RE-10 to the Buyer. Listing agent would like the Buyer to

execute a RE-10 that indicates Buyer is removing their inspection contingency. Broker questions if this is necessary.

RESPONSE: No writing or RE-10 is necessary because the language in the Purchase and Sale Agreement states what happens when a Buyer does not submit a RE-10 to Seller during the inspection timeframe. 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.
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> RE-21, Section 12(C)(1).

The above cited language automatically waives the Buyer's inspection contingency if Buyer does not submit a RE-10 to Seller. While it may be customary to use the RE-10 to remove Buyer's inspection contingency before a Buyer's timeframe is up, Buyer can also wait for the time frame to expire. This will automatically end Buyer's timeline and waive Buyer's right to terminate based on the inspection contingency. Thus, given the language contained in the Purchase and Sale Agreement, a RE-10 is not legally required in every transaction.

The Legal Hotline cannot comment on what IREC looks for in a file during an audit, so Broker may wish to reach out to IREC for compliance purposes.

What is the proper use of the RE-32 Multiple Counter Offer form?

QUESTION: Broker sees the RE-32 being used in various ways and questions what the correct process is when utilizing the Multiple Counter Offer form.

RESPONSE: According to the facts presented to the Hotline, Broker sees agents using the RE-32 as a way to instruct all Buyers to submit their highest and best offers. That is an incorrect use of the form.

The RE-32 is intended to be used as follows: The Seller has presumably received offers on RE-21s from multiple Buyers. Seller uses the RE-32 to counter all offers with specific terms modifying the original offers. Seller then signs the form on Line 48 and can sign the original RE-21 at that time; if Seller does this, it is imperative that the check box indicating Seller's signature is subject to the attached counter offer on Line 523 of the RE-21 is checked. If the Buyer accepts this counter offer, they would sign the Buyer's Acceptance section (Line 52) of the RE-32 and

return it to the Seller, but the parties do not have a binding contract yet. It only becomes binding if Seller signs the RE-32 form a second time under the Final Acceptance section (Line 61). This back and forth is done intentionally to prevent Seller from two regular counter offers (RE-13) being accepted at the same time and thus creating two legally binding contracts.

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MISCELLANEOUS

Are HOA transfer fees a violation of Idaho law?

QUESTION: Broker represents Buyer. The CC&Rs state that the HOA can charge a "reasonable" transfer fee, but they do not reference an actual dollar amount. The settlement statement received prior to closing showed a fee for over $1,000 that included the transfer fee, a set up fee and an estoppel fee. Broker questions whether this would violate the statute dealing with HOA transfer fees.

RESPONSE: Idaho Code § 55-3205 states:

> DISCLOSURE OF FEES AND FINANCIAL DISCLOSURES. (1) A homeowner's association or its agent must provide a member and the member's agent, if any, a statement of the member's assessment account no more than five (5) business days after a written request by the member or the member's agent is received by the manager, president, board member, or other agent of the homeowner's association, or any combination thereof. The homeowner's association will be bound by the amounts set forth within the statement of assessment account. The statement of assessment account shall include all outstanding assessments, charges, and fees, including any transfer fee, that are due and owing to the homeowner's association, including any late fees or interest that may have accrued. Additionally, the homeowner's association shall provide the amount of any transfer fee that may be charged upon a transfer of the property. No fee may be charged by a homeowner's association or its agent for providing a statement of the member's assessment account. Charging a fee for any statement of the member's assessment account required by this section is a violation of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.
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> (2) A homeowner's association may not charge a transfer fee unless the authority to do so is expressly stated in the declaration of covenants, conditions, and restrictions. The transfer fee may be charged only by the homeowner's association, and no portion of the transfer fee may be paid to or allocated to a third party, including any board member or the homeowner's association's agent or manager. On or before January 1 of each year, a homeowner's association or its agent must provide its members a disclosure of fees that will

> be charged to a member. Fees imposed by a homeowner's association for the calendar year following the disclosure of fees may not exceed the amount set forth on the annual disclosure, and no surcharge or additional fees may be charged to any member in connection with any transfer of ownership of his property.
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> (3) A homeowner's association or its agent must provide a member and the member's agent, if any, an up-to-date financial disclosure no more than ten (10) business days after a request by the member or the member's agent is received by the manager, president, board member, or other agent of the homeowner's association, or any combination thereof.
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> (4) Within sixty (60) days of the close of the fiscal year, a homeowner's association or its agent must provide all members of the organization, and each member's agent, if any, with an up-to-date and reconciled financial disclosure for the fiscal year.

Section 2 above indicates that the HOA must provide a disclosure of fees to all members each year. Further, it states that all fees may not exceed the amount set forth in said disclosures. If the HOA did not provide the above disclosures, it is possible that the HOA transfer fees being charged to Buyer are in violation of Idaho law.

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