The Hotline Top Questions

THE LEGAL HOTLINE

1-800-858-8701
Idaho Association of REALTORS®

2012

Published July 1, 2013

Prepared by:

Jason S. Risch
Jeremy P. Pisca
John R. Jameson

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

WHEN SHOULD THE HOTLINE BE UTILIZED?

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

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

Note on Legislative Changes for 2012

The responses contained in the 2012 "Hotline Top Questions" are based on the law in effect during 2012. The Idaho Legislature has enacted some changes to the Idaho Real Estate Licensing Law during the 2013 legislative session. Those changes are not reflected in the responses contained in the 2012 "Hotline Top Questions." Licensees should monitor legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which may reflect and/or identify the 2013 legislative changes to the licensing law. Legislative changes, in most cases, will not become effective until July 1, 2013.

TABLE OF CONTENTS

AGENCY

Can a Buyer allow the RE-14 Buyer's Representation Agreement to expire in order to avoid paying Agent commissions?

QUESTION: Agent and Buyer signed an RE-14 Buyer Representation Agreement. During the term of the contract, Buyer was allegedly contacted by another agent/builder regarding a lot that was not listed on MLS and encouraged by the agent/builder to leave their current agent to move forward unrepresented. The Buyer has paid money to the builder to reserve a lot, and has informed the Agent they will wait until their Buyer's Representation Agreement has expired to purchase the lot in order to avoid paying Agent's commission. Agent wants to know whether they can enforce the Buyer's Representation Agreement against Buyer, even though Agent was not involved in the transaction with agent/builder.

RESPONSE: Section 13 of the RE-14 Buyer Representation Agreement states in relevant part:

> 13. In consideration of the services to be performed by the Broker, BUYER agrees that broker may be compensated in any of the following ways:
>
> C. If the property is not subject to a listing Agreement, such as a Custom Build Job, the BUYER agrees that the Broker will be paid a fee of not less than ____% of selling price or $____.

RE-14 goes on to say:

> This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within ___ calendar days (ninety [90] if left blank) after this Agreement expires or is terminated, if the property acquired by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term of extension of the term of this Agreement. Unless otherwise indicated herein the Broker's fee shall be paid in cash at closing.

The RE-14 Buyer Representation Agreement, Section 13, provides compensation for transactions outside of MLS listing, if that section was marked on the form. It also provides a window of time after the contract expires in which a Buyer still owes compensation to the Brokerage if Buyer enters into a contract to purchase prior to the expiration of the RE-14. This length of time may be set by the parties, but is set at ninety (90) days if parties do not specify otherwise.

Given the information provided to the Hotline, Agent may still be able to collect commissions if the Buyer executes a purchase agreement during the period of their initial contract or 90 days past expiration.

Agent may wish to consult private legal counsel, as the Hotline does not resolve disputes between Agents and clients.

Can an agency relationship be made fiduciary?

QUESTION: Agent represents a group of Sellers in a pending real estate transaction. One of the Sellers requested that a statement be added to the contract creating a "fiduciary relationship" and claimed that this would therefore create an automatic dual-agency relationship. Agent questions if he should put this in the contract, and if a dual-agency relationship would be created by such language.

RESPONSE: Idaho Code § 54-2094 states:

> Representation not fiduciary in nature. While this act is intended to abrogate the common law of agency as it applies to regulated real estate transactions, nothing in this act shall prohibit a brokerage from entering into a written agreement with a buyer or seller which creates an agency relationship in which the duties and obligations are greater than those provided in this act. However, unless greater duties are specifically agreed to in writing between the brokerage and a represented client, the duties and obligations owed to a represented client in a regulated real estate transaction are not fiduciary in nature and are not subject to equitable remedies for breach of fiduciary duty.

According to I.C. § 54-2094, an agency relationship that is created between an agent and client is not fiduciary in nature. This allows a licensed real estate agent to represent the interests of multiple parties in a real estate transaction, as they are not contractually obligated to be specifically and wholly responsible for the interest of one party.

However, I.C. § 54-2094 does not prohibit a licensee from entering into an agreement that creates duties and obligations that are greater than those required by Idaho Code. Therefore, if a licensed agent and a client so choose, they may enter into a fiduciary relationship through a written agreement. This would create a relationship between agent and the client wherein the agent would be obligated to act solely in the benefit of the client. This would not create a "dual-agency relationship," but would rather create a relationship solely between the agent and the client in which the agent has a greater obligation to the client, and in which an agent may be subject to equitable remedies if said fiduciary relationship is breached. Additionally, creating a fiduciary relationship with a client would prohibit any "limited dual agency" relationship with prospective buyers, as such a relationship would be in breach of a fiduciary's duty of loyalty.

As the Hotline is unable to review specific contracts, it may be beneficial for all parties to seek private legal counsel regarding the formation of a fiduciary relationship.

May a Listing Agent purchase property from the Seller?

QUESTION: Agent has co-listed a property with another agent from a different brokerage. The other agent has decided to purchase the property. Agent now questions if the other agent may then be a dual agent, and the buyer.

RESPONSE: Idaho Code § 54-2055 pertains to licensees dealing with their own property and states:

> (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.
> (Underline added.)

According to I.C. § 54-2055, as long as the purchasing agent complies with all other applicable Idaho law, and discloses, in writing, that the licensee intends to purchase the property and holds an active license, the other agent may represent him/herself in the purchase of the property. However, the other agent must conduct the transaction through the brokerage under which they are licensed.

Can an Agent personally finance the transaction for a client?

QUESTION: Broker questions if an agent is allowed to personally finance a transaction for a client, or if this crosses some lines legally or ethically.

RESPONSE: Idaho Code § 55-2055(2) addresses real estate agents dealing with properties in which they may have an interest and states:

> 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.

The Hotline is unaware of any Idaho law or IAR ethics rule that would prohibit Agent from lending money to a client to purchase a property. However, I.C. § 55-2055(2) may apply as the Agent would have a financial interest in the property. The Agent may be required to disclose to all parties, in writing, that the Agent is personally financing the transaction.

Can Agent list properties when the Seller does not actually own the lots?

QUESTION: Agent has been contacted by a potential Seller to list a number of pre-sale new construction properties. However, the Agent has been contacted by the builder, who is not listed on title, but who is under contract with the developer to purchase the lots. Agent questions if she may list the properties when the Seller does not actually hold the title to the lots.

RESPONSE: The Idaho Real Estate Commission has indicated that it permits licensed agents to market and have clients enter into binding contracts for real property in which the Seller possesses only "equitable title." This means that a Seller may list a property that they have a contract to purchase, prior to actually purchasing the property. Additionally, The Hotline is unaware of any Idaho statute or case law that expressly prohibits a potential Seller from entering into a contract for the sale of property in which the seller holds "equitable title." With complete disclosure to all parties, it may be possible to market and sell properties under "equitable title" and still remain in compliance with Idaho law.

Given the information provided to the Hotline, it is likely that the builder of the structures has "equitable title" of the property, in that he may be in a pending transaction with the developer to purchase the lots. If this is indeed the case, then the Seller and the Seller's Agent may market and procure a Buyer for the property, contingent upon the Seller obtaining fee simple title in the future.

However, it should be emphasized that until the builder of the property closes on the first transaction with the developer and the deed is delivered to him, he will not be able to legally convey the property to any other party. Agents should take caution to ensure that full disclosure has been made to all parties that the Seller possesses "equitable title" and will be unable to pass clear title to the Buyer until the Seller closes the first transaction.

How should Agents' personal transactions be properly conducted?

QUESTION: An agent inquired about buying and selling real properties both by themself, with their spouse, and through a company. Agent also inquired whether there were any restrictions as to simultaneous closings, pocket listings, or selling by owner. Agent questions which of these types of transactions must be conducted through her brokerage.

RESPONSE: Idaho Code § 54-2055 Licensees Dealing with Their Own Property states in relevant part that:

> (2) A licensee shall disclose in writing to any buyer or seller no later than at the time of presentation of the purchase and sale agreement that the licensee holds an active Idaho real estate license, if the licensee directly, indirectly, or through a third party, sells or purchases an interest in real property for personal use or any other purpose; or acquires or intends to acquire any interest in real property or any option to purchase real property.
>
> (3) Each actively licensed person buying or selling real property or any interest therein, in a regulated real estate transaction, must conduct the transaction through the broker with whom he is licensed, whether or not the property is listed.
>
> (Emphasis added).

According to this statute, a licensed agent must disclose their status and conduct transactions through their brokerage on all personal transactions, even if the property is not listed.

The Idaho Real Estate Commission (IREC) issued Guideline #24 that addresses the applicability of the aforementioned statute. In short, the Guideline states that all real estate transactions in which the licensee, in her personal name, has an ownership interest must be conducted through her brokerage. However, if the property is being bought or sold by a business entity in which the licensee owns an interest, said transaction is not required to be conducted through the licensee's brokerage.

In this instance, the licensee is interested in buying and selling real properties, most likely in order to "flip" the property for a profit. If the licensee or their spouse wants to buy or sell property personally, the transaction should be processed through the brokerage which the agent is licensed. However, if a company (which does not hold a real estate license), with whom either licensee or spouse is associated, were to buy or sell property, the transaction would not need to go through the brokerage. Personal transactions are not required to be listed with MLS and can be sold by owner. However, that does not change the requirement that the transaction be processed by the brokerage.

How should co-listing with another brokerage be handled?

QUESTION: Agent has a friend that owns property in Salmon, Idaho. The friend has already engaged a brokerage in Salmon that has listed the property for over a year now. In an attempt to broaden the advertisement base for the property, the friend approached Agent to see if she was able to list the property on other MLSs. Agent contacted the Salmon brokerage and negotiated terms for commission splits and allowing agent to list the property on the other MLSs.

However, Agent would like to know if she needs a representation agreement with her friend or if there is some type of co-listing agreement she could enter into with the Salmon brokerage.

RESPONSE: Idaho Code § 54-2054(2) deals with real estate licensees' ability to split commissions with other licensees, and states in relevant part as follows:

> Fee-splitting with unlicensed persons prohibited. Unless otherwise allowed by statute or rule, a real estate broker, associate broker or salesperson licensed in the state of Idaho shall not pay any part or share of a commission, fee or compensation received in the licensee's capacity as such in a regulated real estate transaction to any who is not actively licensed as a real estate broker in Idaho or in another state or jurisdiction. The Idaho broker making the payment to another licensed person is responsible for verifying the active licensed status of the receiving broker.

Applying the facts given to the Hotline, it appears that Agent has entered into a written contractual relationship with the Salmon brokerage for a commission split and permission to list the property under Agent's brokerage. However, it is assumed that the friend already entered into an exclusive representation agreement with the Salmon brokerage. It would therefore be inappropriate for Agent to enter into another representation agreement with the friend. Nevertheless, as Agent is an active licensee in the state of Idaho, it is permissible to split the fee between the Salmon brokerage and the Agent.

Please note that the Hotline is unaware of local MLS rules and regulations. Agent is encouraged to check her local MLS rules and regulations to ensure that her activities of listing her friend's property on her MLSs can be done without a representation agreement. Other than Idaho Code § 54-2054(4), which prohibits interference with another brokerage's agreement, the Hotline is unaware of any Idaho statue or case law that would prohibit Agent from listing the friend's property on other MLSs without a representation agreement.

Agent may wish to consult private legal counsel concerning her rights and obligations regarding both her commission split agreement and her friend's representation agreement.

Is it appropriate for an agent to communicate with a client from their past brokerage?

QUESTION: Broker represents a Buyer in a transaction that ended in default. The Agent that was handling the transaction recently left for another brokerage. Agent left on good terms, and the Broker questions if it is appropriate to ask them to communicate with the client regarding the transaction.

RESPONSE: Idaho Code § 54-2056(5) states:

> Property of the broker. Upon termination of the business relationship as a sales associate licensed under a broker, the sales associate shall immediately turn over to the broker all listing

> information and listing contracts, keys, purchase and sale agreements and similar contracts, buyer brokerage information and contracts, and other property belonging to the broker. A sales associate shall not engage in any practice or conduct, directly or indirectly, which encourages, entices or induces clients of the broker to terminate any legal business relationship with the broker unless he first obtains written permission of the broker. (Emphasis added.)

Given the information provided to the Hotline, if Broker is comfortable with having the Agent speak with Broker's client, Agent may do so with the permission of the Broker. However, Agent must obtain written permission from the Broker before doing so.

Is an agent entitled to commissions if a buyer purchases a property after the representation agreement has expired?

QUESTION: Agent and Buyer signed an RE-14 Buyer Representation Agreement. During the time allotted in the contract, Buyer submitted an offer on a property, but the transaction failed to close. Since that time, the Buyer's Representation Agreement expired. Now, the Buyer and the Seller from the failed transaction have begun negotiations again regarding the same property. Agent questions if he is entitled to commissions if this transaction is completed.

RESPONSE: Section 13 of the RE-14 Buyer Representation Agreement states in relevant part:

> This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within ___ calendar days (ninety [90] if left blank) after this Agreement expires or is terminated, if the property acquired by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term of extension of the term of this Agreement. Unless otherwise indicated herein the Broker's fee shall be paid in cash at closing.

The RE-14 Buyer Representation Agreement, Section 13, provides a window of time after the contract expires in which a Buyer still owes compensation to the Brokerage if Buyer enters into a contract for a property that Agent prepared an offer prior to the expiration of the RE-14. This length of time may be set by the parties, but is set at ninety (90) days if parties do not specify otherwise.

Given the information provided to the Hotline, Agent may still be able to collect commissions if the Buyer executes a purchase agreement for the same property Agent prepared an offer for within the specific time allotted on the RE-14 Buyer Representation Agreement, but it is important to note that the right to collect commissions would be against the Buyer only.

COMMISSIONS AND FEES

Is Agent eligible to receive the original agreed upon commission following the bankruptcy of Property owner?

QUESTION: Agent represents the Buyer in a custom home transaction that has been under contract for three years. The transaction is going to close and Buyer has moved into the property. However, the company developing the property has gone into bankruptcy. The bankruptcy court held that $3,100 will be split between the brokers for commissions on the transaction. Agent questions if he is still entitled to the original agreed upon amount of commissions, or if he must now accept this amount as payment in full.

RESPONSE: Given the information provided to the Hotline, Agent and Buyer signed an RE-14 Buyer Representation Agreement (2009 Edition). Section 13(A), dealing with the agent's commissions states:

> 13. COMPENSATION OF BROKER: In consideration of the services to be performed by the Broker, BUYER agrees that broker may be compensated in any of the following ways: Check all that apply.
> ☐ A. If the property is subject to a listing agreement with the Broker's Company or a cooperating Broker through the Multiple Listing Service (MLS) or otherwise, the fee will be the amount equal to the compensation offered by the aforementioned Brokers but not less than % of the selling price. BUYER agrees to pay to the Broker any difference between the amount received from the aforementioned Brokers and the stated minimum.
> (Emphasis in original.)

According to section 13 of the RE-14, the Buyer agreed to pay any difference between the amount received from the other Broker and the agreed to minimum amount of commissions. In this case, the Agent and Buyer agreed to three percent and Agent received considerably less than that amount. Therefore, Agent may be able to collect more commissions directly from his Buyer.

Since the Seller/Developer has gone through bankruptcy, Agent no longer has the ability to demand sales commissions from the Seller. The Hotline does not specialize in bankruptcy law, and Agent may wish to consult a bankruptcy attorney in this regard.

Further, the Hotline does not resolve legal disputes between parties and Agent may wish to consult private legal counsel regarding his rights and obligations in collecting commissions.

Is it acceptable to receive a referral fee from a lender for referring a client to said lender?

QUESTION: Agent questions if it is acceptable to receive a "referral fee" from a lender in another state for referring a client to said lender.

RESPONSE: Idaho Code § 54-2054(6) states in part:

> Kickbacks and rebates prohibited. No licensed real estate broker or salesperson shall receive a kickback or rebate for directing any transaction to any individual for financing. A licensee shall not receive a kickback or unearned fee for directing any transaction to any lending institution, escrow or title company, as those practices are defined and prohibited by the real estate settlement procedures act…

According to I.C. § 54-2054(6), licensees are not allowed to receive any kickback or rebates for directing someone to a lending institution and/or an escrow or title company. Therefore, an out of state lender providing a referral fee to an Idaho licensee may be prohibited under Idaho law.

Under what circumstances is a referral agreement between brokerages enforceable?

QUESTION: Agent signed a referral agreement with another broker after referring a client to that brokerage. After the client purchased a property, the other brokerage sent Agent a letter stating that they would not be paying the referral fee to Agent, as the relationship with the client had started prior to the signing of the referral agreement. Agent questions if the agreement that both parties signed is enforceable.

RESPONSE: Idaho Code § 54-2054(8) states in pertinent part:

> After-the-fact referral fees prohibited. It shall be unlawful for any person to solicit or request a referral fee or similar payment from a licensed Idaho real estate broker or sales associate, for the referral of a buyer or seller in connection with a regulated real estate transaction, unless the person seeking the referral fee has reasonable cause. "Reasonable cause" shall not exist unless:
> (a) The person seeking the referral fee has a written contractual relationship with the Idaho real estate broker for a referral fee or similar payment.

Given the information provided to the Hotline, Agent and the other brokerage signed a referral agreement stating that Agent was entitled to a referral fee. According to I.C. § 54-2054(8), an agent may seek referral fees after a transaction has closed when the person seeking the referral fee has a written agreement stating they are eligible for such a payment. As the parties signed an agreement stating Agent would receive a referral fee, it is likely that Agent is entitled to such a fee, regardless of whether there was a prior relationship with the client.

The Hotline does not resolve dispute between brokerages and both parties to the contract may wish to consult private legal counsel regarding their rights and obligations in this matter.

Can a property owner purchase the property directly from the bank and circumvent the Seller and any commissions Agent may have been entitled to?

QUESTION: Agent represents a Seller that owns a small piece of land with a house that is adjacent to a large piece of undeveloped land. The large piece of land was recently purchased at auction. The purchase of the large piece of land believed the small piece of land and the house were included in the sale. After disputing who owned the property, the purchaser of the large piece of land claims to have gone to the Seller's lender and purchased the property. The purchaser now claims to own both pieces of land. Agent questions if it is possible for the owner of the other piece of land to purchase the property directly from the bank and circumvent the Seller's and any commissions Agent may have been entitled to.

RESPONSE: Idaho Code § 6-104 states:

> Mortgage not a conveyance. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure sale. (Emphasis added).

It is likely that the owner of the large piece of land purchased the "note" from the lender for the smaller piece of property. According, I.C. § 6-104 a mortgage of a property is not a conveyance, and the ownership of the property would therefore not be transferred to the owners of the larger piece of property without a foreclosure sale. By purchasing the note, the owner of the large piece of property may now be entitled to payments under the note, but absent a foreclosure sale, he has likely not been conveyed ownership of the property.

As this situation is extremely factually specific and could require a thorough review of all related documents and contracts, all parties may wish to consult private legal counsel regarding their rights and obligations.

Is Agent eligible for commissions for finding rental property for Clients?

QUESTION: Agent represents out-of-state clients looking for a property to rent. Agent questions whether her clients or the property owner should pay her commissions once she finds a property for her clients to rent.

RESPONSE: Agent's only contractual relationship is with her out-of-state clients. Unlike when a property is listed for sale on the MLS, where the listing brokerage offers to share commissions with a cooperating brokerage, Agent is searching for rental properties that are not likely listed on an MLS. Therefore, Agent's only contractual right to commissions is with her clients. Only if a property owner were to agree to pay Agent's commissions would the owner be obligated for said commissions.

The Hotline does not resolve disputes between parties or commission disputes. Agent may wish to consult private legal counsel regarding her contractual obligations and rights to commissions.

Can an online website request payment for referral fee from brokerage?

QUESTION: Broker has an agent who is being contacted by an online company based out of California demanding referral compensation. The California company alleges that since an individual submitted a form online, which permits the company to contact agent, the company is now legally entitled to a referral fee. Broker would like to know if this is a valid, binding contract and if she should pay the referral fee to the company.

RESPONSE: Idaho Code § 54-2054(8) states in relevant part:

> (8) After-the-fact referral fees prohibited. It shall be unlawful for any person to solicit or request a referral fee or similar payment from a licensed Idaho real estate broker or sales associate, for the referral of a buyer or seller in connection with a regulated real estate transaction, unless the person seeking the referral fee has reasonable cause. "Reasonable cause" shall not exist unless:
> (a) The person seeking the referral fee has a written contractual relationship with the Idaho real estate broker for a referral fee or similar payment; and
> (b) The contractual relationship providing for the referral fee exists at the time the buyer or seller purportedly referred by such person signs a written agreement with the Idaho broker for the listing of the real estate or for representation by the broker, or the buyer signs an offer to purchase the real estate involved in the transaction.

Given the facts provided to the Hotline, there was no written contractual agreement between the online company and the agent and/or brokerage. In fact, Broker asserted that there has never been any agreement between Broker and this California company, particularly in regards to referral fees.

Therefore, Idaho Law deems that the California company's request for referral fees is potentially unlawful. Barring some written agreement between Broker and the company, Broker is likely under no obligation to pay a referral fee to the company.

CONTRACTS

Can a RE-21 be assigned to Buyer B by Buyer A if the contract does not indicate whether it may be assigned?

QUESTION: Buyer A and Seller executed an RE-21 Purchase and Sale Agreement. Buyer A wishes to assign the contract to Buyer B. However, section 37 of the RE-21 Assignment did not indicate whether the contract may or may not be assigned. Therefore, Broker questions whether the contract may be assigned to Buyer B by Buyer A if neither box for may or may not be sold, transferred, or otherwise assigned has been marked.

RESPONSE: Idaho Law establishes that contracts are freely assignable unless the contract states otherwise. In this instance, a purchase and sale agreement exists between Buyer A and Seller. However, the agreement does not indicate that it may not be assigned. Therefore, given the facts that it is not specified otherwise within the contract or through an addendum that the property cannot be assigned, Buyer A may likely assign the contract to Buyer B.

Can Buyer rely on the original contract after executing later addendums?

QUESTION: Buyer has an agreement with a building contractor who has repeatedly changed the date of closing. The original contract stated the closing date to be June 15, 2013. The second addendum made to the original contract deemed earnest money to be non-refundable. The final addendum stated the closing date to be July 5, 2013. Agent would like to know if Buyer can take action against contractor's changed deadlines by utilizing the original contract, instead of adhering to final addendum.

RESPONSE: RE-11 states in relevant part:

> To the extent the terms of this ADDENDUM modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums or Counter Offers, these terms shall control. All other terms of the Purchase and Sale Agreement including all prior Addendums or Counter Offers not modified by this Addendum shall remain the same. Upon its execution by both parties, this agreement is made an integral part of the aforementioned Agreement.

Given the facts, there have been numerous addendums added to the original purchase and sale agreement. The addendums have established that the earnest money is non-refundable and the closing date has been moved from June 15, 2013 to July 5, 2013. Furthermore, it has been indicated that the contractor wishes to submit another addendum extending the closing date to July 15, 2013. Agent has expressed Buyer's dissatisfaction because of the repeatedly changed deadlines. Although Buyer wishes to take action against the contractor by enforcing the original closing date of June 15, 2013, Buyer will likely be unable to do so since Buyer agreed to later closing dates in subsequent addendums. Therefore, the initial purchase and sale agreement establishing the closing date of June 15, 2013 is superseded by the final addendum, signed by both parties, establishing the closing date as July 5, 2013.

The Hotline does not resolve issues between parties to a contract. Buyer and/or Agent may wish to consult private legal counsel concerning their rights and obligations under the contract with the building contractor.

Does a party need to sign the RE-21in response to a counter offer?

QUESTION: Agent is representing the Buyer in a real estate transaction. The broker of the Seller has advised its client not to sign the final page of the Purchase and Sale Agreement in response to Buyer's counter offer. The Seller's broker states that a signature on the first page of

the Counter Offer Agreement is sufficient to create a binding contract. The Agent would like to know if this advice is accurate and a correct manner to proceed with the counter offer transaction.

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

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

Based on the above quoted language, the RE-13 Counter Offer incorporates all terms of the Purchase and Sale Agreement not modified or conflicted with the provisions of the Counter Offer. Since the Counter Offer incorporated all terms of the non-conflicted terms of the Purchase and Sale Agreement and terms of the counter offer, the Buyer and Seller signing only the Counter Offer likely creates a binding agreement between the parties, which includes the original Purchase and Sale Agreement. Although it is possible for the parties to also sign the original Purchase and Sale Agreement subject to the counter offer, such practice is likely not necessary to create a binding contract between the parties. Therefore, the parties likely need only to sign the Counter Offer.

The Hotline does not resolve disputes between brokerages or parties to a transaction. Therefore, each party may wish to consult private legal counsel regarding their rights and responsibilities under the transaction contract.

Is a Buyer obligated to sign an addendum to a contract?

QUESTION: Agent represents a buyer of 29 acres of land. In the purchase and sale agreement, the parties agreed that the Buyer would be purchasing the full 29 acres. However, the Seller has now submitted an addendum stating that 3.6 acres of the property would not be part of the purchase and will be sold to a different buyer. The original Buyer has located the 3.6 acres and determined it is a beautiful portion in the middle of the 29 acres. Buyer does not wish to sign the addendum and wants to purchase the original 29 acres.

RESPONSE: In contract formation, the parties must mutually assent to the contract. Mutual assent, or a "meeting of the minds," generally is some form of negotiation, during which one person makes an offer and the other agrees to it. Afterwards, each party is bound to the contract that was agreed upon by both parties. No other arrangements made outside of the contract document will become part of the contract, unless both parties assent to the inclusion of such terms or such terms are ambiguous to their meaning or application.

Once there is a meeting of the minds, the contract entered into by the Buyer and the Seller governs the parties' rights and obligations. Absent an agreement to the contrary, the

parties are bound by the terms of the signed and accepted contract that are definite in their meaning.

Given the facts provided to the Hotline, it appears that both parties assented to the formation of the contract for the purchase and sale of the full 29 acres. Later, the Seller indicated that they do not wish to perform under the purchase and sale agreement unless the 3.9 acres is excluded from the sale. However, unless it can be shown that there is an ambiguity in the terms which prohibits a "meeting of the minds," the parties are bound by the terms of the contract as written. If the Sellers are unwilling to move forward with the contract due to the inclusion of the full 29 acres on the original purchase and sale agreement, the Seller may be found to be in default of the purchase and sale agreement.

The Hotline does not resolve legal disputes between Buyers and Sellers. All parties to the agreement may wish to consult private legal counsel in regards to their rights and obligations in these matters.

What qualifies as double contracting?

QUESTION: Agent represents the Seller of a property that is the subject of a lawsuit with the homeowner's association. The Seller informed the potential Buyer that Seller will cover all costs of the lawsuit. Seller retained an attorney to draft a contract stating that Seller will continue to handle the lawsuit and the Buyer will have no liability thereunder. Seller has set aside $4,000 in case it is needed to resolve the lawsuit, and the parties were going to deposit it with the title company to hold in trust. The lender does not want this $4,000 to show up on the HUD, but the title company will not hold it in trust unless it does. Agent questions if holding this $4,000 elsewhere in a different trust account and not listing the deposit on the HUD qualifies as double contracting.

RESPONSE: Idaho Code § 54-2004(22) defines double contracting:

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

According the I.C. § 54-2004(22), double contracting takes place only if the lender is not made aware of one of two or more financing agreements. Given the information provided to the Hotline, the lender has been made aware of all arrangements, and therefore depositing the $4,000.00 in an account after closing and not listing it on the HUD is not likely to be considered double contracting.

Can a Seller accept other offers while a different counter offer is pending acceptance?

QUESTION: Agent represented the Buyer in a recently cancelled real estate transaction. Agent sent a counter offer to the Seller without signatures, since Buyer was out of town. Further, Agent accidently put the wrong date for an extension of time on the counter offer. Agent explained this to the Seller's Agent and they agreed they would get all signatures when the Buyer returned. However, the Seller then received another offer and subsequently sent a cancellation to Agent and Buyer. Agent questions if the Seller may cancel the contract.

RESPONSE: Idaho Code § 54-2051(4) states:

The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:

> *(a) All terms and conditions of the real estate transaction as directed by the buyer or seller;*
> (b) The actual form and amount of the consideration received as earnest money;
> (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;
> (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
> (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;
> *(f) All appropriate signatures;* and
> (g) A legal description of the property.
>
> (Emphasis added.)

According to I.C. § 54-2051(4), all submitted offers and/or counter offers must contain all terms and conditions that are directed by the buyer or seller and all appropriate signatures. Without signatures or appropriate contract terms, it does not appear as if there was ever an acceptable counter offer. If so, Seller would be entitled to accept alternative offers. In such an instance, no contract was ever formed and the parties would be free to enter into agreements with other parties.

The Hotline does not resolve disputes between buyers and sellers and all parties may wish to consult private legal counsel regarding their rights and obligations in this matter.

Upon late acceptance, is a contract still deemed valid?

QUESTION: Broker represents a decedent's estate that is selling real property. A RE-13 Counter Offer was sent to buyer with an acceptance deadline of May 9, 2013. Buyer accepted and signed the RE-13 on May 10, 2013. Broker questions whether there is an existing and valid contract in the presence of a late acceptance.

RESPONSE: Stated in bold on the RE-21 Purchase and Sale Agreement, line 362, number 39:

TIME IS OF THE ESSENCE IN THIS AGREEMENT

> This term of the RE-21 Purchase and Sale Agreement requires that the parties to a transaction strictly comply with all timeframes and deadlines in the agreement.

Furthermore, the RE-13 Counter Offer states in relevant part:

> If a signed acceptance is not delivered on or before (date): _____ at _____ A.M. /P.M. this Counter Offer shall be deemed to have expired.

Given the facts provided to the Hotline, seller put an acceptance deadline of May 9, 2013 in its Counter Offer. However, buyer did not accept the offer until May 10, 2013. Therefore, the late acceptance is unenforceable unless the seller consents to the late acceptance.

Seller consenting to the late acceptance can be by either express or implied means. Consent can be implied by seller and buyer continuing to perform under the contract after the late acceptance. Therefore, it is important that the seller not allow the buyer to perform acts consistent with the agreement (such as inspecting the property), if seller does not wish to consent to the late acceptance.

The Legal Hotline does not resolve disputes between buyers and sellers. The parties may wish to consult private legal counsel to determine their rights and obligations under the agreement.

Does paying Seller commission reductions after closing qualify as a double contract?

QUESTION: Prior to closing, Buyer asked listing and selling agents to reduce their commissions, decreasing costs by a total of $1,250. At closing, Buyer's lender disapproved of the commission reductions and would not fund transaction if commission reductions were paid back to Buyer. After closing, Listing Agent requested that Selling Agent pay selling agent's reduction in commissions to Buyer. Selling Agent questions this request and would like to know if this is an appropriate practice.

RESPONSE: Idaho Code § 54-2054(5) states:

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

> misconduct and dishonorable and dishonest dealing and shall subject the licensee to disciplinary action by the commission.

Idaho Code § 54-2004(22) defines a "double contract" as:

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

Given the facts provided to the Hotline, Buyer requested that agents of both parties accept reduced commissions. The lender objected Buyer's request and stated denial of funds to Buyer if commission reductions were paid to Buyer. Subsequent to closing, the Listing Agent requests that Selling Agent pay commission reductions. Although the lender was initially aware of the request to pay commission reductions but rejected it, the lender was not aware of the secondary request following closing. In this case, because the lender is unaware of the additional request by Buyer for payment from the Selling Agent there is potential that the second agreement could result in double contracting.

As cited-above, double contracts are prohibited. Since an agreement between Buyer and Selling Agent for payment of commission reductions without the lender's knowledge of the transaction is likely to be deemed double contracting, Agent should be wary of entering into said agreement.

The Hotline does not resolve disputes between parties. Agent may wish to seek private legal counsel to determine her rights and obligations regarding these matters.

Is Seller required to give the first Buyer an opportunity to close after the closing date has passed?

QUESTION: Buyer and Seller have entered into a real estate contract with a specific closing date. Forty-five (45) days into the contract, the Seller became concerned because the appraisal had not been ordered. As a result, the Seller entered into a back-up agreement, which is contingent upon the first transaction being cancelled or failing to close. The first Buyer has now requested that the Seller sign an extension to the contract, which Seller refused because back-up agreement is substantially better for the Seller. Agent questions if Seller is required to give the first Buyer an opportunity to close even though the closing date has passed and transaction did not occur.

RESPONSE: The RE-21 Purchase and Sale Agreement states:

> 35. CLOSING: On or before the closing date, BUYER and SELLER shall deposit with the closing agency all funds and instruments necessary to complete this transaction. Closing means the date on which all documents are either recorded or accepted by an escrow agent and the sale proceeds are available to SELLER. The closing shall be no later than (Date) _____.

Given the facts provided to the Hotline, Buyer and Seller have a signed purchase and sale agreement establishing a fixed date and time closing will occur. During the process, Seller became troubled by Buyer's delay in ordering an appraisal. For this reason, Seller obtained a back-up agreement which was contingent upon the failure to close or the cancellation of the first contract. First Buyer requested Seller extend the closing date. However, Seller objected as she is not obligated to sign an addendum. Therefore, in the absence of an addendum to extend the closing date, the Purchase and Sale Agreement becomes voidable after the closing date has lapsed. It is likely that Seller may now sign the back-up agreement and close with Second Buyer.

Can an agent market a property prior to getting all signatures on an RE-20 Notice to Terminate?

QUESTION: Agent represents a Seller that executed a purchase and sale agreement with a Buyer. Buyer has decided not to move forward with the transaction and submitted an RE-20 Notice to Terminate Contract and Release of Earnest Money and is willing to turn over the earnest money with no dispute. Agent is aware of the provisions in the RE-21 Purchase and Sale Agreement, Section 30 that allows Seller to collect the earnest money or pursue other legal remedies. Agent now questions if they may market the property prior to committing to a remedy for Buyer's default.

RESPONSE: The RE-20 Notice to Terminate Contract and Release of Earnest Money states:

> The undersigned BUYER and SELLER agree that the above real estate Contract WILL NOT be completed and hereby mutually release each other from all further obligations to buy, sell or exchange under the Contract and all related documents, and from all claims, actions and demands which each may have against the other by reason of said Contract. It is the intent of this agreement that all rights and obligations arising out of said Contract are null and void. BUYER and SELLER further agree to release brokers and their associates from any claims, actions and demands by reason of releasing and disbursing of said earnest money deposit.

The RE-20 provides that the contract is null and void and that the parties are no longer under any obligations to buy, sell or exchange. This form also allows the parties to agree to the distribution of the earnest money.

Given the information provided to the Hotline, Buyer has signed the notice to terminate and has therefore acknowledged that the transaction will not be completed and agreed to release the earnest money to the Seller. Even though the Seller has yet to decide what legal remedy to take, the Buyer has stated by submitting this termination of the contract that the transaction will not occur. Therefore, the Seller and Seller's Agent may market the property as the contract between the parties has been terminated even though the Seller refuses to sign the RE-20.

Does the closing time frame begin at signature of Seller or receipt of acceptance by Buyer?

QUESTION: Agent represents a Buyer that executed a Purchase and Sale Agreement. The contract states that closing will take place thirty (30) days from the Seller's signing date. The Seller signed the contract on September 30th. However, the Seller's agent did not provide the contract to the Buyer until October 6th. Agent now questions if the thirty days starts from September 30th, when the contract was actually signed, or from October 6th when the Buyer received the document.

RESPONSE: The contract states that closing will take place thirty (30) days from the date that the Seller signs the Purchase and Sale Agreement. In this case, September 30th was the date it was signed by the Seller, so therefore the date of closing would be no later than October 30th.

However, the Seller's agent did not provide the signed contract to the Buyer and Buyer's agent until nearly one week after it was signed. Idaho Code § 54-2051(3) states:

> Upon obtaining a properly signed and dated acceptance of an offer to purchase, the broker or sales associate shall promptly deliver true and legible copies of such accepted offer to both the buyer and the seller. (Emphasis added).

The Seller's agent may not have delivered the signed offer to purchase in a prompt manner, as required by Idaho Code § 54-2051(3). The statute does not specify an exact amount of time allotted to deliver a signed purchase and sale agreement, though it states that an agent should act promptly.

Given the information provided to the Hotline, there is a legitimate legal dispute as to the date that the closing must occur. Generally, given the language of the contract, the date of closing would be October 30th. However, because there is a substantial delay in delivering the executed contract, it could be argued that the Buyer incurred an inequitable burden to meet the closing deadline. The most equitable solution would be to have both parties reach an agreement and set a new closing date. This can be done easily by attaching an addendum signed by both parties that states a new date for closing.

Can a seller who only holds "equitable title" contract to sell the property?

QUESTION: Agent represents a Buyer that wishes to make an offer. The Seller has executed a purchase and sale agreement with a bank, but the transaction has not closed. The

bank is purchasing the property as an investment and wishes to immediately sell the property. The Agent was informed that the bank now has "equitable title" and all offers to purchase now must be submitted to them. Agent questions if this is acceptable.

RESPONSE: The Hotline is unaware of any Idaho statute or case law that expressly prohibits a potential Seller from entering into a contract for the sale of property in which the Seller holds "equitable title." Additionally, the Idaho Real Estate Commission indicated that it permits licensed agents to market and have clients enter into binding contracts for real property in which the Seller possesses only "equitable title." However, It is important to note that a Seller only has "equitable title" if the Seller has entered into a binding Purchase and Sale Agreement to purchase the property. An option to purchase is not considered possessing "equitable title." With complete disclosure to all parties, it may be possible to market and sell properties under "equitable title" and still remain in compliance with Idaho law.

Given the information provided to the Hotline, it is likely that the bank has "equitable title" of the property, in that it may have a binding purchase agreement with the current owner. If this is indeed the case, then the bank may market and procure a Buyer for the property, contingent upon the bank obtaining fee simple title in the future.

However, it should be emphasized that until the bank closes on the first transaction and the deed is delivered to it, the bank will not be able to legally convey the property to any other party. Agents should take caution to ensure that full disclosure has been made to all parties that the bank possesses "equitable title" and will be unable to pass clear title to the Buyer until the bank closes the first transaction.

Is an electronic signature valid and enforceable?

QUESTION: Broker is receiving contracts with e-signatures without supplementary attachments and/or documentation to prove the individual who signed electronically actually provided the signature. Broker is concerned that there is no documentation or e-signature service legally identifying the Buyer with the provided signature and disclosure form. To ensure brokerage had information to connect the action with the process, Broker requested Buyer resend the disclosure form in an email stating signatures were made on the attached disclosure and listing contract. Broker would like to know if this is an appropriate action to validate electronic signatures and if there are additional risks in accepting them.

RESPONSE: Idaho Code § 28-50-102(8) states:

> "Electronic signature" means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Further, Idaho Code § 28-50-107 states in relevant part:

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

Additionally, Idaho Code § 28-50-105(b) states:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

According to I.C. § 28-50-102(8), an electronic signature is a sound, symbol or process that a person uses to execute a contract. I.C. § 28-50-107 provides that a contract or record cannot be denied legal enforceability because it was signed electronically, and that electronic signatures satisfies Idaho law. Finally, I.C. § 28-50-105(b) states that an electronic signature is only effective if the parties agree to conduct the transaction electronically.

Given the information provided to the Hotline, Idaho law grants electronic signatures the same legal status as written signatures. However, the parties must agree to conduct a transaction by electronic means in order for an electronic signature to be acceptable. Therefore, electronic signatures on Idaho Association of REALTOR® ("IAR") forms, as well as on any other contracts or forms requiring signatures in Idaho, are valid as IAR Purchase and Sale Agreements contain an agreement that the transaction may be conducted electronically.

Furthermore, the Hotline is not aware of Idaho statute or case law requiring supplemental documentation be provided in order to validate electronic signatures. In this instance, it is likely not necessary for brokerage to request verification of electronically signing contracts and forms.

Does the death of a party invalidate a contract?

QUESTION: Broker's Agent represented the Buyer in a transaction that was set to close this week. Prior to closing, the Seller died inside the home. The Buyer no longer wishes to purchase the home due to the death being on the premises. The earnest money was released back to the Buyer. Broker questions if the death of the Seller voids the contract, which entitles Buyer to a refund of the Earnest Money.

RESPONSE: In general, when a party to a contract passes away or is incapacitated, the contract is then void. As the deceased party is unable to complete the obligations set forth in the contract, the transaction would likely be unable to close. Since the contract may be void, the Buyer may have the right to receive a refund of the deposited earnest money. Broker and Buyer may wish to consult with private legal counsel regarding their concerns in this matter.

Can an Agent present a second full-price offer made on a short sale house to the Bank?

QUESTION: Agent represented a seller who signed a RE-44 Short Sale Addendum agreeing not to continue to market or accept offers from other buyers. There has now been a second full-price offer made on the house and the Agent wants to know whether they are allowed to present the second offer to the Bank.

RESPONSE: RE-44 Short Sale Addendum Part 3 indicates whether the Seller may, or may not, continue to market or accept offers to purchase the property. This section also advises that some creditors require that the property continue to be marketed and offers be accepted to meet their obligation. This section goes on to say:

> ...the Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ___ (3 days, if left blank) to submit an offer under this Right of First Refusal.

While the Seller may have agreed not to market the property or accept offers, the creditor may require that they do. If the parties agreed that the Seller may not continue to market the property, then later offers may only be accepted if the lender is requiring Seller to market the property. Regardless of whether the Seller is permitted to continue to market the property, when a second offer is made, the Agent shall give the original buyer notice of the offer and allow them at least three (3) days to match or exceed the second offer. The notice of the new offer, and the opportunity for the first buyer to use their "Right of First Refusal" should expire prior to Seller accepting the second offer.

The Hotline does not resolve disputes between Buyers and Sellers and all parties may wish to consult private legal counsel regarding their rights and obligations.

DISCLOSURE

Does an agent need to disclose that a building does not meet current building code?

QUESTION: Agent lists a four (4) bedroom split level house built in the early to mid-1970s. At the time of construction, the two (2) bedrooms downstairs had windows which met building codes of that time and allowed for the home to be listed as a four (4) bedroom home. Presently, the windows downstairs do not meet current building code requirements for Egress windows. Agent would like to know what the liabilities are for Agent and/or brokerage to list the property as a four (4) bedroom home.

RESPONSE: The Seller Disclosure Act applies to buildings with four (4) or less residential units. However, Agent's duty to disclose applies to all adverse facts affecting the property. Therefore, Agent and/or brokerage is likely not liable as long as the facts surrounding

the windows are disclosed. Seller may also be required to disclose the facts regarding the windows.

If Seller inherits property, is Seller exempt from completing the RE-25 Seller's Property Condition Disclosure Form?

QUESTION: Seller is in the process of selling inherited property. Agent would like to know if Seller is exempt from completing the RE-25 Seller's Property Condition Disclosure Form. If so, is it appropriate for Seller to select the specified exemption box on the first page of the RE-25 and sign the bottom of the form.

RESPONSE: Idaho Code § 55-2505 states all exemptions to the Property Condition Disclosure Act. In particular, I.C. § 55-2505(14) states as follows:

> (14) A transfer from a transferor who both has not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise

Given the facts provided to the Hotline, the Seller has inherited property to which it has not been a resident of for one or more years prior to inheritance. Since Seller has both not occupied the property as personal resident for one or more years and acquired the property through inheritance, Seller is likely exempted from the Property Condition Disclosure Act. As Seller is likely exempted from the Act, there is no need to complete the entirety of the RE-25 Seller's Property Condition Disclosure Form. However, Seller should check the applicable exemption on the first page on the RE-25 and sign at the bottom of the page to certify that it is in fact exempt from the Property Disclosure Act.

Is it required to disclose to a potential buyer that death has occurred on the property?

QUESTION: Agent questions if it is required to disclose to a potential buyer that two people have died on the property.

RESPONSE: Idaho Code § 55-2801 defines "psychologically impacted" property. The section states in part:

> …'psychologically impacted' means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to . . . [t]hat the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon.

Idaho Code § 55-2802 states further:

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

Finally, Idaho Code § 55-2803 states that:

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

According to I.C. § 55-2802, no cause of action may be made against an owner who refuses to disclose whether or not a property is psychologically impacted. Therefore, this may mean that the Seller has no obligation to disclose any deaths on the property to any potential buyers. However, a buyer may request such information according to I.C. § 55-2803, but the seller may then refuse to disclose whether the property was psychologically impacted.

Given the information provided to the Hotline, Agent should discuss with seller whether they wishes to disclose the deaths to the general public and may only disclose that information if the seller consents. If any potential buyers specifically state in writing that "knowledge of whether the property may be psychologically impacted is an important factor in the purchaser's decision to purchase the property," Agent should again seek consent from seller before disclosing the deaths. If Seller refuses to disclose, Agent should notify the potential buyer that such information will not be disclosed.

Can local boards and MLSs require disclosure of property price?

QUESTION: Agent questions whether a local board and/or MLS may require that Agent discloses a sold price of a property.

RESPONSE: While the Hotline is not able to specialize in the rules of all local boards and MLS, the NAR MLS model does require the disclosure of sold prices if certain conditions are met. When signing an RE-16 Seller Representation Agreement, the Seller has the option to allow the property to be listed on the local MLS. Section 11 of the RE-16 states:

> MULTIPLE LISTING SERVICE AUTHORIZATION.
> (Name of MLS) _____

> _____By initialing this line, it is understood that Broker is a member of the above MLS. SELLER authorizes and directs Broker to offer to cooperate with and compensate other Brokers, and to submit a Property Data Sheet and any authorized changes to MLS as required in the Rules and Regulations of the above MLS. SELLER understands and agrees that any MLS information regarding the above property will be made available to Buyer's Agents and/or Dual Agents. SELLER acknowledges that pursuant to Idaho Code §54-2083(6)(d), a "sold" price of real property is not confidential client information.(Underline added.)

This section authorizes the Agent to list the property on the local MLS. It also states that the Seller agrees to cooperate with and compensate other brokers, and to authorize changes to MLS as required in the MLS rules and regulations. Most importantly, it notifies the Seller that a sold price of real property is not confidential information.

If a Seller agrees to the terms set forth in Section 11 of the RE-16 by initialing on the designated line, then the Seller has also agreed to follow the rules and regulations required by the named MLS. Further, the Seller acknowledges that the sold price of the property is not confidential. Therefore, the Agent may be obligated to disclose the sales price to the local MLS and local board regardless of whether the Seller later states that they do not want such information disclosed.

Is it required to disclose to a potential Buyer that property is suspected to be haunted?

QUESTION: Agent questions if it is required to disclose to potential buyers if a home is suspected of being haunted.

RESPONSE: Idaho Code § 55-2801 defines "psychologically impacted" property. The section states:

> …'psychologically impacted' means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to . . . [t]hat the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon.

Idaho Code § 55-2802 states further:

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

Finally, Idaho Code § 55-2803 states that:

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

Given the information provided to the Hotline, the Sellers suspect the property of being "haunted." Belief that a property is haunted is based on a person's suspicions and individuals ideas of the existence of ghosts or apparitions. Often, such a suspicion is founded on the belief that a person may have died on the property. Therefore, suspicion of a haunted home may fall under the description of a "psychologically impacted property."

According to I.C. § 55-2802, no cause of action may be made against an owner who refuses to disclose whether or not a property is psychologically impacted. Therefore, the Seller likely has no obligation to disclose that the property may be haunted to any potential buyers. A buyer may request such information according to I.C. §55-2803, but the Seller may then refuse to disclose whether the property was psychologically impacted.

Agent should discuss with Seller whether they wishes to disclose the possibility of the property being haunted to any potential buyers, and Agent may only disclose that information if the Seller consents. If any potential buyers specifically state in writing that knowledge of whether the property may be psychologically impacted is an important factor in the purchaser's decision to purchase the property, Agent should again seek consent from Seller before disclosing any information regarding the property being haunted. If Seller refuses to disclose, Agent should notify the potential buyer that such information will not be disclosed.

Does a Seller have an obligation to disclose unknown plumbing leaks?

QUESTION: Broker represents a Buyer who recently purchased property. After closing, an underground leak was discovered that had not been disclosed or noticed during the inspection. The Buyer's water bill was extremely high, which made the Buyer investigate the cause. The Buyer also found out that the water bills had been high for the Seller prior to closing, but the Seller did not disclose this fact. Agent questions which party is responsible for the costs of the repair.

RESPONSE: Idaho Code § 55-2507 discusses a Seller's responsibility to disclose information about a property to a potential Buyer and states in pertinent part:

> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) *That the statement is not a substitute for any inspections*.
> (5) That the transferor is familiar with the particular residential real property and *each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.* (Emphasis added).

According to I.C. § 55-2507(4), disclosure statements are not a substitute for a professional inspection. However, I.C. § 55-2507(5) states that all disclosures should be performed in good faith.

Given the information provided to the Hotline, if the Seller was aware of the leak, Seller may have breached its duty to disclose facts regarding the property in good faith to the Buyer. However, the Buyer had the property inspected in which the leak was not discovered, and Seller disclosures are not to be used as a substitute for inspection. Additionally, Seller only owes a duty to disclose information actually known by the Seller. If Seller truly was unaware of the leak, then Seller would have no duty to disclose.

The Hotline does not resolve disputes between Buyers and Sellers and all parties may wish to consult private legal counsel regarding their rights and obligations.

Is Agent required to disclose potential Buyers that a homicide occurred on the property?

QUESTION: Agent represents a Seller whose is aware of a homicide that occurred in the home. Agent questions whether he is required to disclose the homicide to potential buyers.

RESPONSE: Idaho Code § 55-2801, et seq. governs "psychologically impacted" property. That section states that:

> …'psychologically impacted' means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to . . . [t]hat the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon.

The act further states that:

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

Finally, the act states that:

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

Agent should discuss with Seller whether they wish to disclose the homicide to the general public and only disclose the information if the Seller consents. If any potential buyers specifically state in writing that "knowledge of whether the property may be psychologically impacted is an important factor in the purchaser's decision to purchase the property," Agent should again seek consent from Seller before disclosing the homicide. Idaho Code § 55-2803. If Seller refuses to disclose, Agent should notify the potential buyer that such information will not be disclosed. *Id.*

Is Seller exempt from completing the IAR RE-25 Seller's Property Condition Disclosure Form if the Seller has not lived in the home for one (1) year or more?

QUESTION: The Agent questions whether a seller is exempt from completing and producing to the buyer the IAR RE-25 Seller's Property Condition Disclosure Form if the Seller has not lived in the home for one (1) year or more.

RESPONSE: Idaho Code § 55-2505 exempts certain Sellers from completing a Seller's Property Condition Disclosure Form, such as newly constructed property that has not been previously inhabited. However there is no exemption for Sellers who have simply not lived in the property for one year or more. The exact exemptions referring to length of time the Seller may have lived in the home read as follows:

> (14) A transfer from a transferor who has both not occupied the property as a personal residence within one (1) year immediately prior to the transfer and has acquired the property through inheritance or devise.

Therefore, the fact that the Seller did not live in the home as their primary residence for one year prior to the sale, does not exempt Seller from completing a Seller's Property Condition Disclosure unless the property was also acquired by the Seller through inheritance or devise.

Is Seller required to disclose to a potential Buyer that human remains are buried on the property?

QUESTION: Agent is representing the Seller. The Seller disclosed to agent that her property contains the buried ashes of a deceased relative. Agent would like to know if said information should be disclosed to buyers and/or included on a property disclosure form.

RESPONSE: Idaho Code § 55-2506, which discusses the required disclosures under the Property Condition Disclosure Act, states in relevant part:

> The form must be designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred including, but not limited to, the source of water supply to the property; the nature of the sewer system serving the property; the condition of the structure of the property including the roof, foundation, walls and floors; the known presence of hazardous materials or substances.
> (Emphasis Added)

The Property Condition Disclosure Act requires sellers of residential property to disclose of material matters relating to the physical condition of the property. Having a relative's ashes buried somewhere on the property is not likely to be considered a matter affecting the physical condition of the property. Therefore, it is not likely necessary for seller to disclose the fact that a relative's ashes are located on the property.

Moreover, the fact that a relative's ashes are located on real property potentially places the property within the definition of psychologically impacted property. Idaho Code § 55-2801 states in relevant part:

> ..."[P]sychologically impacted" means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions…

Given the facts, the only impact that can be imagined from having a relative's ashes buried on the property would be the suspicion of ghosts or other unproven anomalies. Idaho Code provides that a seller is not required to disclose facts related to psychologically impacted property. Therefore, it is not likely that seller needs to disclose the fact that a relative's ashes are buried on the property.

Can a Buyer rely on the RE-21 financing contingency if Buyer does not disclose that the loan was contingent upon selling their first home?

QUESTION: Agent represents Seller. Buyer of real estate property acquired a loan that was contingent upon Buyer selling their first home. The Buyer's loan contingency was not disclosed to the Seller and Seller's agent. The transaction was not completed because lender

would not finance the transaction. Agent would like to know if Buyer can now rely on the financing contingency because Buyer did not make their loan contingency known.

RESPONSE: RE-21 Section C states:

> …In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER'S Earnest Money may be returned at BUYER'S request…

The loan contingency relates to the financing agreement between the Buyer and the financial lender. There is no requirement that the Buyer must disclose the terms of a financing agreement to the Seller or Seller's agent. Therefore, as long as Buyer exercised good faith efforts to sell their first home in order to obtain the loan, yet was unable to sell it, they are not likely to be held in breach of the purchase and sale agreement. If the Buyer is unable to obtain financing after using good faith efforts, Buyer may be permitted to withdraw from the transaction and receive refund of their earnest money.

Should Seller disclose that the property was once a "meth house"?

QUESTION: Agent represents a Seller that is selling a property previously deemed as a "meth house." The house has been certified clean after all remediation and cleanup efforts were completed as required by law. Agent now questions if the Seller must disclose that this house was previously used as a methamphetamine laboratory to any potential buyers.

RESPONSE: Idaho Code § 55-2801 states in relevant part:

> PSYCHOLOGICALLY IMPACTED DEFINED. As used in this chapter, "psychologically impacted" means the effect of certain circumstances surrounding real property which include, but are not limited to, the fact or suspicion that real property might be or is impacted as a result of facts or suspicions including, but not limited to the following:
> (1) That an occupant or prior occupant of the real property is or was at any time suspected of being infected or has been infected with a disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or
> (2) That the real property was at any time suspected of being the site of suicide, homicide or the commission of a felony which had no effect on the physical condition of the property or its environment or the structures located thereon… (Emphasis added.)

Also, Idaho Code § 6-2607 states:

> RESIDENTIAL PROPERTY OWNER IMMUNITY. Once a residential property meets the cleanup standards established by the department pursuant to rules adopted as provided in this chapter, the residential property owner and any representative or agent of the residential property

> owner shall be immune from civil actions involving health claims brought by any future owner, renter or other person who occupies the residential property, and by any neighbor of such residential property, where the alleged cause of injury or loss is based upon the use of the residential property for the purposes of a clandestine drug laboratory, provided however, that such immunity shall not apply to any person alleged to have produced the clandestine drugs. (Emphasis added.)

I.C. § 55-2801 states that an owner does not need to disclose if a property has been psychologically impacted if a felony committed on the property had no effect on the physical condition of the property. As there may have been physical damage to the property due to the clandestine methamphetamine laboratory, Seller may not be exempt from the Property Condition Disclosure Act.

According to I.C. § 6-2607, once a property has met the cleanup standards the owner is immune to any civil action brought against them by any future owners or tenants. Therefore, if the Seller chooses to disclose the property had once contained a meth lab to potential Buyers, and any civil action is attempted to be brought against the Seller, the Seller may be immune to such actions by statute.

Given the information provided to the Hotline, the property has been cleaned and has met all requirements set by law and is now considered to be in a safe condition. However, since the property was once physically impacted by the presence of the meth laboratory, it is likely not exempted from disclosure and the Seller may wish to disclose this information to potential Buyers.

Is an Agent required to disclose the sale amount of a property?

QUESTION: Agent questions if a person is required by law to disclose the sale amount of a property. Specifically, the Agent is curious if there is a way to keep a sale price confidential, as one of the Agent's clients wishes to keep the sold price information personal.

RESPONSE: Idaho Code § 54-2083(6)(d) states:

> The client would not be personally obligated to disclose to another party to the transaction. Information which is required to be disclosed by statute or rule or where the failure to disclose would constitute fraudulent misrepresentation is not confidential client information within the provisions of sections 54-2082 through 54-2097, Idaho Code. Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections. (Emphasis added.)

According to I.C. § 54-2083(6)(d), the sales price of a home is not confidential information. Further, information disseminated, or generally dispersed throughout the

marketplace, is also not considered confidential information. This could include sharing the sold price of a property to help determine other property values of similar nature or location.

However, Idaho is a "nondisclosure state," meaning that the sold price of real property is not considered public information. Therefore, the Buyer may not be forced to involuntarily disclose information to other individuals. However, the Hotline is unfamiliar with all local MLS rules, which may require participants to report "sold prices."

Given the information provided to the Hotline, disclosing the sold price of a property is allowed by statute, but it may not be mandatory. As it is provided by Idaho Code that such information *may* be shared, it does not state that disclosure of this information is required by an Agent or other parties privy to such knowledge. Only in an instance where sales price disclosure is mandatory by the MLS Rules would an agent be required to disclose.

Which party is responsible for mold damage if it is discovered after inspection and closing?

QUESTION: Agent represented a Seller who recently sold their property, which was inspected by the buyer's inspector and was found to be satisfactory. After closing, the buyer claimed to notice an odor, and upon further investigation discovered mold. Agent questions which party is responsible for the costs of the repair.

RESPONSE: Idaho Code § 55-2507 discusses a Seller's responsibility to disclose information about a property to a potential Buyer and states in pertinent part:

> (3) That the statement is not a warranty of any kind by the transferor or by any agent or subsequent agent representing the transferor in this transaction.
> (4) *That the statement is not a substitute for any inspections*.
> (5) That the transferor is familiar with the particular residential real property and *each act that may be performed in making a disclosure of an item of information shall be made and performed in good faith.* (Emphasis added.)

According to I.C. §55-2507(4), disclosure statements are not a substitute for a professional inspection. However, I.C. § 55-2507(5) states that all disclosures should be performed in good faith.

Given the information provided to the Hotline, if the Seller was aware of the mold, Seller may have breached its duty to disclose facts regarding the property in good faith to the Buyer. However, the Buyer had the property inspected in which the mold was not discovered, and Seller disclosures are not to be used as a substitute for inspection. Additionally, Seller only owes a duty to disclose information actually known by the Seller. If Seller truly was unaware of the mold, then Seller would have no duty to disclose.

The Hotline does not resolve disputes between Buyers and Sellers and all parties may wish to consult private legal counsel regarding their rights and obligations.

Is Agent entitled to commissions if Buyer purchases a property after the representation agreement has expired?

QUESTION: Agent and Buyer signed an RE-14 Buyer Representation Agreement. During the time allotted in the contract, Buyer submitted an offer on a property, but the transaction failed to close. Since that time, the Buyer's Representation Agreement expired. Now, the Buyer and the Seller from the failed transaction have begun negotiations again regarding the same property. Agent questions if he is entitled to commissions if this transaction is completed.

RESPONSE: Section 13 of the RE-14 Buyer Representation Agreement states in relevant part:

> This compensation shall apply to transactions made for which BUYER enters into a contract during the original term of this Agreement or during any extension of such original or extended term, and shall also apply to transactions for which BUYER enters into a contract within ___ calendar days (ninety [90] if left blank) after this Agreement expires or is terminated, if the property acquired by the BUYER was submitted in writing to the BUYER by Broker pursuant to Section One hereof during the original term of extension of the term of this Agreement. Unless otherwise indicated herein the Broker's fee shall be paid in cash at closing.

The RE-14 Buyer Representation Agreement, Section 13, provides a window of time after the contract expires in which a Buyer still owes compensation to the Brokerage if Buyer enters into a contract for a property that Agent prepared an offer prior to the expiration of the RE-14. This length of time may be set by the parties, but is set at ninety (90) days if parties do not specify otherwise.

Given the information provided to the Hotline, Agent may still be able to collect commissions if the Buyer executes a purchase agreement for the same property Agent prepared an offer for within the specific time allotted on the RE-14 Buyer Representation Agreement, but it is important to note that the right to collect commissions would be against the Buyer only.

DUTIES TO CLIENTS AND CUSTOMERS

Does Agent still have a duty to keep client's information confidential after representation has been terminated?

QUESTION: A party is requesting that the Agent provide them with a previous client's home address. Agent questions if this qualifies as "confidential information" and if she still has a duty to keep such information confidential after representation has ended.

RESPONSE: Idaho Code § 54-2087(6) outlines the duties a licensed real estate agent has to their client, and states in particular, "to maintain the confidentiality of specific client

information as defined by and to the extent required in this chapter…" Further, Idaho Code §54-2092(2) states that after the termination of the representation, an agent is still responsible for "maintaining the confidentiality of all information defined as confidential client information by this act."

Idaho Code § 54-2083(6) defines confidential client information:

> (6) "Confidential client information" means information gained from or about a client that:
> (a) Is not a matter of public record;
> (b) The client has not disclosed or authorized to be disclosed to third parties;
> (c) If disclosed, would be detrimental to the client…

According to I.C. § 54-2087(6) and I.C. § 54-2092(2), an agent has certain duties to protect a client's confidential information. This duty is to be performed throughout the duration of the representation agreement, and after termination of the representation if such information remains confidential. I.C. § 54-2083(6) defines confidential client information to include information not of public record, information the client has not disclosed or authorized to be disclosed to third parties, any information that could be detrimental to the client, and any information the client would not be obligated to disclose to another party to the transaction.

Given the information provided to the Hotline, Agent may still have a duty to keep information confidential, even after representation has expired or been terminated. As a home address may not be public information, and said information is presumed to be requested for reasons that may be detrimental to the client, Agent may have an obligation to her previous client to keep said information confidential.

Does Agent have duties to protect a Buyer even though Agent is currently representing Seller?

QUESTION: Agent represented a Seller in a recently closed real estate transaction. At time of closing, the Buyer was to pay an additional $20,000 to a company for the placement of a tenant. However, the title company made a mistake and released the $20,000 to the Seller. Upon discovering the mistake, the title company had the Agent request that the Seller return the $20,000 that was not intended to be released to the Seller, as it was contractually stated that the title company was to release it to the third-party company. Agent now questions if he had any right to request the money back from Seller, as the Agent was representing Seller at the time.

RESPONSE: Idaho Code § 54-2094 states:

> Representation not fiduciary in nature. While this act is intended to abrogate the common law of agency as it applies to regulated real estate transactions, nothing in this act shall prohibit a brokerage from entering into a written agreement with a buyer or seller which creates an agency relationship in which the duties and obligations

> are greater than those provided in this act. However, unless greater duties are specifically agreed to in writing between the brokerage and a represented client, the duties and obligations owed to a represented client in a regulated real estate transaction are not fiduciary in nature and are not subject to equitable remedies for breach of fiduciary duty.

According to I.C. § 54-2094, an agency relationship that is created between an agent and client is not fiduciary in nature. This allows a licensed real estate agent to represent the interests of multiple parties in a real estate transaction, as they are not contractually obligated to be specifically and wholly responsible for the interest of one party.

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

> Duties to a customer. (1) If a buyer, prospective buyer, or seller is not represented by a brokerage in a regulated real estate transaction, that buyer or seller remains a customer, and as such, the brokerage and its licensees are nonagents and owe the following legal duties and obligations:
> (a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real estate;
> (b) To perform these acts with honesty, good faith, reasonable skill and care;
> (c) To properly account for moneys or property placed in the care and responsibility of the brokerage;
> (d) To disclose to the buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee…

According to I.C. § 54-2086, if the Buyer was not represented by Agent's brokerage or agent, that Buyer remains a customer and the brokerage and Agent still have a duty to the customer. This may mean that Agent had a duty to assist in the recovery of the $20,000 that was mistakenly released to the Seller, as the Buyer would be considered a customer. When performing these duties, a licensee must do so with honesty, good faith, and reasonable skill and care.

Additionally, the Idaho Supreme Court considered the application of the aforementioned statute in *Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 22 P.3d 105 (2001). In *Nordling*, the agent representing the seller failed to disclose the fact that the listed property was subject to a rule, which involved invalid discrimination under the Federal FHA. Although the buyer was represented by another brokerage, the Court held that all prospective buyers/sellers are either clients or customers. Additionally, it did not matter that the rule was invalid, but rather the agent should have been concerned with the rule's existence. Therefore, the Court ruled that the agent owed a duty to disclose the adverse fact to all prospective buyers, as they were customers of agent regardless of the fact that the buyers were represented by another agent.

The Idaho Supreme Court ruling in *Nordling* provides that an agent has a duty to any prospective buyer or seller regardless of whether they are represented by another brokerage. As such, it is likely that the Agent had a duty to the Buyer to request the return of the improperly distributed funds.

It is important to note that the Legal Hotline does not resolve legal disputes between agents and clients/customers, and all parties to this transaction may wish to consult private legal counsel regarding their rights and obligations in these matters.

EARNEST MONEY

When is a Buyer considered to be in default and the Seller is entitled to earnest money?

QUESTION: Agent represents the Seller in a real estate transaction in which the Buyer decided to cancel the contract prior to closing. The parties had been in a waiting game for quite some time, as Agent was waiting for lender financing approval. The contract expired, and Buyer informed Agent that they do not intend to move forward. Agent was then informed that the Buyer asked their lender to put the approval "on hold" as Buyer was not certain that they wanted to follow through with the transaction. Agent questions if the Buyer is in default and therefore if the Seller is entitled to the earnest money.

RESPONSE: The RE-21 Purchase and Sale Agreement specifies in section 3(C) dealing with financial terms: "In the event BUYER is unable, after exercising good faith efforts, to obtain the indicated financing, BUYER's Earnest Money may be returned at BUYER'S request."

Given the information provided to the Hotline, as the Buyer may have requested that financing be put on hold because the Buyer did not intend to complete the transaction, the Buyer may have not exercised good faith in attempting to obtain the required financing. Therefore, the Buyer may be found to be in default of the contract.

The Hotline does not resolve legal disputes between Buyers and Sellers. All parties to the transaction may wish to consult private legal counsel regarding their rights and obligations in these matters.

How does a Broker resolve a dispute when both parties are claiming a right to the earnest money?

QUESTION: Broker questions what to do when both parties are claiming a right to the earnest money. Buyer was not qualified for the loan, and therefore the transaction was unable to move forward. Buyer is requesting the earnest money due to the failure to obtain financing, which it has been asserted that Buyer used good faith efforts in obtaining. Seller is demanding the earnest money to cover some of the costs and damages they have incurred due to the transaction failure.

RESPONSE: Idaho Code § 54-2047(2) states:

> The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

According to I.C. § 54-2047(2), the Broker may rely on the terms of the contract to make earnest money disbursements. However, as more than one party has made a demand for the earnest money and this may lead to an "earnest money dispute," Idaho Code § 54-2047(1) states:

> Disputed earnest money. (1) Any time more than one (1) party to a transaction makes demand on funds or other consideration for which the broker is responsible, such as, but not limited to, earnest money deposits, the broker shall:
> (a) Notify each party, in writing, of the demand of the other party; and
> (b) Keep all parties to the transaction informed of any actions by the broker regarding the disputed funds or other consideration, including retention of the funds by the broker until the dispute is properly resolved.

Further, I.C. § 54-2047(3) states:

> (3) If the broker does not believe it is reasonably possible to disburse the disputed funds, the broker may hold the funds until ordered by a court of proper jurisdiction to make a disbursement. The broker shall give all parties written notice of any decision to hold the funds pending a court order for disbursement.

According to I.C. § 54-2047(1), when more than one party is making a demand for the earnest money, the Broker must notify the parties in writing, and keep all parties informed of any action made. Further, I.C. § 54-2047(3) provides that if Broker does not believe it is possible to disburse the funds, the funds may be held by Broker until a court orders the disbursement.

Given the information provided to the Hotline, the Broker has the authority to disburse the earnest money to a party to the contract relying on the terms of the purchase and sale agreement. However, as both parties have made a demand for the earnest money, the Broker has a responsibility to notify the parties, in writing, of any actions taken. Further, if the Broker does not believe it possible to disburse the funds on his own accord, the funds may be held until a court orders them to be released to one of the parties.

The Hotline does not resolve dispute between buyers and sellers and all parties to the transaction may wish to consult private legal counsel regarding their rights and obligations in this matter.

Can Broker refund the earnest money back to the Buyer due to failure to obtain financing?

QUESTION: Broker questions if she may refund the earnest money back to the Buyer, due to failure to obtain financing, without the consent of the Seller. Broker has obtained documents that prove financing failed, and Broker believes that Buyer used a good faith effort to obtain financing.

RESPONSE: Idaho Code § 54-2047(2) states:

> The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

According to I.C. § 54-2047(2), the Broker may rely on the terms of the contract to make earnest money disbursements. Given the information provided to the Hotline, the Buyer was unable to obtain financing. Broker stated that the contract allows for Buyer to be refunded its earnest money in such an instance. Therefore, the Broker may be able to refund the earnest money to the Buyer at Broker's own discretion.

What is the correct procedure to collect and deposit earnest money?

QUESTION: Agent is in a dispute with another brokerage regarding the timing for collection of earnest money on a lot being platted and developed. Agent believes earnest money cannot be legally collected until the plat is approved and recorded. Seller's brokerage believes earnest money can be collected and deposited at any time as long as both parties have signed the purchase and sale agreement. Agent would like to know the correct procedure to collect and deposit earnest money.

RESPONSE: Stated in relevant part on the RE-24 Vacant Land Purchase and Sale Agreement in Section 3(A) page 1:

> $_____ EARNEST MONEY: BUYER hereby deposits _____ DOLLARS as Earnest Money evidenced by: □cash □personal check □cashier's check □note (due date): _____ and a receipt is hereby acknowledged. Earnest Money to be deposited in trust account □upon receipt or □upon acceptance by BUYER and SELLER or □other_____ and shall be help by: □Listing Broker □Selling Broker □other _____ for the benefit of the parties hereto.

Given the facts provided to the Hotline, Agent represents a Buyer purchasing a parcel of land that has yet to be formally platted. Because the land has not yet been platted, Agent believes that Buyer is not required to deposit earnest money until a final plat has been recorded.

The Hotline is unaware of any Idaho statute or case law requiring that an earnest money deposit should only be deposited after a final plat has been recorded. The RE-24 Vacant Land Purchase and Sale Agreement, as quoted above, specifies between the parties' intent as to when the earnest money shall be deposited. Therefore, Buyer's earnest money should likely be deposited based on the time frame stated in the Purchase and Sale Agreement.

The Hotline does not resolve disputes between brokerages and/or Buyers and Sellers. The parties may wish to seek private legal counsel concerning their rights and obligations under the Purchase and Sale Agreement.

Can Broker agree to release the earnest money without Buyer's consent?

QUESTION: Broker represents the Buyer in an all cash property transaction. The transaction went to closing and the parties were waiting for the transaction to be funded through a wire transfer. The money never arrived, even after time extensions were allowed. The Seller's Agent now has requested that the Broker sign a release form with the title company that allows the Seller to recover the earnest money. The Buyer has not signed any releases, but is no longer contacting the Broker. Broker now questions if it is appropriate to release the earnest money knowing that the Seller's Broker is likely to then release the money to the Seller.

RESPONSE: Idaho Code § 54-2047(2) states:

> The broker may reasonably rely on the terms of the purchase and sale agreement or other written documents signed by both parties to determine how to disburse the disputed money and may, at the broker's own discretion, make such disbursement. Discretionary disbursement by the broker based on a reasonable review of the known facts is not a violation of license law, but may subject the broker to civil liability.

I.C. § 54-2047(2) establishes that Broker may rely on the terms of the purchase and sale agreement and use reasonable review of known facts to disburse the earnest money.

Given the information provided to the Hotline, Buyer is now likely in default of the contract, as Buyer failed to fund the transaction on the closing deadline. Therefore, Broker may sign a release form with the title company allowing recovery of the earnest money by Seller.

FORMS

If a Seller is not exempt from completing the RE-25 Seller's Property Condition Disclosure Form should Seller sign the first page of the form?

QUESTION: Agent would like to know if a Seller is NOT exempt from completing the RE-25 Seller's Property Condition Disclosure form, whether they should sign the first page of the form.

RESPONSE: The RE-25 states at the bottom of page one, before the signature lines as follows:

> If the referenced property herein is exempt from the Seller Property Condition Disclosure Act, Idaho Code section 55-2501 et seq., for any of the aforementioned reasons, Seller is not obligated to complete the remainder of this disclosure form in any manner. Seller certifies that he/she is exempt from the Seller's disclosure by checking the applicable box above and signing this form on the line(s) below. (Emphasis added)

The signature lines on page one of the RE-25 are for those who are certifying they are exempt from the Seller Property Disclosure Act for any of the reasons enumerated on page one of the form. The first page should only be signed by those who are claiming to be exempt. Sellers who are not exempt should not sign the first page, but complete and initial each following page, then sign the last page to indicate the statements preceding are true.

Should the RE-21 be dated and initialed?

QUESTION: Agent questions if paragraph 41 on the RE-21 Purchase and Sale Agreement should be dated, as well as initialed, to ensure that it was executed within the allotted timeline.

RESPONSE: Paragraph 41 of the RE-21 states:

> 41. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) □A.M. □P.M. If acceptance of this offer is received after the time specified, it shall not be binding on the BUYER unless BUYER approves of said acceptance within _____ calendar days (three [3] if left blank) by BUYER initialing HERE _____. If BUYER timely approves of SELLER's late acceptance, an initialed copy of this Agreement shall be immediately delivered to SELLER. (Emphasis added.)

Given the information provided to the Hotline, a Buyer is able to proceed with an accepted offer subsequent to the allotted time for acceptance if they so choose. When negotiating the contract, the parties may agree on a specific amount of time allowing the Buyer to approve of a late acceptance, or the time will be 3 calendar days if left blank. If the Buyer decides to move forward within the allotted time, the initialed copy must *immediately* be sent to the Seller. Immediately delivering the agreement may mean that an initialed copy is faxed, emailed or hand delivered directly following the Buyer's approval of the late acceptance to ensure that the delivery is within the given amount of time.

The immediate delivery of the agreement may resolve the need to have a Buyer date their initials. However, the Hotline is unaware of any reason why a Buyer could not date the initial, if they so choose. It is important to remember that the executed and initialed agreement still must be delivered immediately, regardless of any dated initials.

What happened to the RE-47 and RE-48 MARS Disclosure forms?

QUESTION: Broker questions why the 2012 Idaho Association of REALTORS® forms no longer contain the RE-47 and RE-48 MARS Disclosure forms.

RESPONSE: On July 15, 2011 the Federal Trade Commission (FTC) officially announced that it will not be enforcing most provisions of its Mortgage Assistance Relief Services (MARS) Rule against real estate brokers and their agents who assist financially distressed consumers in obtaining short sales from their lenders.

As a result of this decision by the FTC, REALTORS® will no longer be required to make the several disclosures required by the MARS Rule while assisting sellers in short sale transactions. Therefore, the RE-47 and RE-48 MARS Disclosures forms will no longer be required to be used in short sale transactions and as a result, the IAR Forms Committee decided to no longer publish these forms.

For further information regarding FTC's ruling on non-enforcement of the MARS Rule against REALTORS®, please visit the website: www.ftc.gov/opa/2011/07/mars.shtm.

Does Seller have to sign the first page of the RE-25 Seller's Property Condition Disclosure Form if they are *not* exempt from disclosure?

QUESTION: Agent questions if a Seller must sign the first page of the RE-25 Seller's Property Condition Disclosure Form if they are *not* exempt from disclosure.

RESPONSE: The signature section of the RE-25 Seller's Property Condition Disclosure Form states:

> If the referenced property herein is exempt from the Seller Property Condition Disclosure Act, Idaho Code section 55-2501 et seq., for any of the aforementioned reasons, Seller is not obligated to complete the remainder of this disclosure form in any manner.

> *Seller certifies that he/she is exempt from the Seller's disclosure by checking the applicable box above and signing this form on the line(s) below*. (Emphasis added.)

If a Seller is exempt from filling out a property condition disclosure form, then the Seller should check the applicable exemption on the first page of the RE-25 and sign to certify Seller's exemption. As the RE-25 states that a Seller is certifying their exemption by checking applicable boxes and then signing below, a Seller that is *not* exempt should not check any boxes or sign the first page. Therefore, a Seller that is not exempt from disclosures may skip the first page and should complete the rest of the pages of the RE-25.

What does AVM mean on the RE-16 Seller Representation Agreement?

QUESTION: Agent questions the contents of the RE-16 Seller Representation Agreement, Paragraph 13. This section authorizes the use of an Automated Valuation Model ("AVM"). Agent is unsure what an AVM is and what purpose it fulfills.

RESPONSE: It is the Hotline's understanding that an AVM is an automated valuation technology analysis, which utilizes public record data and computer decision logic to provide a calculated estimate of a probable selling price for a residential property. In other words, an AVM is a computer generated program that assists in obtaining the price a Seller may obtain for selling their home.

Paragraph 13 of the RE-16 gives Sellers the option to have an AVM used in the marketing of their home. Because AVMs do not take into account the property condition, some homeowners may choose to not use an AVM. Also, newly constructed homes are particularly difficult to value due to the lack of comparable properties and historic data. On the other hand, advantages of using AVMs over traditional valuation techniques are that they save time, money and resources. In either event, one of the purposes of paragraph 13 of the RE-16 is to give the seller the option to authorize or prohibit the use of AVMs in the marketing efforts of the brokerage regarding the Seller's property.

How does the RE-44 Short Sale Addendum affect submitting offers to any third-party lenders?

QUESTION: Agent questions how the new language in Section 3 of the RE-44 Short Sale Addendum may affect submitting offers to any third-party lenders.

RESPONSE: Section 3 of the RE-44 Short Sale Addendum states:

> OFFERS FROM OTHER BUYERS. Seller □ may; □ may not (may, if box is left unchecked) continue to market the property and accept offers from other buyers to purchase the Property to submit to Seller's creditor(s). The parties are advised that some creditors may require that Seller continue to market the property and accept multiple offers in order to satisfy Seller's obligations to its

> creditor(s). If the parties agree that Seller may accept offers from other buyers, or if the creditor requires that Seller must continue to market the property, then the Buyer retains the Right of First Refusal to submit an offer that matches or exceeds any offer submitted after Seller's acceptance of Buyer's original offer. In such an event, Seller shall give Buyer notice of any subsequent offer immediately, and the Buyer shall have ____ days (3 days, if left blank) to submit an offer under this Right of First Refusal. (Emphasis added.)

Black's Law Dictionary defines a "right of first refusal" as a potential buyer's contractual right to meet the terms of a third party's higher offer.

As short sale transactions are generally contingent on third-party creditor approval, Buyer's right of first refusal could be used in multiple differing occasions during a short sale transaction. The first two scenarios occur after Buyer One's offer has been submitted to the lender. 1) The Buyer may wait until after the lender has rejected the submitted offer to present a subsequent offer that "meets or exceeds" Buyer Two's offer, or 2) Buyer One may immediately terminate their submitted offer and present a new offer that "meets or exceeds" Buyer Two's offer.

The third scenario occurs when multiple offers have been accepted by Seller prior to submission to the third party creditor. In such an instance, Buyer 1's right of first refusal must be exercised immediately and prior to submitting the offer to the third party creditor.

In any scenario presented, the subsequent offer should be presented to the first Buyer within the contractual timeframe so that they may determine if they wish to exercise their right of first refusal.

Why do Agents need to fill out the agency representation section of the RE-21?

QUESTION: Agent questions what each box is used for in section 34 of the RE-21 Purchase and Sale Agreement.

RESPONSE: The portion for the BUYER in Section 34 of the RE-21 states:

> 34. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).
> Section 1:
> □ A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).
> □ B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.

☐ C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
☐ D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).

Agent may wish to check Box A if the Agent's brokerage is representing the Buyer only. In this case, this is notifying the parties that the brokerage is only representing the interests of the Buyer, and the Seller is likely to be represented by another brokerage.

Box B is to be used if the brokerage is working with the Buyer and Seller in a limited dual agent capacity, but without assigning agents to each party. This box should be used to signify to the parties that one agent is representing both parties and their interests. As a result, the same agent is representing both Buyer and Seller.

Box C may be checked if the brokerage is working with both Buyer and Seller in a limited dual agency and a separate agent has been expressly assigned to the Buyer and the Seller. Therefore, the Buyer would be represented by one agent in the brokerage, and the Seller would be represented by another agent within the same brokerage. There needs to be an express "assignment" of agents for this category to apply.

Marking Box D indicates that the brokerage is working with a Buyer as a "nonagent." This would mean that the Buyer did not sign an exclusive representation agreement with the brokerage and is therefore is working with a Buyer who is a customer, and no agent is exclusively representing the Buyer's interests.

The check boxes are included in the RE-21 Purchase and Sale Agreement as a clear way to disclose agency relationships to all parties to the transaction.

Can a representation agreement be limited by specifying the type of property to be shown to Buyer?

QUESTION: Agent and Buyer signed an RE-14 Buyer Representation Agreement, which specified "Vacant Land" as the type of property. The Buyer went on in email and verbal correspondence with Agent to request that the search be expanded to commercial buildings. However, the Buyer is now claiming they do not owe the Agent the commission, because the Buyer's Representation Agreement only covered Vacant Land and not Commercial property. The Agent wants to know whether the Buyer's Representation Agreement is indeed limited by specifying only certain types of property.

RESPONSE: Section 13 of the RE-14 Buyer Representation Agreement states in relevant part:

A. If a property is subject to a listing agreement with the Broker's Company or a cooperating Broker through the Multiple Listing Service (MLS) or otherwise, the fee will be the amount equal to

> the compensation offered by the aforementioned Brokers but not less than ___% of the selling price.

Given the information provided to the Hotline, Agent may still be able to collect commission if the Buyer executes a purchase agreement for a property that is subject to a listing agreement through the MLS. Agent's claim for commissions would not be against the Buyer, but rather against the listing brokerage. This assumes that agent was the "procuring cause" of Buyer being introduced to the property listed on the MLS.

Regarding the enforceability of a RE-14 agreement for types of property not specifically marked, it would depend on whether the type of property is considered a material term of the agreement. To the Hotline's knowledge, this issue has not been adjudicated, and it is unknown how a court would rule on this issue.

Agent may wish to consult private legal counsel, as the Hotline does not resolve disputes between Agents and clients.

Can a RE-21 Purchase and Sale Agreement be cancelled due to delay in response from Buyer?

QUESTION: Agent represents the Seller who entered into a Purchase and Sale agreement with Buyer, and has completed the inspection process. The inspection was satisfactory, but the Buyer was to retrieve quotes for work they wanted to have done before the closing. It has been two weeks since the inspection and the Seller still has not received any quotes from Buyer. In the meantime, the Seller has received another offer. Agent wants to know if the Purchase and Sale can be cancelled, because of the delay in response from Buyer regarding quotes for work requested.

RESPONSE: The RE-21 Purchase and Sale Agreement states in section 10A lines 136-145:

> BUYER chooses □to have an inspection □not to have an inspection. If BUYER chooses not to have an inspection, skip 10C. BUYER shall have the right to conduct inspections, investigations, tests, surveys and other studies at BUYER'S expense. *BUYER shall, within ____ business days (ten [10] if left blank) of acceptance, complete these inspections and give to SELLER written notice of disapproved items or written notice of termination of this Agreement based on unsatisfactory inspection.* BUYER is strongly advised to exercise these rights and to make BUYER'S own selection of professionals with appropriate qualifications to conduct inspections of the entire PROPERTY.

Also, The RE-21, Section 10C, states in relevant part:

3) If BUYER does within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall provide to SELLER pertinent section(s) of written inspection reports. SELLER shall have ___ business days (three [3] if left blank) in which to respond in writing. SELLER, at SELLER's option, may correct the items as specified by BUYERS in their letter or may elect not to do so. If both parties agree, in writing, as to the items to be corrected by SELLER within ___ business days (five [5] if left blank) of receipt of SELLER's response, then both parties agree that they will continue with transaction and proceed to closing. This will remove BUYER'S inspection contingency.

4) If both parties do not come to a consensus as to the disapproved items to be corrected by SELLER within the strict time period specified, or SELLER does not respond in writing within the strict time period specified, then the BUYER has the option of either continuing the transaction without the SELLER being responsible for correcting these deficiencies or giving the SELLER written notice within ____ business days (three [3] if left blank) that they will not continue with the transaction and will receive their Earnest Money back.

The RE-21 Purchase and Sale Agreement gives specific guidelines as to the required actions by both parties. The Buyer has elected to have a home inspection as suggested in the RE-21. In this instance it appears as if Buyer did submit a list of disapproved items and the Seller agreed to give the Buyer a discount at closing based on quotes the Buyer was to produce. However, the Buyer has not produced any quotes for discount and closing is about a month away.

Given the information provided to the Hotline, it appears that the inspection contingency period has passed. It is not likely that the delay in producing the quotes would allow Seller to cancel the contract and accept the second offer. If Seller were to do so, he may be found to be in breach of the contract. However, it might be possible for Seller to accept the second offer as a backup offer.

As the Hotline does not resolve legal disputes between Buyers and Sellers, all parties may consider consulting private legal counsel in these matters.

What is the RE-41 Agency Disclosure form used for?

QUESTION: Agent is representing a Buyer in a real estate transaction. The brokerage representing the Seller is requesting a RE-41 Agency Disclosure form, because the Buyer is using a HUD Purchase Contract. The Agent has established and signed a Buyer Representation Agreement. Agent would like to know the precise requirements for a RE-41 and if signing this contract is necessary.

RESPONSE: Idaho Code § 54-2051(4) outlines specific requirements for a valid offer to purchase, which are stated as follows:

> (4) The broker or sales associate shall make certain that all offers to purchase real property or any interest therein are in writing and contain all of the following specific terms, provisions and statements:
> (a) All terms and conditions of the real estate transaction as directed by the buyer or seller;
> (b) The actual form and amount of the consideration received as earnest money;
> (c) The name of the responsible broker in the transaction, as defined in section 54-2048, Idaho Code;
> (d) The "representation confirmation" statement required in section 54-2085(4), Idaho Code, and, only if applicable to the transaction, the "consent to limited dual representation" as required in section 54-2088, Idaho Code;
> (e) A provision for division of earnest money retained by any person as forfeited payment should the transaction not close;
> (f) All appropriate signatures; and
> (g) A legal description of the property.
> (5) All changes made to any offer to purchase or other real estate purchase agreement shall be initialed and dated by the parties to the transaction.

Since a HUD Purchase Contract is being utilized instead of a RE-21 Purchase and Sale Agreement, which contains all the aforementioned requirements, there is a need to utilize and sign a RE-41 to supplement the terms of the HUD Agreement. As a HUD Purchase Contract does not likely have all the statutory requirements for a valid offer under Idaho Law, it is necessary to use a RE-41 to supplement the terms of the HUD Contract to make it a valid offer.

Does a RE-51 Rental Agreement form affect Agent's commissions?

QUESTION: Buyer had its closing date postponed for a few months. However Buyer and Seller agreed Buyer could move into the home and pay monthly installments toward the purchase price. Agent would like to understand the application of the RE-51 Rental Agreement clause concerning the release of real estate brokerages. Agent would like to know if Buyer signs the form is she no longer entitled to sales commissions under the Purchase and Sale Agreement.

RESPONSE: Section 9 of the RE-51 Rental Agreement states:

> Landlord and Tenant release all real estate brokerages, their licenses and employees, and agree to indemnify all brokers, their licenses and employees from any and all claims arising as a result of this Agreement or the Tenants possession of the Premises.

The above quoted language refers to the Rental Agreement only. The Rental Agreement is not tied to the Purchase and Sale Agreement, and therefore a signature on a RE-51 would not prohibit Agent from collecting commissions under the Purchase and Sale Agreement. The Rental Agreement and Purchase and Sale Agreement are two separate contracts. It should be noted that the RE-51 Rental Agreement does not require the existence of a Purchase and Sale Agreement in order to be valid.

How does Agent properly use the language "as is" in an addendum?

QUESTION: Agent would like to know when creating an addendum if the phrase "*as is*" for example, *the property is being sold as is,* needs to be clarified in detail or if this phrase is an umbrella term.

RESPONSE: *"As is"* is most often recognized as an umbrella term. However, the Hotline would advise agent to include further specifications. It is recommended subsequent to the phrase to use language from the Inspection Form, specifically containing the Buyer Inspection Disapproved Items. Therefore, it is clear to all parties what is meant and included under the term *"as is."*

How does Seller complete a RE-25 Seller's Property Condition Disclosure Form when Agent represents a bankruptcy trustee?

QUESTION: Agent is representing a bankruptcy trustee who is selling a home from the bankruptcy estate. The trustee has no knowledge of the property. For this reason, agent would like to know how to complete the RE-25 Seller's Property Condition Disclosure Form.

RESPONSE: Given the information provided to the Hotline, a trustee is selling the real property from the bankruptcy estate. According to Idaho Code § 55-2505(1), a transfer by a trustee in bankruptcy is a stated exemption from the Property Condition Disclosure Act. Therefore, the trustee need only check the applicable exemption on the first page of the RE-25 Seller's Property Condition Disclosure Form and sign the bottom of the first page to complete the form. As the trustee appears to be exempt from the Property Condition Disclosure Act, the trustee need not fill out the remaining portion of the RE-25.

Can a buyer terminate a transaction without having an inspection?

QUESTION: Agent represents the Seller. Buyer indicates to Seller that Buyer is considering terminating the contract to purchase vacant property. Agent would like to know Buyer's rights in regard to utilizing the Inspection Contingency in order to deem property unsatisfactory and terminate said transaction.

RESPONSE: As stated in relevant part in the RE-24:

> If BUYER does within the strict time period specified give to SELLER written notice of termination of this Agreement based on an unsatisfactory inspection, the parties will have no obligation to

> continue with the transaction and the Earnest Money shall be returned to BUYER.

Given the above referenced language, Buyer cannot simply terminate the contract. Buyer must cite an unsatisfactory term in an inspection with substantial reasoning as to why they deem it unsatisfactory inspection.

What is the application and meaning of checking the "seller" box for "Fuel in Tank" in Section 17, page 4 of the RE-21?

QUESTION: Agent represents the Buyer. Agent is in dispute with selling party over the interpretation of the RE-21. The agent would like to understand the application and meaning of checking the "seller" box for "Fuel in Tank" in Section 17, page 4.

RESPONSE: It is the intent of the "Fuel in Box" checkbox to indicate the party responsible for the cost of any fuel remaining in a fuel tank on the seller's property. If the seller box is checked, seller would be responsible for the cost of said fuel. As it is likely that seller previously paid for the fuel, seller would not likely be entitled to a reimbursement for the cost of the remaining fuel.

The Hotline does not resolve disputes between Buyers and Sellers. The parties may wish to consult private legal counsel to determine their rights and responsibilities under the purchase and sale agreement.

If a counter offer states that the property will be sold "as-is," does this remove the inspection contingency?

QUESTION: Agent represents a Buyer who submitted an offer to purchase a short-sale property. Seller has put a term in the RE-32 Multiple Counter Offer that the property is to be sold "as-is." Agent questions whether the counter offer, if signed by the Buyer, will remove the inspection contingency contained in the RE-21 Purchase and Sale Agreement, and prevent the Buyer from getting his earnest money back if he decides to terminate the contract based on the results of the home inspection.

RESPONSE: The RE-32 Multiple Counter Offer states in pertinent part:

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

Given the information provided to the Hotline, the language contained in the Seller's counter offer does not specifically remove the inspection contingency in the RE-21 Purchase and Sale Agreement. Rather, the "as-is" language serves to put the Buyer on notice that the Seller is

not willing to make any corrections to the deficiencies Buyer may find during the home inspection period. The Buyer still has the right, within the time specified in the contract, to perform any and all desired inspections and to give the Seller written notice of any disapproved items.

Can a Buyer terminate a representation agreement with a brokerage without consequence?

QUESTION: Agent has a signed Buyer Representation Agreement with a Buyer who now wishes to break the contract so that Buyer can use a different brokerage to find a property. The contract does not expire for quite some time, and Agent questions if the Buyer is able to terminate the contract without any consequences.

RESPONSE: Lines 140-142 of the RE-14 Buyer Representation Agreement states:

> In the event Buyer purchases any property without using the representation of the Broker named above within the time this agreement remains in force, above stated Buyer shall be liable to Broker for a cancellation fee equal to _____% of the contract or purchase price of the property acquired or $_____.

This provision of the RE-14 provides for the situation where a Buyer decides to purchase a property without the representation of the Broker but during the timeframe contained in the contract. In such an instance, the Broker may still receive compensation in the amount specified if the Buyer purchases a home within the time remaining on the contract. However, if the cancellation fee amounts in this provision are left blank or stated as "N/A", then it is likely that the Agent may not be able to receive compensation in the event of cancellation by the Buyer.

LICENSE LAW

Is it a sound practice to retain records longer due to the potential for future legal claims?

QUESTION: Broker asked whether it would be good practice to retain records longer due to the potential for future legal claims.

RESPONSE: Idaho Code § 54-2049 Record Retention Schedules sets forth the statutory requirements for maintaining documents as follows:

> All records required in this chapter to be kept and maintained by a real estate broker, including trust account and financial records, transaction files and other records are to be kept in the broker's files according to this section. The following records must be kept by a broker for three (3) calendar years after the year in which the event occurred, the transaction closes, all funds were disburse, or the agreement and any written extension expired.

The statute of limitations for actions on written contracts is codified in Idaho Code § 5-216 provides a five (5) year statute of limitations.

As the statute of limitations for an action on written contact is five (5) years, but brokers are only required to maintain records for three (3) years, broker may wish to retain records for longer than the statutorily required time. However, retention for five (5) plus years would be out of an abundance of caution, since most actions would be between buyer and seller and would not involve the brokerage.

What real estate license is required to sign Broker Price Opinions (BPOs)?

QUESTION: Agent would like to know, by law, whether or not a licensed real estate salesperson is permitted to issue a Broker Price Opinion (BPO), or is an individual required to be a licensed appraiser or be a broker and/or associate broker in order to render BPOs.

RESPONSE: Idaho Code § 54-4105(3) of the Idaho Real Estate Appraisers Act states in relevant part:

> The provisions of this chapter shall not prohibit a real estate broker or associate broker licensed under chapter 20, title 54, Idaho Code, whose license is active and in good standing, from rendering a broker's price opinion.

Based on the above quoted statute, which is an exception to the Appraiser Act, a licensed real estate person cannot legally sign a broker price opinion (BPO). An individual must be a licensed broker or associate broker in order to issue and sign broker price opinions.

Is it in violation of Idaho license law to represent a party after the expiration of a different representation agreement?

QUESTION: Agent represents Seller in a real estate transaction. The Buyer has an expired Buyer Representation Agreement with another brokerage. Since the representation agreement has expired, Buyer wanted to enter into a new representation agreement with the Agent. Agent completed and closed the transaction between Seller and Buyer. Subsequent to closure, Buyer's prior Agent contacted the Listing Agent stating that he had no legal right to represent Buyer. Listing Agent would like to know if his subsequent representation of Buyer was in violation of Idaho license law.

RESPONSE: Idaho Code § 54-2054 states in relevant part:

> (4) Interference with real estate brokerage agreement prohibited. It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client. Communicating a company's relocation policy or benefits to a transferring employee or consumer shall not be considered a violation of this subsection so long as the communication does not

> involve advice or encouragement on how to terminate or amend an existing contractual relationship between a broker and client. (Underline Added).

Given the facts provided to the Hotline, Agent and Buyer entered into a contractual agreement following the expiration of Buyer's initial Buyer Representation Agreement with the other Agent. Buyer's original agent is demanding that said action was in violation of Idaho law, as he believes there was contractual interference. However, it is deemed interference only when the agreement still exists. As Buyer has indicated, the Buyer Representation Agreement had expired. Since Buyer made this information known to Agent, it is not likely that the Agent has unlawfully interfered with a previously made contractual agreement.

ADVERTISING/MARKETING

Does printing the language "No Pets Allowed," in local newspaper violate the Fair Housing Act?

QUESTION: The Agent owns and rents a property, which she advertised in her local paper. The newspaper would not print the language "No Pets Allowed," because they claimed it violated the Fair Housing Act. Agent would like to know if this policy does in fact violate the FHA.

RESPONSE: The Fair Housing Act (42 U.S.C. §§ 3601-3619) prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, and disability. Certain persons with disabilities, which can range from deafness and blindness to severe anxiety, require the use of a "service animal." Having a no pet policy may cause the landlord to run afoul of the FHA when considering such disabled persons.

A housing provider or the Agent in this case, is required to make reasonable accommodations for disabled persons. This may include waiving to their "no pet" policy for a renter who requires a service animal. Further, Agent cannot charge applicant with a service animal a fee or security deposit as a condition of allowing the animal. However, if the animal causes damages to the property, the tenant may be responsible for the cost of repairing the damage.

Can Agent advertise for Seller on Craigslist?

QUESTION: Seller would like agent to advertise her real estate property on Craigslist. Agent would like to know if there are specific advertising requirements she must follow in order to utilize Craigslist.

RESPONSE: Idaho Code § 54-2053 requires the following:

> (1) Only licensees who are actively licensed in Idaho may be named by an Idaho broker in any type of advertising of Idaho real

> property, may advertise Idaho property in Idaho or may have a sign placed on Idaho property.
> (2) All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.
> (3) All advertising by licensed branch offices shall contain the broker's licensed business name.
> (4) No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a distinct probability that such information will deceive the persons whom it is intended to influence.

Electronic venues such as Craigslist are not prohibited means for real estate property advertisement. Therefore, agent must adhere to Idaho Law as cited above when advertising seller's property on Craigslist.

How does Agent list a preliminary approved property for sale?

QUESTION: Agent is representing client who owns 108 acre parcel. This property has recently been approved for commercial development. This is a preliminary approval in which no platted or parceled lots exist. The Agent would like to know if its brokerage and client may list this property for sale, even though there is not yet an approved and recorded plat.

RESPONSE: It is not required to list property on a MLS in order to sell real property in Idaho. However, Idaho Code requires real estate licenses to be truthful in their advertising. In particular Idaho Code § 54-2053(4) states as follows:

> No advertising shall provide any information to the public or to prospective customers or clients which is misleading in nature. Information is misleading if, when taken as a whole, there is a distinct probability that such information will deceive the persons whom it is intended to influence

The Hotline is unaware of any Idaho Statute or case law that would prohibit Agent from listing the property for sale prior to seller obtaining final plat approval. However, Agent would be well advised to disclose that the property has not yet obtained final plat approval, and that individual plats cannot be sold prior to the final approval.

Can Agent advertise under two separate brokerages?

QUESTION: Broker's company recently merged with a different brokerage. Broker is in the process of changing her license to the new company. In the interim, Broker maintains listings under old company name. Broker wants to advertise in local newspaper under the new company's name. Broker is aware she cannot list property under new company's name until her

license has been changed. However, she wants to know that if she may advertise the new company if she places a disclaimer on the advertisement identifying that she is currently licensed and listing property under the old company name.

RESPONSE: Idaho Code § 54-2053 states in relevant part:

> All advertising of listed property shall contain the broker's licensed business name. A new business name shall not be used or shown in advertising unless and until a proper notice of change in the business name has been approved by the commission.

Given the facts provided to the Hotline, Broker would like to advertise under two brokerage names. However to remain in compliance with Idaho Code, Broker should advertise listings under her current licensed brokerage name. Additionally, it would be improper to advertise with the new brokerage name unless it has been approved by the commission, even if Broker inserts a disclaimer. Until Broker's license reflects the new company's name and is recognized and approved by the commission, Broker should likely advertise solely under current brokerage name.

Are Seller concessions considered "confidential client information"?

QUESTION: Broker would like to know if seller concessions are regarded as part of the sales price or if concessions are confidential client information.

RESPONSE: Idaho Code § 54-2083(6)(d) states:

> (6) "Confidential client information" means information gained from or about a client that:
> (d) The client would not be personally obligated to disclose to another party to the transaction…Information generally disseminated in the marketplace is not confidential client information within the provisions of such sections. A "sold" price of real property is also not confidential client information within the provisions of such sections.

Generally, concessions are treated as reductions to the selling price and are agreed upon by both Buyer and Seller. Based on Idaho Code § 54-2083(6)(d), information generally disseminated in the marketplace is not confidential client information nor is a sold price of real property. Since the concessions are known by both Buyer and Seller, concessions are not likely regarded as confidential client information. Additionally, because concessions are most often included in the closing costs they are likely reflected in the sold price of real property, which is also not confidential client information. Therefore, given the facts provided to the Hotline, Broker would likely not be violating client information by disclosing seller concessions.

MISCELLANEOUS

How does an Agent appropriately dispute boundary lines?

QUESTION: Agent is having a boundary line dispute with his neighbor who recently surveyed their property. The survey showed that the property lines have been drawn incorrectly and agent's fence and other property improvements are encroaching 3 feet on to the neighbor's lot. However, the fence and improvements were placed on a previous survey conducted in 1915. Agent would like to know if any actions exist that would allow him to keep the 3 feet section of property that is now in dispute.

RESPONSE: Idaho Code § 5-203 discusses adverse possession requirements:

> No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

To establish a case for adverse possession, "the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the [property]; (5) for the statutory period [which is 20 years]." *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003).

Therefore, the statutory time period requirement for adverse possession is 20 years. Due to the length of this statutory requirement, such claims are likely to be rare and difficult to prove. However, given the facts provided to the Hotline, it may still be possible for agent to establish a claim for adverse possession. Agent may wish to consult private counsel regarding his rights and obligations under a claim for adverse possession.

Is there a rental control ordinance in Idaho?

QUESTION: Agent represents Renter in Kootenai County. For this reason, Agent would like to know if Idaho and/or Kootenai County have a rental control ordinance.

RESPONSE: The Idaho Landlord—Tenant Guidelines state in relevant part:

> There are no federal or state rent control or rent stabilization laws that apply in Idaho. As a result, there are no legal limitations on how much or how often a landlord can raise the rent.

Based on the above-cited guidelines, rental control ordinances do not exist in Idaho. However, the Hotline is unaware of any Kootenai County ordinances that may affect rental rates within Kootenai County. It may be beneficial for Agent and/or Renter to contact Kootenai

County and/or applicable municipalities regarding ordinances that may directly affect tenants and/or impact rental agreements.

Is a Seller of rental property required to transfer security deposits to Buyer at closing?

QUESTION: Agent would like to know the seller's requirements to transfer security deposits to the new owner, as well as the transfer's effect on the relationship between new owner and the previous property management company.

RESPONSE: Idaho Code § 6-321 requires the following:

> Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement…If security deposits have been made as to a particular rental or lease property, and the property changes ownership during a tenancy, the new owner shall be liable for refund of the deposits. (Underline added).

In adherence to Idaho Code, upon completing the purchase and sale transaction, the security deposits are to be controlled by the new owner who becomes the responsible securer and distributer of security deposits to tenants.

Furthermore, as cited above, the security deposits belong to the tenants. For this reason, the property management company should have a contractual relationship with the new owner in order to hold the money after the property has changed ownership. The new owner has a superseding responsibility and obligation to the tenants to maintain the security deposits in the event the tenants' leases are terminated.

Is the owner of rental property responsible for itemizing repairs after tenancy termination?

QUESTION: Agent and spouse own rental property. Partially through the term of a lease, agent switched property management companies. Renters are preparing to move out and want their security deposit returned. Owners are currently holding the security deposit and have requested that the current property management company itemize repairs needed to the rental property. Property management company refuses to itemize the repairs stating it does not have a contractual requirement to do so. Agent would like to know if she and her husband are responsible for itemizing repairs in the absence of the property management company and if renters can take action against them for withholding the security deposit.

RESPONSE: Idaho Code § 6-321 states in relevant part:

> Amounts deposited by a tenant with a landlord for any purpose other than the payment of rent shall be deemed security deposits. Upon termination of a lease or rental agreement and surrender of the premises by the tenant all amounts held by the landlord as a security deposit shall be refunded to the tenant, except amounts necessary to cover the contingencies specified in the deposit arrangement… Refunds shall be made within twenty-one (21) days if no time is fixed by agreement, and in any event, within thirty (30) days after surrender of the premises by the tenant. Any refunds in an amount less than the full amount deposited by the tenant shall be accompanied by a signed statement itemizing the amounts lawfully retained by the landlord, the purpose for the amounts retained, and a detailed list of expenditures made from the deposit. (Underline Added).

Given the facts to provide to the Hotline, Agent and her spouse are holding all security deposits submitted by renters. The property management company is asserting that it owes no contractual duty to provide a list of itemized repairs to the property. Since Agent is in possession of the security deposit and has the legal obligation to return said deposit to the renter within the statutory time frame, there is no statutory obligation for the property manager to prepare the itemized list of repairs for Agent.

Unless Agent and property manager have contractually agreed to have property manager prepare the itemized list, it is Agent's responsibility to create and issue an itemized statement to the renters within the statutory time period.

The Hotline does not resolve issues between parties to a contract. Agent may wish to consult private legal counsel concerning her rights and obligations under the contract with the property management company.