

**The Hotline Top One Hundred Questions**

**THE LEGAL  
HOTLINE**

**1-800-858-8701**

**Idaho Association of REALTORS®**

**2008**

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## **WHEN SHOULD THE HOTLINE BE UTILIZED?**

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

Evans Keane LLP 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. Any 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. This response is not intended, nor shall it be construed, as a guarantee of the outcome of any legal dispute. The scope of this 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 Evans Keane LLP has no obligation or duty to advise anyone of any change in applicable law that may affect the conclusions set forth. This publication may not be distributed to others without the express written consent of Evans Keane LLP, 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.

### **Note on Legislative Changes for 2009**

The responses contained in the 2008 "Top One Hundred" are based on the law in effect during 2008. The Idaho Legislature has enacted some changes to the Idaho Real Estate Licensing Law during the 2009 legislative session. Those changes are not reflected in the responses contained in the 2008 "Top One Hundred." Licensees should monitor legislative updates and changes to the Idaho Association of REALTORS® "RE" forms, which will reflect and/or identify the 2009 legislative changes to the licensing law. Legislative changes, in most cases, will not become effective until July 1, 2009.



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## AGENCY

### **Paying a Gratuity to an Individual Who Loaned Buyer Money**

QUESTION: Agent represented a buyer in a transaction where an individual loaned the buyer a substantial amount of money to purchase the property. The buyer and the buyer's agent want to give the individual a "gratuity" for loaning the buyer the money. Agent questions whether this would violate license law.

RESPONSE: Based on the facts given to the Hotline, the Hotline is unaware of any license law that the agent may be violate by giving a "gratuity" to an individual for providing a loan to the buyer. However, the agent needs to keep in mind Idaho Code Section 54-2054, which deals with compensation, commissions, fees and prohibited conduct. Specifically subsection (2) states:

(2) 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 person 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. This section shall not prohibit payment of a part or share of a commission, fee or compensation by the broker to a legal business entity, all of whose shareholders, members or other persons having a similar ownership interest are active real estate licensees. An Idaho licensee may pay any part or share of a commission, fee or compensation received, directly to the buyer or seller in the real estate transaction. However, no commission, fee or compensation may be split with any party to the transaction in a manner which would directly or indirectly create a double contract, as defined in this chapter, or which would otherwise mislead any broker, lender, title company or government agency involved in the transaction regarding the source of funds used to complete the real estate transaction or regarding the financial resources or obligations of the buyer.

Agent should take care not to split his commission with the person who lent the buyer money.

### **Brokerage Fees**

QUESTION: Agent is set to list a property for sellers that was subject to a previous, but now expired, RE-16 Exclusive Seller Representation Agreement. Agent will enter into a new RE-16 with the sellers. Under Paragraph 6(B) of the expired RE-16, the former agent and sellers agreed that the former brokerage is entitled to payment of the brokerage fee if, for a period of ninety (90) days after the expiration of the RE-16, the property is sold to any person who examined, saw, or was introduced to the property during the term of the expired RE-16. Agent indicates that she has two likely offers from parties who saw the property during the term of the

expired RE-16. Agent questions whether sellers will be required to pay the fee of the former brokerage if one of these two potential buyers closes on the property.

**RESPONSE:** The various rights and obligations of the parties are subject to the relevant contracts. When read in total and considering the fact that Agent will enter into a new RE-16 with sellers, under Paragraph 6 of the RE-16, sellers should not be required to pay the former brokerage a commission. Paragraph 6(A) obligates the seller to pay the brokerage a specified amount if the any person “procures a purchaser ready, willing and able to purchase” the property. Paragraph 6(B) of the RE-16 Exclusive Seller Representation Agreement states:

(B) Further, the brokerage fee is payable if the property or any portion thereof or any interest therein is, directly or indirectly, sold, exchanged or option or agreed to be sold, exchanged or optioned within \_\_\_\_\_ days following expiration of the term hereof to any person who has examined, been introduced to or been shown the property during the term hereof.

Finally, Paragraph 6(C) of the RE-16 states:

(C) if SELLER, upon termination of *this* Agreement, enters into an Exclusive Right to Sell Agreement to market said property with another Broker, then the time period specified above in Section 6B, shall not apply and will be of no further force or effect.

Based on the language in paragraph 6 of the RE-16, the sellers are required to pay their former brokerage the agreed-upon fee in the expired RE-16 if the property is sold to anyone who was shown the property during the effective dates of the expired RE-16, if the transaction occurs during a period of ninety (90) days after the expiration of the RE-16. However, if after termination of the expired RE-16 (expiration constitutes termination) the sellers enter into a new RE-16 with Agent or Agent’s brokerage, then Paragraph 6(B) of the *expired RE-16* and the time period set forth in Paragraph 6(B) “shall not apply and shall be of no further force or effect.”

In this particular situation Agent will enter into a new RE-16 with sellers. Therefore, Paragraph 6(B) of the expired RE-16 and the ninety (90) day time period set forth in Paragraph 6(B) will not apply, and will not be of further force and effect. Paragraph 6(B) is intended as a protection to a broker from unscrupulous sellers. Paragraph 6(C), on the other hand, allows a seller to continue marketing and to sell a property without fear of paying additional commissions in the event the seller chooses to work with a different brokerage.

### **Agent Giving Sellers a Rebate After Closing**

**QUESTION:** Agent agreed to rebate one percent (1%) of his commission to his clients, Buyers, in the RE-14 Exclusive Buyer’s Representation Agreement. Buyers qualified for and received assistance at closing from the Idaho Housing and Finance Association (“IHFA”) in the form of a grant. As part of the instructions to the closing agent, the IHFA indicated that Buyers were not to receive cash at closing. Agent did not rebate one percent of the commission to

Buyers at closing. Agent would like to rebate Buyers the one percent commission as per his agreement with Buyers, but is afraid the IHFA may view the rebate as inappropriate. Agent also fears that rebating the commission could be considered fraud or something similar.

**RESPONSE:** Idaho Code § 54-2054 permits Agent to pay part of his commission to Buyers. Further, Agent has a contractual obligation to Buyers through the representation agreement to rebate one percent of the commission. The problem, however, is that it appears from its rules and regulations that the IHFA prohibits Buyers from receiving cash at closing. IHFA makes grants and certain loans to buyers who meet stringent financial and lending criteria. Therefore, a rebate from Agent to Buyers is likely a relevant consideration for IHFA in its review and assessment of Buyer's eligibility for its program. It is irrelevant whether Buyers literally received the cash at closing or at a later time because a payment or rebate to Buyers from Agent is cash that became due and owing at closing. Agent should request that Buyers review their agreement or grant documents from the IHFA *and* contact the IHFA agent with whom they worked to obtain the grant to determine whether the rebate is within the IHFA rules. Without approval from the IHFA for the rebate, both Agent and Buyers risk action by the IHFA if the rebate is improper under its rules. If IHFA does not allow payment of the rebate, but Buyers insist on enforcing their contractual right, Agent should document the payment and explain the risks to Buyers in writing. Agent may also want to contact his own attorney for counsel if Buyers insist on payment.

### **Payment of Fees in Failed Auction**

**QUESTION:** Broker's agent specializes in auctions. Broker listed a high-end property for seller to sell at agent's auction as an "absolute sale" (i.e. no seller minimum). The day before the auction, Broker and Agent/auctioneer met with seller and discussed the risks of an absolute sale. Seller agreed to go forward. At auction two buyers bid on the property and won the right to pay earnest money and purchase the property. Seller refused to sign the earnest money agreement and now refuses to go through with a transaction with either potential buyer because he is unsatisfied with the winning bids at the auction. Seller now refuses to talk to buyers or to Broker. Buyers have called broker regarding Seller's intentions with regard to the property. The listing agreement indicated that seller was responsible for advertising costs, but seller has not or refuses to pay any advertising costs. Broker questions his liability to the buyers. Broker indicates that he is not interested in pursuing seller for a commission, but also questions his legal right to recover his costs of \$4,000 for advertising the auction.

**RESPONSE:** The terms of the contract dictate the rights, obligations and remedies for the parties involved. From the facts provided to the Legal Hotline, seller is in breach of his agreement with Broker. Broker and/or agent/auctioneer may recover the costs of advertising by filing a lawsuit in district court or pursuing the manner in small claims court. The amount of the advertising costs is less than the \$5,000.00 limit for recovery in small claims court. Small claims court may offer a more efficient and cost effective method for obtaining a judgment against seller since the advertising costs are less than the small claims limit and because costs and attorney fees will not be an issue in small claims court. If broker has questions regarding which venue is best for this claim, broker should contact his attorney.

As for liability to buyers, broker has no agreement or contract with the brokers and, based on the facts provided to the Legal Hotline, is not liable to the buyers in this situation. Buyers bid on seller's property and their right of recourse, if any, is against seller for seller's refusal to enter into an earnest money agreement and proceed with a transaction to close on the property. Broker cannot control seller's actions and has no legal obligation or ability to force seller to carry through on the transaction. If buyers continue to question broker regarding seller's intentions with regard to the property, broker should advise buyers to contact their own legal counsel if they wish to pursue the matter against seller.

### **Compensation**

QUESTION: Agent is a member of a multiple listing service ("MLS") whose rules accept exclusive right to sell listings only. Agent's practice is to enter into an RE-16 Exclusive Seller Representation Agreement and list or advertise the property with the MLS, but questions whether he may enter into a separate agreement with the seller regarding compensation in the event a buyer is found "in house" or the seller locates a buyer. In such a situation, Agent is willing to agree to a lower commission with the Seller.

RESPONSE: Based on the facts provided, the Legal Hotline is not aware of any licensing statute or rule that prohibits Agent from entering into a separate agreement with the seller regarding compensation, as long as the compensation specified in the RE-16 and identified in the MLS listing is available and paid in the event a cooperating broker brings a buyer to the transaction.

Compensation of real estate licensees is governed by Idaho Code section 54-2054, which generally prohibits sharing a fee with an unlicensed person, fee splitting, referral fees, interfering with contracts, double contracts, kickbacks and rebates, and after the fact referral fees. As to the issue of double contracts, 54-2054(2) states, in part:

An Idaho licensee may pay any part or share of a commission, fee or compensation received, directly to the buyer or seller in the real estate transaction. However, no commission, fee or compensation may be split with any party to the transaction in a manner which would directly or indirectly create a double contract, as defined in this chapter, or which would otherwise mislead any broker, lender, title company or government agency involved in the transaction regarding the source of funds used to complete the real estate transaction or regarding the financial resources or obligations of the buyer.

Idaho Code section 54-2004(20) defines a double contract as two or more contracts regarding the sale or financing of real property where one of the contracts is not disclosed to the lender that allows the buyer to get a larger loan or qualify for a loan.

Based on the information provided by Agent, the separate contract with seller is not a double contract because it is not a contract that will allow a buyer to obtain a larger loan or

qualify for a loan. Furthermore, any question of double contracts may be avoided by properly disclosing, in writing, all compensation arrangements to the loan underwriter or loan guarantor.

The Legal Hotline's response does not take into account MLS rules that may also govern the questions posed. Agent should review the relevant MLS rules to determine if the MLS rules pose any additional restrictions.

### **Agency Relationships**

**QUESTION:** A relocation company contacted a broker regarding certain brokerage services. In accordance with Idaho law, the broker gives the prospective buyer or seller the Idaho Real Estate Commission Blue Brochure explaining agency relationships. In addition, as is the custom in the industry, the agent also provides a seller representation agreement produced by the Idaho Association of REALTORS® to a prospective seller. Relocation companies, however often refuse to sign Idaho-produced representation agreements and refuse acceptance of the Blue Brochure. Further, the inquiring broker believes that several agents in the area think that they represent the relocation companies as clients, even though no representation agreement has been entered. The broker if these practices are appropriate.

**RESPONSE:** Idaho Code Section 54-2085, "Disclosure and Writing Requirements – Agency Disclosure Brochure and Representation Confirmation," provides that: "A licensee shall give to a prospective buyer or seller at the first substantial business contact the agency disclosure brochure adopted or approved by the Idaho Real Estate Commission. . . . Each brokerage shall keep a signed and dated record of a buyer or seller's receipt of the agency disclosure brochure." By law, each brokerage must provide the brochure at the "first substantial business contact."

That same code section also states that "A brokerage's relationship with a buyer or seller as an agent, nonagent, limited dual agent, or limited dual agent with assigned agents must be determined and all necessary agreements executed no later than the preparation of a purchase and sale agreement. A broker must disclose its relationship to both the buyer and seller in any transaction *no later than the preparation or presentation of a purchase and sale agreement.*" In summary, the type of agency representation must be determined no later than the preparation of the purchase and sale agreement.

Idaho Code Section 54-2084 "Brokerage Agency Relationships – Creation," sets forth that: "A buyer or seller is not represented by a brokerage in a regulated real estate transaction unless the buyer or seller and the brokerage agree, in a separate written documents, to such representation. No type of agency representation may be assumed by a brokerage, buyer or seller or created orally or by implication."

Idaho Code Section 54-2086 governs duties to a customer, and Idaho Code Section 54-2087 governs duties to a client. Idaho Code Section 54-2087 sets forth that "If a buyer or seller enters into a written contract for representation in a regulated real estate transaction, that buyer or seller becomes a client to whom the brokerage and its licensees owe the following agency duties and obligation. . . ." The "client" relationship only occurs if an express written contract for

representation has been entered into between the client and the brokerage. If no contract for representation has been entered into, then the prospective buyer or seller remains a “customer” and, as such, is owed those legal duties set forth in Idaho Code Section 54-2086.

The agent is correct that a “relocation company” is not a “client” if no contract for representation has been expressly entered into between the relocation company and the brokerage. The “Idaho Real Estate Brokerage Representation Act” is codified at Idaho Code Section 54-2082, et seq. All brokers and their licensees are encouraged to review the actual representation statutes.

### **RE-16**

**QUESTION:** Agent entered into an RE-16 Exclusive Seller Representative Agreement with Seller, a family owned corporation. Seller’s agent, the primary shareholder and president of the corporation, signed the RE-16 on behalf of the corporation and in his capacity as president. Seller’s agent who signed the RE-16 passed away. Agent questions whether the RE-16 remains valid or in effect.

**RESPONSE:** Based on the facts provided to the Legal Hotline, Agent contracted with the corporation, not with the individual who passed away. Seller’s signatory signed the RE-16 in his capacity as the corporation’s president, not in his individual capacity. Therefore, the RE-16 remains in effect. If possible, Agent should keep abreast with the probate or disposition of the share’s of the signing agent of Seller because the person or persons who inherit the shares will likely control the corporation or dictate what happens to the corporation as an ongoing business concern. Nonetheless, the RE-16 remains valid and the corporation’s obligations to agent and agreement with agent under the RE-16 remain in effect.

### **No Signed Representation Agreement**

**QUESTION:** A broker has an agent who wrote an offer for a buyer. The agent’s employment was terminated shortly afterwards and it was discovered that the agent failed to have the buyer enter into a Buyer’s Representation Agreement even though it was marked in the Purchase and Sale Agreement that the brokerage was acting as an agent for the buyer. The broker questions whether he can now have the buyer sign a representation agreement. The agent also questions whether the lack of a signed representation agreement effects the validity of the Purchase and Sale Agreement.

**RESPONSE:** The Hotline is unaware of any reason why the Purchase and Sale Agreement would not be valid because the parties did not enter into a representation agreement. The parties are free to enter into a representation agreement if both parties agree to the terms. However, the broker should keep in mind that Idaho Code Section 54-2085 states:

(3) A brokerage's relationship with a buyer or seller as an agent, nonagent, limited dual agent, or limited dual agent with assigned agents, must be determined and all necessary agreements executed no later than the preparation of a purchase and

sale agreement. A brokerage must disclose its relationship to both buyer and seller in any transaction no later than the preparation or presentation of a purchase and sale agreement. (Underlining added).

The Idaho Real Estate Commission may find the broker/agent in violation of license laws and rules due to this lease. The broker should probably explain the dilemma to the buyers and ask if they will mind sign a representation agreement.

### **Agent Purchasing Property from a Client**

QUESTION: An agent represented a buyer in a previously completed transaction. Now the agent wants to buy a percentage of the property from the buyer. The agent questions whether he may purchase the property because he represented the buyer in the original transaction.

RESPONSE: The Hotline is unaware of any professional, legal or ethical reason why the agent cannot purchase a portion of the buyer's property simply because the agent represented the buyer in the original transaction. This potential transaction is separate from the original transaction. The agent will want to review Idaho Code Section 54-2055 to make sure that he follows the applicable rules when licensees deal with their own property. That section states:

#### **54-2055. LICENSEES DEALING WITH THEIR OWN PROPERTY.**

(1) Any actively licensed Idaho broker, sales associate, or legal business entity shall comply with this entire chapter when that licensee is buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction.

(2) A licensee shall disclose in writing to any buyer or seller 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.

### **Termination of RE-16**

QUESTION: Upon the request of Sellers, Broker agreed to terminate an RE-16 Exclusive Seller Representation Agreement in exchange for Sellers' payment to her for her out-of-pocket marketing and advertising expenses. Sellers complained to the relevant Multiple Listing Service of Broker's request that they pay marketing and advertising expenses in exchange for her agreement to terminate the RE-16. The MLS contacted the Idaho Real Estate Commission regarding Sellers' complaint and was informed that such matters had to be in

writing to be enforced. IREC did not provide a statute or regulation supporting its opinion. Broker questions whether this is correct.

**RESPONSE:** Assuming Broker did not breach the RE-16 agreement, Broker is under no legal obligation to terminate the agreement and release Sellers from their contractual obligations. Broker's agreement to terminate the agreement and release Sellers in exchange for reimbursement of her out-of-pocket expenses was akin to a settlement agreement or an amendment. The Hotline is unaware of any statute or IREC regulation that requires such an arrangement be in writing in order to be legal.

### **Agent Leaving Brokerage and Contacting Prior Clients**

**QUESTION:** Agent switched Brokerages and questions whether it is appropriate for her to speak with ex-clients to tell them that she is no longer with her former Brokerage.

**RESPONSE:** Idaho Code § 54-2054 addresses prohibited conduct by a licensee. Specifically, subsection 4 states that: "[i]t shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client." If Agent contacts ex-clients, she may not do anything that may be construed as intentionally interfering with the contractual relationship between her ex-client and her former Brokerage. It is not necessarily a violation of Idaho Code section 54-2054(4) to contact an ex-client merely to advise that client that Agent is no longer with the former Brokerage, so long as the agent does not provide advice or encourage the former Brokerage's clients to breach their representation agreement with the former Brokerage. Agent may avoid all suggestions or appearances of inappropriate conduct by simply not contacting ex-clients or in the event an ex-client contacts her, refer the ex-client back to the former Brokerage.

### **Representation of Buyers**

**QUESTION:** Agent is involved in a transaction to sell property of which he is part owner. Buyers were assisted by a relative in Arizona who is a broker, but is not representing Buyers. Buyers have indicated to Agent that they are not interested in being represented by Agent. Agent listed the property advertising a 5% commission, with 2.5% to be paid to the real estate professional on each side of the transaction. Since Buyers have elected not to be represented, Agent went forward in the transaction with the belief that only a 2.5% commission would be paid to Agent, who is acting only as agent for Sellers. Agent's broker has informed Agent that his arrangement with regard to the commission is not appropriate and has asked Agent to provide him with citations to regulations or laws that permit Agent's actions in this transaction.

**RESPONSE:** While the Idaho Code addresses issues such as compensation (Idaho Code section 54-2054) and agency (Idaho Code sections 54-2082 through 54-2097), Agent's obligation to his broker in terms of commission and payments is likely governed by contract. Agent should review seller's representation agreement, if any, used in this transaction as well as any employment or independent contractor agreement Agent may have entered into with the broker. These contractual arrangements likely govern compensation/commission issues with the

brokerage. If agent has further questions in regards to this issue, it is recommended that he follow up with his personal legal counsel.

### **Dual Agency**

QUESTION: Agent's brokerage represents a developer/seller in the sale of homes in a subdivision or development. Agent is not a listing agent for brokerage on this particular subdivision, but sometimes "sits floor" in model homes and works with potential new buyers. Brokerage has instructed Agent to enter into representation agreements with previously unrepresented buyers as a dual agent without assignment. Agent has found that buyers generally prefer an assigned agent in these situations. Agent questions the duties of an assigned agent and who is entitled to assign or invoke an assigned agent relationship.

RESPONSE: "Assigned agent" and the designation of assigned agent arise in those transactions where the brokerage is representing more than one party to a transaction (i.e. a limited dual agency situation). Idaho Code Section 54-2083(3) defines an assigned agent as:

Assigned agent means, where a brokerage is representing more than one (1) party to the transaction as a limited dual agent as provided in section 54-2088, Idaho Code, the sales associate assigned by the brokerage to act on behalf of one (1) client and to represent solely that client consistent with the applicable duties set forth in section 54-2087, Idaho Code. The designated broker shall not act as an assigned agent of the brokerage.

Under Idaho Code Section 54-2088(1), a brokerage may represent both the buyer and seller as a limited dual agent as long as the brokerage obtains written consent from all of the clients involved in the transaction. Further, under Idaho Code Section 54-2088(2):

A brokerage acting as a limited dual agent may, at the option of the brokerage and with the express written consent of the other clients involved in the transaction, assign separate sales associates to each client to act on behalf of and represent that client solely. The designated broker shall not act as an assigned agent of the brokerage.

The relevant statutory provisions suggest that the brokerage makes the decision regarding whether to assign an agent to a client in a dual agency situation. The client's wishes, of course, may be the deciding factor. Agent should advise her brokerage in situations where a buyer expresses a desire to work with an assigned agent.

### **Exclusive Buyer Representation Agreement**

QUESTION: Buyer contacted Agent about a certain piece of property. Buyer had previously entered into an Exclusive Buyer Representation Agreement with another agent for a different piece of property (listing the legal description). Buyer is now interested in purchasing the piece of property that Agent showed him. Agent questions whether Buyer still has a binding Exclusive Buyer Representation Agreement with his previous Agent.

RESPONSE: The terms of the contract control the parties' rights, duties and responsibilities. If Buyer limited the previous agent's representation agreement to a specific property, then Buyer is free to hire another agent to assist in the purchase other property not specifically listed in the agreement with the previous agent. Based upon the information given to the Hotline, it appears the agreement with the previous agent was only for the purchase of the specific legal description given in that agreement.

Idaho Code § 54-2054 governs prohibited conduct. Specifically, subsection 4 states that interference with a real estate brokerage agreement is prohibited. "It shall be unlawful for any person, licensed or unlicensed, to interfere with the contractual relationship between a broker and a client." If Agent is aware that Buyer may be represented by another brokerage, then Agent must not do anything that may be construed as intentionally interfering with that contractual relationship. Agent should review Buyer's agreement with the other agent and, if necessary, contact the other agent to verify that Buyer and the other agent intended to limit their agreement to the specific property identified in that agreement.

### **Agent Signing on Behalf of Buyer**

QUESTION: Agent represents a Buyer who does not want to be disclosed as the buyer on the purchase and sale agreement. Buyer is in the process of forming a limited liability company, but has yet to complete that process. Buyer's attorney contacted Agent and requested that Agent sign the purchase and sale agreement on Buyer's behalf. Agent questions whether she may do that.

RESPONSE: An effective transfer of real property requires the parties to reduce the terms of the agreement to a writing that the parties sign. In order for someone other than one of the contracting parties to effectively sign an offer or an acceptance of the offer, that person, who is called an "agent," must have authority from the contracting person to sign on their behalf. In this case, if Agent signs an offer without Buyer's authorization, there is no evidence of an offer of the terms because buyer did not sign the agreement. It is doubtful that a request from Buyer's attorney to sign the offer on Buyer's behalf is sufficient authorization for Agent to sign on Buyer's behalf.

Buyers or sellers may authorize another person to sign an offer or acceptance of an offer on their behalf so long they intend to be bound by that person's signature. To obtain adequate authority and to evidence Buyer's intent to be bound by Agent's signature, Agent may consider requesting a power of attorney from Buyer or a notarized letter from Buyer authorizing her to sign the offer on Buyer's behalf and/or appoint Agent as Buyer's attorney-in-fact to act on Buyer's behalf. Seller very well may require evidence of Agent's authority to sign on Buyer's behalf. If Agent does sign the offer on Buyer's behalf, Agent should also take care to ensure that she does not commit herself contractually (i.e. signs in her capacity as an agent only).

## Dual Agency

**QUESTION:** Broker's agent represents a buyer. Agent wrote an offer on behalf of buyer for a listing with a cooperating broker. In paragraph 34 of the RE-21, which is entitled REPRESENTATION CONFIRMATION, agent checked box "A" for parts 1 and 2 of paragraph 34. Box A indicates that the brokerage working with the buyer/seller is acting as agent for buyer/seller. Agent received a counter offer from seller's agent, which counter offer included changing paragraph 34, part 2 from "A" to "C". Paragraph 34.2.C of the RE-21 indicates that the brokerage working with seller is acting as a limited dual agent for seller and has an assigned agent working solely on behalf of seller. Broker contacted the listing broker/agent to correct what he believed was an error in the counteroffer because the buyer and seller in this transaction are clients of two different cooperating brokerages and are not being represented as part of a limited dual agent relationship. A representative for the cooperating broker informed broker that part 2 of paragraph 34 of the RE-21 was not of the buyer's agent's concern and because the opening sentence in paragraph 34 of the RE-21 uses the word "had" in reference to the relationship between the brokerage and the seller, that part 2 of paragraph 34 of the RE-21 must reflect the seller client's selection of representation in paragraph 18 of the RE-16 (which in this case was limited dual/assigned agency). Broker asks: (1) is the intent of paragraph 34 of the RE-21 to disclose to the buyer and the seller the agency relationship between them and their respective brokerages; (2) is a broker responsible for ensuring that disclosures regarding the agency relationship is accurate; and (3) do the RE-14 and RE-16 simply establish a client relationship and merely provide the client signing the representation agreement the option of consenting to and entering into a limited dual and/or assigned agency relationship if the client so wishes, but otherwise does not require a client to enter into a limited dual agency relationship in a transaction where the buyer and seller are represented by different brokerages?

**RESPONSE:** In answer to broker's first question, paragraph 34 of the RE-21 is, in effect, a disclosure to the buyer and seller of the agency relationship with the respective brokerages involved in the transaction, which disclosure is mandated by Idaho Code section 54-2085. Therefore, if buyer is a client of and is represented by brokerage A and seller is a client of and represented by brokerage B, then it is not possible for either buyer or seller to be represented in a limited dual agency relationship with the brokerage. As paragraph 8 in the RE-14 and paragraph 18 in the RE-16 set forth, a limited dual agency situation may arise if the client consents to the brokerage introducing the client to sellers or buyers (as the case may be) that the brokerage also represents, thus creating limited dual representation. Paragraph 34 of the RE-21 must accurately disclose the nature of the agency relationship between the respective brokerages and the buyer and seller.

In answer to broker's second question and based on the answer to the first question, broker has a right to correct what he perceives to be an error in the RE-21 regarding disclosure of the agency relationship.

In answer to the third question, it is important to keep in mind that the RE-14 and the RE-16 are agreements strictly between a buyer and broker or seller and broker, as the case may be. The consent to a limited dual agency relationship in the RE-14 or RE-16 is merely between the

client and their brokerage and merely allows the brokerage, if consent is granted, to introduce that client to the brokerage's other clients. The seller is not a party to and is not bound by the RE-14 and the buyer is not a party to and is not bound by the RE-16. If the transaction involves cooperating brokerages, consent to limited dual agency in the RE-14 or RE-16 is not applicable because the buyer and seller are not represented by the same brokerage. As a result, in this particular situation, even if sellers consented to limited dual agency and/or assigned agency representation in their RE-16 with their brokerage, it is not accurate for purposes of paragraph 34, part 2 of the RE-21 to disclose that sellers are represented by their broker as limited dual agent because the buyers in this case are not represented by sellers' brokerage.

## **COMMISSION**

### **Seller's Agent Demanding Commission From Buyer's Agent**

QUESTION: An agent represents a buyer that looked at a home, but decided not to make an offer. Seller's representation agreement with his former agent expired and the seller put it on the market as "For Sale by Owner." The buyer looked at the home again and decided to make an offer. Buyer's agent asked the seller if the offer should be submitted to the former listing agent or directly to the seller. The seller said to submit the offer directly to him and that seller will take care of their former listing agent. The seller entered into a compensation agreement with buyer's agent giving a 3% commission. Seller's former listing agent is now requesting a portion of the buyer's agent's 3% commission. Buyer's agent questions if seller's former listing agent is entitled to a portion of his commission.

RESPONSE: Based on the facts given to the Hotline, it appears there is no contractual agreement that entitles seller's former listing agent to a portion of buyer's agent's commission. Listing agent's commission is based upon the seller's representation agreement between his/her broker and the seller.

### **Commission Dispute with Seller**

QUESTION: An agent entered into an Exclusive Seller's Representation Agreement that expired. Shortly after expiration, a buyer's agent called and said he had a buyer who saw the property advertised by the agent on Craig's List. The buyer made an offer that seller accepted. Seller now states they will not pay the agent a commission because the Seller's representation agreement expired. Seller offered to pay the agent \$1,000 to help close the transaction. Agent questions whether she is entitled to a commission in this matter since she marked that she would be entitled to a commission if the property sold within 30 days after expiration.

RESPONSE: The RE-16 Exclusive Seller Representation Agreement states that a commission is owed if the property is "sold, exchanged or optioned within \_\_\_\_\_ days following expiration of the term hereof to any person who has examined, been introduced to or been shown the property during the term hereof." (Underlining added). The agent will have to

prove that the buyer was “introduced” to the property during the term of her representation agreement in order to receive a commission per the terms of the contract.

### **Commissions Paid to a Corporation**

**QUESTION:** A broker has incorporated his brokerage and conducts business under an assumed business name. The broker has his real estate commissions paid through the corporation. The broker has been told by the Idaho Real Estate Commission that all members of a corporation have to be licensed real estate agents in order for the corporation to receive the commission. The broker questions whether this is correct.

**RESPONSE:** Idaho Code Section 54-2054 deals with commissions. Specifically, subsection (2) states:

(2) 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 person 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. This section shall not prohibit payment of a part or share of a commission, fee or compensation by the broker to a legal business entity, all of whose shareholders, members or other persons having a similar ownership interest are active real estate licensees. An Idaho licensee may pay any part or share of a commission, fee or compensation received, directly to the buyer or seller in the real estate transaction. However, no commission, fee or compensation may be split with any party to the transaction in a manner which would directly or indirectly create a double contract, as defined in this chapter, or which would otherwise mislead any broker, lender, title company or government agency involved in the transaction regarding the source of funds used to complete the real estate transaction or regarding the financial resources or obligations of the buyer. (Underlining added).

The statute clearly states that commissions may be paid to a business entity (in this situation the corporation) only if all owners are active real estate licensees. If any of the shareholders or owners of the corporate entity are not licensees, then the commission may not be paid to the corporation. Broker should keep in mind that employees are not “owners” or shareholders of the corporation.

### **Commission Dispute with Seller**

**QUESTION:** An agent represented a seller in a transaction where shortly before closing the seller decided not to pay the agent the full commission set forth in the representation agreement. The agent contacted the title company and asked them to hold the full amount of the

commission because of a dispute with the seller. The seller is now refusing to talk to the agent about the commission and the agent questions what her next move should be.

**RESPONSE:** The terms of the contract control the parties' duties, rights and responsibilities (i.e. the representation agreement). Unless otherwise provided in the contract, a party may not unilaterally change the terms of the contract without the consent of the other party. If the seller agreed to pay the agent a full price commission but then later changed her mind then seller may be in breach of that agreement. Agent may have to sue the seller for breach of contract to collect the full commission. The agent is advised to seek the services of private legal counsel.

### **Oral Commission Agreement**

**QUESTION:** Broker showed a partially constructed high-end home in a gated community almost two years ago. Broker was accompanied by a client and an agent from her brokerage. At the time, the home was part of a bankruptcy proceeding and the builder was in "first position" to recover the home from bankruptcy. Broker asked the builder if he would pay her a commission in the event he obtained possession of the home and she procured a buyer. The builder responded that he would pay broker a commission of three percent (3%) in the event he obtained possession of the home and she presented a buyer for the home. The builder obtained possession of the home and broker found a buyer for the home. Closing occurred two weeks ago, but the builder thus far refuses to pay broker any commission. Builder denies verbally agreeing to pay broker a commission. Broker asks whether she may attempt to enforce the oral agreement with the builder for a three percent commission.

**RESPONSE:** Under Idaho Code section 9-508, any contract for the payment of money or thing of value as a commission for procuring a purchaser of real estate must be in writing and signed by the owner of the real estate to be valid. In this case the commission agreement was verbal and, therefore, unenforceable under section 9-508.

### **Commission on a Lease/Option Agreement**

**QUESTION:** Agent entered into an RE-16 Exclusive Seller's Representation Agreement with seller. Seller has decided to enter into a lease with option to purchase agreement with a lessee/potential buyer. Seller wants to pay agent a commission or otherwise compensate agent for her time and efforts. Agent questions the proper method for handling payment in this case.

**RESPONSE:** There is not a correct or incorrect method for seller to pay a commission this situation. Agent and seller may amend their seller's representation agreement to reflect that, in consideration for Agent agreeing to cancel or terminate the seller's representation agreement, seller agrees to pay Agent the agreed-upon compensation. The addendum should also indicate that, upon payment of the agreed-upon amount, the seller's representation agreement is terminated and neither party has any ongoing obligations to the other. In the event the lessee/potential buyer exercises the option to purchase, Agent and seller may enter into a new agreement if the seller wishes to employ Agent for her services.

## **Commission Dispute**

**QUESTION:** Broker agent entered into an RE-12 Compensation Agreement with Seller. The agreement specifies a commission of 6% in the event agent locates a buyer for Seller. Seller is not Broker's client and Broker has not entered into a representation agreement with Seller. Agent located a buyer who made an offer that seller accepted. Closing is set for the near future. Seller now refuses to sign any closing-related document specifying a commission of 6% and states that she will only agree to pay a commission of 3%. The title company has indicated to broker that it will only release the commission amount it is instructed to release from seller. The title company has indicated that it will hold any disputed commission amount and will release it when the parties resolve the dispute in writing or one party obtains a judgment. Broker questions her options in collecting the disputed commission amount.

**RESPONSE:** Broker may sue the seller for the disputed amount in district court or small claims court. Per the RE-12, if broker sues seller in court and prevails, seller is required to pay court costs and attorney fees. Litigation in district court, however, may be time consuming and costly, and even if broker prevails, there is no guarantee broker will recover all of her attorney fees. Broker's decision regarding how to proceed against the seller for the disputed commission amount depends on broker's tolerance for the risks of litigating in district court as opposed to small claims court. Also, broker should take care that any closing instructions specify the disputed commission amount and that the title company is holding the disputed amount until the matter is resolved. The Hotline recommends that Broker contact her own attorney for assistance with this matter.

## **Negotiating Commission in RE-21 Purchase and Sale Agreement**

**QUESTION:** Agent has increasingly encountered situations where a buyer's agent will including in Paragraph 4, "Other Terms and Conditions", of the RE-21 a different, higher commission than the commission advertised in the MLS listing. Agent mostly sees this practice in short sale transactions. Agent questions whether it is appropriate to include different compensation terms in the RE-21 from the compensation advertised in the MLS listing.

**RESPONSE:** Based on the information provided by agent, it is not appropriate to include terms regarding compensation in the RE-21 because the agents are not parties to the Purchase and Sale Agreement. Therefore, terms of compensation should not be made part of the Purchase and Sale Agreement. In fact, Article 16, Standard of Practice 16-16 of the National Association of REALTORS® Code of Ethics states as follows: "REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation." Furthermore, it may potentially be argued that buyer's representative, by virtue of participating in the MLS as a cooperative broker, already "accepted" the compensation terms set forth in the MLS listing/advertisement. Finally, agents should be particularly careful

regarding adjustments to compensation agreements in a short sale transaction. In short sale situations the lender/underwriter usually compromises on the outstanding loan amount owed by the seller and, as part of that compromise, negotiates or requires reduced commissions for the real estate professionals involved. It is possible that the lender/underwriter involved in the transaction may consider the unilateral increase of the compensation after the fact to be an act of fraud or misrepresentation, which could expose an agent to liability.

### **Commission Dispute**

QUESTION: Seller's Agent advertised a commission of three percent (3%) in the MLS. Buyer's Agent made an offer on behalf of Buyer, which Seller accepted. After Buyer's acceptance, Seller's Agent changed the MLS listing to show a commission of two and a half percent (2 ½%). Broker questions whether the listing Agent can change the commission offered in the MLS after an offer is accepted. Seller's agent held the commission back at closing until the dispute is settled.

RESPONSE: The National Association of REALTORS® defines a Multiple Listing Service as "a means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law)." Based on NAR's definition, Seller's Agent made a unilateral offer for compensation in the MLS. Generally, an offer for a unilateral contract is accepted when the other side (the offeree) merely performs – in this case Buyer's Agent likely performed by submitting an offer on Buyer's behalf that Seller accepted. Nonetheless, absent Seller's Agent acquiescing, there is an evidentiary issue as to what agreement the brokerages reached in terms of compensation.

Article 17 of the National Association of REALTORS'® Code of Ethics governs disputes between agents relating to compensation. Article 17 states: "REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter." Buyer's Agent has three basic choices in proceeding. She may either: (1) accept the reduced commission amount to avoid the dispute; (2) attempt to negotiate a compromise on the disputed amount; or (3) may seek arbitration of the matter with her local association of REALTORS® and attempt to recover the full three percent (3%) originally included in the listing.

### **Commission Dispute/Arbitration**

QUESTION: Agent questions the proper designations for the "City" and the "State" top left-hand portion for the RE-33 Promissory Note. Agent also questions when to start counting "business days" for matters that have to be accomplished within a specified number of business days (inspections, for example). As a reference, Agent asks when to start counting "business days" if an agreement is signed at 5:01 p.m. on a Friday.

RESPONSE: The designated city and state on the RE-33 Promissory Note is not a material term to the promissory note agreement. Generally, the city and state where the "payee"

resides is the appropriate designated city and state since the payee is the party receiving payments under the promissory note. It does not, however, impact the enforceability of the promissory note if the maker's city and state is designated in the form.

“Business Days” is defined under paragraph 26 of the RE-21 Purchase and Sale Agreement. That paragraph states, in the third full sentence: “The time in which any act required under this agreement is to be performed shall be computed by excluding the date of the execution and including the last day.” Agent should note that, when computing business days, this definition merely states that the day the agreement is executed should be excluded from counting the time. It says nothing about excluding the first business day after the agreement is executed. Counting begins the next business day after the agreement is signed. So, using Agent's example, if an RE-21 is signed at 5:01 p.m. on a Friday afternoon, that day, the Friday, is excluded from counting for “business days” purposes. It is clear from the language in paragraph 26 that whether the agreement is signed during the business day (i.e. between 8:00 a.m. and 5:00 p.m.) is irrelevant. The counting begins on the next business day, which is Monday unless Monday is a holiday. The same would be true of the RE-21 was signed at 8:00 p.m. on a Tuesday evening. That day, Tuesday, is not counted – counting begins on the next business day, Wednesday (as long as Wednesday is not a holiday). Taking the example to the extreme, if an agreement is signed at 12:01 a.m. on a Monday, that day, the Monday, is excluded from counting “business days” and the counting begins on the next business day, which is Tuesday (unless Tuesday is a holiday).

### **Real Estate Marketing Agreement/Commission Dispute**

QUESTION: Agent represents a Seller whose Real Estate Marketing Agreement expired on October 31, 2008. The Agreement includes language that states that for 30 days following the expiration of the Agreement, Seller cannot sell, exchange, option, or agree to sell, exchange or option the property without payment of a commission to the Brokerage. The only exception to that is if Seller retains the services of another Brokerage. Seller informed Agent that Seller has agreed to trade the property, but will wait until after December to do so in order to avoid paying Agent a commission. Agent questions whether he is entitled to a commission.

RESPONSE: The terms of the contract control the parties' rights, duties and responsibilities. Paragraph 4 of the Real Estate Marketing Agreement states:

Post Expiration Period – the broker fee is payable if the property is sold or any portion thereof or any interest therein is directly or indirectly sold, exchanged, or optioned, or agreed to be sold, exchanged, or optioned within the Post Expiration Period to any person who has examined, been introduced to, been shown or been offered the property during the term thereof. If the Owner upon termination or expiration of this contract enters into an exclusive employment contract to market the property with another Broker, this Post Expiration Period shall not apply.  
(underline added)

Based on the facts given to the Legal Hotline, Seller agreed to “trade” or otherwise exchange the property during the “Post Expiration Period” of the Agreement. Even if Seller waits until 90 days after the Agreement expires to conduct the transaction, it appears that Seller came to an agreement to dispose of the property during the Post Expiration Period. Therefore, as long as the other requirements in the Post Expiration Period provision are satisfied (i.e. the transaction is with a party that was introduced to, made an offer on, was shown, or examined the property during the effective period of the Agreement) and Seller has not retained the services of another brokerage, it appears that Seller owes a commission to Agent because Seller actually reached an agreement with this potential “buyer” during the Post Expiration Period. Seller cannot merely wait until the 90 day Post Expiration Period passes to avoid paying a commission on an agreement that was actually made during that Post Expiration Period.

### **Commission Dispute**

**QUESTION:** Agent represents Seller. The MLS listing states that the “Buyer’s Agent to be present on initial showing or commission to be 1%.” Buyer’s Agent was not present at the initial showing to Buyer and Buyer’s Agent is aware of that fact. Buyer’s Agent, however, claims that she is entitled to a commission of 3.5% because she was not representing Buyer at the time he initially saw the property. As a result of the apparent commission dispute, the title company informs Agent that it will not close the transaction unless the agents agree to allow the Title Company to hold the disputed amount until they reach a resolution. Agent questions whether the Title Company can do this and questions whether she has a problem with the offer for compensation in the listing. Agent also indicates that Buyer’s agent may engage in some conduct that may affect the closing due to the commission issue.

**RESPONSE:** As for the offer of compensation, the Model Rules and Regulations promulgated by the National Association of REALTORS®, Section 5, Division of Commission, states in relevant part that:

The listing broker shall specify, on each listing filed with the multiple listing service, the compensation offered to other multiple listing service participants for their services in the sale of such listing. Such offers are unconditional except that entitlement to compensation is determined by the cooperating broker’s performance as the procuring cause of the sale (or lease) or as otherwise provided for in this rule.

(emphasis added). While Note 5 to the model rule provides that cooperating participants may, by mutual agreement, modify the cooperative compensation, this is irrelevant to the requirement that the listing broker specify the compensation offered and that such offers are unconditional. An offer of compensation in a listing that specifies that a buyer’s representative is entitled to a reduced commission of one percent (1%) if not present at the initial showing is a conditional offer. Agent should check with her local MLS to determine whether the MLS has adopted the NAR model rules and regulations for MLS’s. If so, the offer of compensation in the listing is not in compliance with the rule.

As for the title company issue, the agents cannot control the title company and its decision regarding the commission dispute, though the respective clients may possibly have a legal claim against the title company if its actions interfere with their agreement or otherwise prevent closing. Likewise, if Buyer's Agent's actions interfere with the contract between Buyer and Seller, they may possibly have a legal claim against Buyer's Agent. Buyer's Agent may also accept the one percent commission and then seek arbitration through the MLS or local board if Buyer's Agent feels she is entitled to greater compensation.

As for any conduct by an agent that affects a closing, both Agents have an ethical and statutory duty to act in the best interests of their clients and not to engage in conduct that disrupts the clients' transaction or otherwise cause the closing to be delayed or to fail.

## **CONTRACT**

### **Counteroffer Made During Home Inspection Period**

QUESTION: An agent represented a buyer in a transaction that failed due to the home inspection. The buyer presented a list of disapproved items in a timely matter to the seller. Seller refused to fix any disapproved items and sent a counteroffer stating the property was being sold "as is" and changing the date for the buyer to respond to seller's refusal to fix disapproved items. The buyer did not sign the counteroffer. The seller's agent stated that the new date in the counteroffer for the buyer to respond controlled. Buyer's agent argued that the original terms in the Purchase and Sale Agreement controlled. The agent questions which terms control in this situation.

RESPONSE: Based upon the facts given to the Hotline, the parties entered into a binding contract and were in the home inspection period. One party may not unilaterally change the terms of the original offer. Thus, for new terms to be binding, both parties must agree in writing, evidenced by their signatures. Although the document is titled "Counteroffer" what seller sought was a change or amendment to the terms of the contract. The Hotline has been informed that the buyer did not sign the counteroffer. Therefore, the original terms of the contract control.

### **Seller Using the RE-27 to Terminate a Contract**

QUESTION: An agent represents a seller in a transaction where an accepted offer was contingent upon the buyer's personal residence selling. The parties entered in the RE-27 Seller's Right to Continue to Market Premises. Seller has now been informed by his employer that he will be returning to his home town and not transferred permanently. Therefore, Seller has no need to sell his home. Seller wishes to terminate the contract now and questions whether he may utilize the RE-27 to terminate the contract.

RESPONSE: The RE-27 states that: "Should SELLER receive another acceptable offer to purchase, SELLER shall give BUYER written notice of such acceptable offer. BUYER shall have \_\_\_\_ consecutive hours after receipt of such written notice to waive or remove all

BUYER(S) contingencies in this addendum. . .”. Clearly the quoted language indicates that the seller may only utilize the RE-27 if seller receives another acceptable offer to purchase. If the seller terminates the contract, based solely on the fact that he no longer has to re-locate then seller risks a lawsuit for damages and/or specific performance. In addition, The agent’s knowledge that seller will not perform under the contract is an adverse material fact that agent will need to disclose to the buyer.

### **Necessity of Signing Notice to Terminate Contract and Release of Earnest Money**

QUESTION: An agent is involved in a transaction that was terminated. The sellers, who are brothers and tenants in common, agreed to verbally return the earnest money to the buyer. The RE-20 Notice to Terminate Contract and Release of Earnest Money was sent to the sellers. One of the brothers signed the release, but the other brother has been too busy to sign the notice. The earnest money is a rather large amount and buyers would like the earnest money returned immediately. The agent questions the necessity of having the Notice to Terminate Contract and Release of Earnest Money signed considering that sellers have verbally agreed to return the earnest money to the buyers.

RESPONSE: Seller’s inability to sign the Notice to Terminate Contract and Release of Earnest Money does not automatically give the buyer the right to the return of the earnest money if there is an earnest money dispute. In this instance there is not an earnest money dispute and the parties do not need to sign the Notice to Terminate Contract and Release of Earnest Money in order for the earnest money to be returned to the buyer. The purpose of the RE-20 is to protect the parties from any claims, actions or demands the parties may have against each other. Some buyers and sellers refuse to sign the RE-20 because they do not wish to waive such claims.

The broker may also rely on the terms of the Purchase and Sale Agreement or any other written documents signed by the parties to determine how to disburse the funds. Disbursement of the earnest money is solely within the discretion of the brokerage. Idaho law states that the discretionary disbursement by the broker, based upon a reasonable review of the known facts, is not a violation of license law, however, it may subject the broker to civil liability if the funds are not properly disbursed. Therefore, the broker has the option of refusing to release the disputed funds, and the broker may hold the funds until ordered to release such funds by a court of proper jurisdiction. Should the broker decide not to disburse the funds, but rather hold the funds until a court order is issued, the broker must give the parties written notice of his decision to hold the earnest money.

### **“Delivery” of a Contract and Definition of Business Day v. Calendar**

QUESTION: An agent questions when a contract is considered delivered. For instance, if seller’s agent e-mails an acceptance to the buyer’s agent, is it considered delivered when e-mailed or when buyer’s agent opens and reviews the e-mail?

The agent also questions how the term “business day” applies to “deliver” of a contract and how you calculate deadlines. Another agent told the inquiring agent that he believes that

when a contract is delivered, the delivery must occur within the “business day” referred to in the contract or the contract is not effective until the next business day, which gives buyers additional days to satisfy specified deadlines such as inspections to be accomplished within “x” days of acceptance.

**RESPONSE:** A contract is considered delivered and in effect when an agent hand delivers, e-mails or faxes a contract to buyer or seller’s agent, not when the other agent has the time or opportunity to read e-mails, faxes or the mail. “Time is of the essence” in every contract.

A purchase and sale agreement, or any contract that must be signed, is valid and enforceable when properly executed and delivered to the other party. “Business Days” do not dictate the effective date of a contract. Business days are only used to calculate home inspection cutoffs and other deadlines referred to in the contract. If a contract is signed and delivered at 7:00 p.m. on a Friday for example, it becomes effective at that time not the next “business day.”

### **Buyer Terminating Backup Offer**

**QUESTION:** A broker’s agent made an offer on a home on behalf of a buyer, which the seller accepted as a backup offer. An addendum to the contract states: “Seller will notify buyer in writing of change of position in the event first offer is withdrawn. Buyers will have 24 hours to respond and move into first position. If no response is received the seller will begin accepting new offers and actively marketing the property.” The buyer signed the addendum. The broker normally adds language in a backup offer that the buyer has the right to withdraw his/her offer before moving into first position. This language was not inserted in the addendum and buyer now wishes to withdraw his/her offer and make offers on other homes. The broker questions whether the buyer may terminate the contract. The broker also questions whether the earnest money needs to be placed in his trust account or if he may return the earnest money to the buyer on this transaction since the time has not run for the broker to deposit the money in his trust account.

**RESPONSE:** The seller’s terms that if the first offer fails, then buyer is put on 24 hour notice to respond and move into first position contemplates that the parties do not have a binding contract until the buyer is put on notice and decides whether to move into first position or withdraw. Until such condition precedent is met, it appears no binding contract has formed. It is good practice to notify seller of buyer’s intent to withdraw the offer. The broker may thereafter return the earnest money to the buyer. Broker should also note that under Idaho Code section 54-2041 broker has a duty to immediately deposit earnest money in a trust account upon receipt.

### **Validity of Contract When Legal Description is Added in an Addendum**

**QUESTION:** An agent questions whether a contract is valid and enforceable if the Purchase and Sale Agreement does not include a legal description, but is then added later as an addendum.

**RESPONSE:** A binding contract for the purchase and sale of real property requires a proper legal description of the property. The legal standard for describing property in a contract

is a description that is sufficient to objectively identify the property subject to conveyance. Therefore, a street address, a lot and block number or a formal metes and bounds description are all sufficient. Other methods for describing property may also be sufficient, depending on the circumstances, as long as the parties, a court, or a third party can objectively determine and identify the property.

Agents must take care in listing a property or drafting an offer to ensure that the subject property is adequately described. The use of a full and accurate legal description is the preferred practice. However, use of a common address, so long as it unambiguously and particularly identifies the subject property usually suffices. If a “proper” legal description is not available at the time of contracting, the best practice is to indicate the parties’ agreement to add a legal description via an addendum when it is available, but the parties must objectively describe the property as accurately as possible in the initial agreement or it may be subject to invalidation. Note that there is no valid contract until all the required elements are met. Thus, only until a legal description is attached will the contract be enforceable.

**Please note that in the time between this response and publication of the “Top One Hundred” the Idaho Supreme Court issued its decision in *Ray v. Frasure*, which decided that a physical address alone is insufficient to properly describe real property in a purchase and sale agreement. As a result, licenses must ensure that a proper legal description is included with all purchase and sale agreements.**

### **Termination of Contract and Earnest Money**

QUESTION: Agent represents Seller. Buyer terminated or attempted to terminate the purchase and sale agreement via an addendum. No reason for termination was specified, but the termination came during the home inspection period. Buyer did not provide Seller any list of unsatisfactory items as a result of the home inspection. Agent questions whether Buyer has to indicate why she is terminating the contract. Buyer’s Agent stated over the telephone that Buyer does not want to purchase the property because of the current economic situation. Agent also questions whether Seller’s may claim the earnest money.

RESPONSE: The parties are bound by the term of their agreement, which were mutually agreed upon in the purchase and sale agreement and all applicable addenda. Absent the failure of a contingency or some other specified condition within the purchase and sale agreement, Buyer’s unilateral termination is likely a breach of the agreement. Unless buyer specifically expressed current economic concerns as a contingency or condition to purchasing the property, that is not a sufficient reason to terminate the agreement. Furthermore, while Buyer’s Agent has not specified a reason related to the home inspection contingency, based on the facts provided to the Legal Hotline, it does not appear that the inspection contingency provides a valid basis for Buyer’s termination either. Buyer never provided Seller with a list of unsatisfactory items for Seller to repair, which is a necessary step of the home inspection contingency process.

Paragraph 28 (“Default”) of the RE-21 states that “if buyer defaults in the performance of this agreement, seller has the option of (1) accepting the Earnest Money as liquidated damages or

(2) pursuing any other lawful right or remedy to which seller may be entitled.” Assuming no other valid grounds for Buyer’s termination of the agreement, one remedy Seller is entitled to is retention of the earnest money.

Idaho Code § 54-2046(1) states that the broker holding entrusted funds may not make a disbursement without a written signed authorization from the parties. This section also states that instructions regarding disbursement of earnest money may be contained in the purchase and sale agreement. While the terms of the purchase and sale agreement and addendum may be sufficient, an RE-20, which contains instructions regarding disbursement and release and waiver of claims may be a preferable method.

In the event Buyer disputes release of the earnest money to Seller, Idaho Code section 54-2047 governs earnest money disputes. Under that statute, the Broker holding the earnest money must notify the parties, in writing, of the dispute. The Broker may, in the Broker’s discretion and based on the applicable purchase and sale agreement, decide with party is entitled to the earnest money. While disbursing earnest money in this manner is not a violation of licensing law, improper disbursement may subject Broker to civil liability. If the Broker does not believe it can decide how to disburse the earnest money, the Broker may hold it until receipt of a court order regarding disbursement. If the broker decides to hold the earnest money, the broker must notify both parties in writing. The parties may then take court action for such an order, or the Broker may “interplead” the disputed earnest money to the court for an order.

### **Appraisal and Termination of Purchase and Sale Agreement**

QUESTION: Agent represents Seller in a transaction scheduled to close on October 15, 2008. Buyers have indicated that they are terminating the contract because the appraisal came in at the exact price of property and they were expecting more than the selling price of the property so that they could re-sell it. Agent questions whether the purchase and sale agreement remains enforceable and/or whether Buyers may terminate on the stated basis.

RESPONSE: The parties are bound by the terms that were mutually agreed upon in the purchase and sale agreement. Each party must perform the terms of the agreement in “good faith.” Unless the parties agreed that the transaction was contingent on the appraisal coming back at more than the agree-upon purchase price, terminating the agreement based on the appraisal is questionable. Under Paragraph 3(C) of the RE-21, if Buyer’s lender requires an appraisal, the property must appraise at or above the purchase price and, if it does not, Buyer is entitled to a return of earnest money. In such a situation, Buyer may terminate the contract based on the financing contingency. This paragraph in the RE-21, however, does not create an “appraisal contingency.” While the appraisal may impact Buyer’s ability to obtain financing and, consequently, may trigger a financing contingency, based on the facts provided to the Legal Hotline, financing does not appear to be the issue in this particular case.

## Contract Dispute

**QUESTION:** Agent represents a Seller who lives out of state, but has property here in Idaho that Agent listed. Seller received an offer and signed the purchase and sale agreement. Upon receipt of the closing documents, Seller refused to sign and will not close on the transaction. Agent has made numerous phone calls to Seller, who refuses to return calls. Agent questions what to do and whether he may take action to recover any commission owed by Seller.

**RESPONSE:** The parties are bound by the terms that were mutually agreed upon in the purchase and sale agreement. Paragraph 28 (“Default”) of the purchase and sale agreement states that “if Seller defaults, having approved said sale and fails to consummate the same as herein agreed, Buyer’s Earnest Money deposit shall be returned to him/her and Seller shall pay for the costs of title insurance, escrow fees, appraisals, credit report fees, inspection fees, brokerage fees and attorney’s fees, if any. This shall not be considered as a waiver by Buyer of any other lawful right or remedy to which Buyer may be entitled.” Therefore, Buyer may pursue Seller for these damages. Additionally, because real property is unique, Buyer may be entitled to pursue an “equitable” claim for specific performance. In other words, Buyer may file a lawsuit asking a court to order Seller to carry through with the transaction. Of course, Buyer must decide whether to take action to recover his damages.

As for Agent’s commission, according to the Idaho Supreme Court a Broker earns a commission when (a) he produces a purchaser ready, willing and able to purchase based on the terms for purchase and sale; (b) the purchaser enters into a binding contract to purchase the property; and (c) the purchaser completes the transaction by closing in accordance with the terms of the contract. Margaret H. Wayne Trust v. Lipsky, 123 Idaho 253, 260 (1993). In this case Buyer was prevented from closing on the transaction because of Seller’s refusal to close. Seller will likely be unsuccessful in defending against Agent’s claim for a commission if his argument is that a commission is not owed because Seller refused to close on the transaction. Agent may proceed in small claims court against Seller if he so chooses. The terms and conditions of the Seller Representation Agreement, along with the facts of this case, will dictate Agent’s right to recover damages based on an unpaid commission. Agent should contact his own attorney for legal advice and direction on his claims.

## RE-27 Notice

**QUESTION:** Agent questions whether the definition of “Business Days” in the RE-27 means that, in the event seller receives a second offer and gives notice to buyer, that the time limit for buyer to remove or waive contingency(s) is counted only during a “Business Day.”

**RESPONSE:** The respective obligations of the parties are determined by their contract. In the event seller receives an acceptable offer from a second buyer and provides notice to buyer of that second offer, the RE-27, “Contingency Release Clause” states: “Should SELLER receive another acceptable offer to purchase, SELLER shall give BUYER written notice of such acceptable offer. **Buyer shall have \_\_\_\_\_ consecutive hours after receipt of such written notice to waive or remove all BUYER(S) contingencies in this addendum.**” Based on this

language in the RE-27, the definition of “Business Days” is not relevant to notice from seller regarding another acceptable offer. Per the quoted language, the pre-determined time period for buyer to remove or waive the contingency(s) begins and is counted in consecutive hours after receipt of written notice from seller.

In regards to seller’s written notice of a second acceptable offer, the “Contingency Release Clause” states that: “Notice shall be personally delivered to BUYER and/or their representative and acknowledged by same. Delivery may be in person or by mail, facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be deemed to be the same as deliver of an original.” Therefore, notice is not sufficient if it is merely verbal – notice must be in writing and delivered to buyer and/or buyer’s representative and acknowledged to be effective.

### **Addendum to Purchase and Sale Agreement**

QUESTION: Agent listed a property for sale and received an offer no. 1 from buyer, which offer included seller’s personal property. Seller rejected offer no. 1 outright. After seller received an offer from another buyer, buyer made offer no. 2, which did not address or include any of seller’s personal property. Seller accepted buyer’s offer no. 2. After the initial offer and acceptance, addenda to the purchase and sale agreement were made. Addendum no. 3, dated August 4, 2008, from buyers included a change in the closing date and a number of other items. Addendum no. 3 was not signed by buyers, but was signed by buyer’s agent. Sellers signed Addendum no. 3. In subsequent telephone calls, buyer’s agent indicated that buyer’s expected that certain personal property was included in the transaction. Seller’s agent indicated that the personal property was not included in the transaction. Buyers then submitted or re-submitted Addendum No. 3, which included handwriting indicating, among other things, that the personal property was included in the transaction. Buyer’s signed and dated this second Addendum No. 3 on August 15, 2008. Buyer’s agent requests a telephone conference to discuss the personal property that was originally discussed in the first offer that was rejected. Seller’s agent questions whether Addendum No. 3 is valid since buyers did not sign it when it was originally submitted and, if it is valid as originally submitted, whether the subsequent Addendum no. 3 dated August 15, 2008 valid?

RESPONSE: Addenda to a purchase and sale agreement must be fully executed to be valid and binding. Certain facts and circumstances, however, may demonstrate acceptance of an addendum to the purchase and sale agreement. Sellers may attempt to argue that Addendum no. 3 as originally submitted on August 4, 2008, is not valid because buyers never signed it. Buyers, on the other hand, may likely prove that Addendum no. 3, as originally submitted on August 4, 2008, is valid and binding because sellers signed it and then engaged in a course of conduct demonstrating their acceptance of the terms in Addendum no. 3 dated August 4, 2008.

The same is not true of Addendum no. 3 dated August 15, 2008. Technically speaking, there are no addendums to an addendum. If buyers wish to further amend the purchase and sale agreement, they should submit an Addendum no. 4 with the additional terms. If sellers do not re-

sign Addendum no. 3 dated August 15, 2008, it is not valid and does not become part of the contract. The Re-11 for Addendum explains the impact of an addendum on an underlying Purchase and Sale Agreement. Also, because sellers outright rejected buyer's offer no. 1 and buyer's offer no. 2 did not include seller's personal property, unless sellers agree to include personal property in a subsequent addendum to the purchase and sale agreement, there does not appear to be any agreement to include seller's personal property in the transaction.

### **First Right of Refusal**

QUESTION: Agent listed "Sublot 1" of townhouse for Seller. Seller is currently in foreclosure, so the offer is contingent on the lender's approval. The townhouse is subject to a certain recorded declarations, one of which includes a reciprocal right of first refusal, which states that if "Sublot 1 is to be sold then the owner of Sublot 2 will be given first right of refusal of any sale" and vice versa. Agent identified a Buyer; Buyer and Seller are represented by the brokerage under a dual agency with assigned agent representation. Upon receipt of Buyer's offer, Seller provided written notice to the owner of "Sublot 2" that an offer of sale had been received, the amount and the closing date. Agent has likewise had discussions with the owner of "Sublot 2" and/or the owner's own real estate agent regarding the sale of "Sublot 1," including the sale price and closing date. Written notice of the sale of "Sublot 1" was provided to the owner of "Sublot 2" almost a month ago. The owner of "Sublot 2" initially stated he would "think about" Buyer's offer, but now demands a copy of the written offer, which both Buyer and Seller have instructed Agent not to provide. The lender has accepted Buyer's offer and Buyer and Seller are ready to close. The title company informs Agent that it cannot close on the transaction due to the right of first refusal. The lender has also indicated to Agent that it will not allow the owner of "Sublot 2" to purchase from Seller because the owner and Seller have a business or other relationship that prevents the transaction from being an "arms length" transaction. Agent questions whether she is required to provide a copy of the offer to the owner of "Sublot 2" and what she should do given the right of first refusal. Agent also questions the potential legal ramifications for the parties involved if closing fails.

RESPONSE: the owner of "Sublot 2" holds a valid right of refusal by virtue of the declaration that runs with the townhome. The right of first refusal, however, is vague and does not provide any terms or conditions regarding how to exercise the right of first refusal and/or how much information the party entitled to exercise the right of first refusal must receive in regards to an offer to purchase. Agent has two countervailing factors to weigh in this situation. On the one hand, under Idaho Code section 54-2087, Agent owes a duty to Seller to maintain Seller's confidential information. Under Idaho Code section 54-2083, confidential information is information provided to the Agent that is not public information, that the client has not authorized Agent to disclose, if disclosed would be detrimental to the client, and that the client is not obligated to disclose to a third party. On the other hand, the owner of "Sublot 2" has a valid right of first refusal on Seller's "Sublot 1." Since Seller is obligated to provide at least some information about the transaction to a third party (i.e. owner of "Sublot 2"), at very least the terms of the offer cannot be "confidential information." There is nothing, however, in the right of first refusal that entitles the owner of "Sublot 2" to an actual copy of the offer. At very least,

Seller should provide the owner of “Sublot 2” with information sufficient to allow the owner to make an informed decision regarding his right of first refusal.

Based on the facts provided to the Legal Hotline, Seller has already provided the owner of “Sublot 2” with written notice of an offer, the sale price and the closing date. Agent may be well advised to follow up with the owner of “Sublot 2” in writing, reiterating the material terms of the offer and indicating that if owner does not exercise his first refusal by a date certain, Seller will deem owner to have waived or declined his right of first refusal. Agent should also provide written verification from the lender on the lender’s position with regards to selling the property to the owner of “Sublot 2.” Agent is also well advised to instruct Seller to retain or consult with his own legal counsel.

In the event the transaction fails, it is possible that both Buyer and Seller may have legal claims against the owner of “Sublot 2” for failure to act and/or for interfering with their contract, depending on whether the owner’s conduct is sufficient to suggest he intentionally or tortiously interfered. It is extremely unclear as to the lender’s potential liability based on the lender’s refusal to allow a sale to the owner of “Sublot 2.” It is unclear if the lender’s position is based on a law or regulation, or whether it is acting on internal policy. Nonetheless, because the transaction is a short sale, the lender has significant bargaining power and leverage in regards to the terms it is willing to accept in lieu of foreclosure.

### **Purchase and Sale Agreement**

QUESTION: Agent represents a Seller who had previously entered an agreement to sell his home through an entity or organization called Property by Owner. Agent sold the home after listing through the MLS with a cooperating broker representing buyers in the transaction. Property By Owner has demanded a copy of the purchase and Sale Agreement and/or documents related to the transaction. Agent questions whether she is obligated to provide copies of these documents.

RESPONSE: Agent does not have a duty or obligation to disclose or provide copies of any documents pursuant to the demand. Under Idaho Code section 54-2083(6), the documents related to the transaction are likely confidential client information. The agent should relay the demand to her client for the client to consider.

### **Counter Offer**

QUESTION: Broker’s Agent received a counter-offer (in a series of offers and counteroffers) from Buyer that Seller signed, signifying Seller’s acceptance. Within twenty-four hours after receipt of and signing the counter offer, Seller indicated that he forgot to change the sales price and wants to withdraw his acceptance of the counter-offer. Broker questions whether the offer is a binding contract.

RESPONSE: Absent an agreement or clause in the contract allowing withdrawal within 24 hours, Seller may be bound by the terms of the signed and accepted counteroffer. Seller’s

failure to adjust the sales price of Buyer's latest counteroffer may not provide a valid basis or reason to withdraw Seller's acceptance of Buyer's counteroffer. Under the appropriate circumstances, Seller's failure to change the sales price before signing Buyer's counteroffer may create certain defenses to enforcement, including "unilateral mistake," which allows for reformation of the contract if proven. Seller may establish a defense to enforcing the contract if seller can prove that he never intended to sell the property for the price identified in the counter offer and, thus, never reached a "meeting of the minds" with Buyer sufficient to form the contract. Having signed the counteroffer, Seller may face significant difficulties in proving his lack of intent. Agent should advise Seller to contact his own legal counsel for review and recommendation if Seller wishes to challenge the purchase and sale agreement as written.

### **Necessity of Signatures of All Parties on all Paperwork**

QUESTION: Agent questions whether both husband's and wife's signatures need to be on all documents in a transaction. In this case, the husband and wife signed the Purchase and Sale Agreement as buyers, but only the husband's signed the counter-offers and addendums.

RESPONSE: Failure of signature is ordinarily a defense to enforcement of a contract by the party who failed to sign. However, if one Buyer has the proper authority to enter into the contract on behalf of the non-signing Buyer, such as a power of attorney, the contract is likely valid and enforceable. This is especially important when a married couple is selling community property. Under Idaho Code Section 32-912 both a husband and wife are required to sign any document to sell, convey or encumber community property. The only exception to this is if one of the spouses executes a power of attorney authorizing the other to sign.

### **Costs Paid by Buyers and Sellers in RE 21**

QUESTION: Agent represents Sellers. In paragraph 17, "**Costs Paid By:**", Sellers agreed to pay the costs associated with "Fuel in Tank – Amount to be Determined by Supplier." Agent reads this cost item to mean that Sellers agreed to shoulder the costs of the "fuel in tank," i.e. the remaining or existing fuel in the storage tank and not to charge Buyers for value of that fuel. Buyer's, on the other hand, feel that Sellers agreed to pay for costs related to filling the tank up to full from its level at the time of closing. Agent questions whether paragraph 17 refers to the cost of existing fuel or the cost of fuel necessary to fill the tank up to capacity.

RESPONSE: the phrase "amount to be determined by supplier" in relation to "fuel in tank" in paragraph 17 of the RE-21 is instructive regarding the meaning of this particular item. If this cost item referred to fuel that was already in the tank at the time of the transaction, there would be no need for a supplier to determine the amount. Furthermore, from a practical perspective, Seller has already absorbed the cost of putting fuel into the tank. Paragraph 17 does not contemplate reimbursement for pre-transaction costs, rather, it contemplates costs to be incurred by one party or the other in relation to completion of the purchase and sale agreement. For these reasons, the phrase "fuel in tank" does not appear to refer to fuel already in the tank, but rather appears to refer to the costs associated with filling the tank from its current level at the

time of closing. Agent may consider advising Sellers to confer with their own legal counsel if Sellers wish to pursue this question further.

### **Sequence of Counter Offers**

QUESTION: Agents involved in a transaction question the sequence of multiple counteroffers and whether terms included in a previous counteroffer become part of a subsequent accepted counteroffer. The transaction in question involved several counteroffers, which were made on the RE-13 Counter Offer form, before a final agreement was reached.

RESPONSE: When a party rejects an offer and makes a counteroffer using the RE-13, the language and terms of the RE-13 become part of offer to be accepted. The RE-13 states at the top: “**THIS COUNTER OFFER SUPERSEDES ALL PRIOR COUNTER OFFERS**” (emphasis in original). Therefore, in any situation where the parties make multiple counteroffers using the RE-13, each subsequent counteroffer supersedes all prior counteroffers. Put another way, all prior counteroffers are “wiped out” by the newest counteroffer and none of the terms in the prior counteroffer become part of the final contract if an agreement is reached. For example, in a transaction involving seven counteroffers, the underlying purchase and sale agreement and Counter Offer # 7 are the contract – Counter Offer #'s 1 through 6 in such a transaction are superseded by Counter Offer # 7 and are not part of the contract.

There may, however, be exceptions to this general rule. It is possible for a party to include language in a counteroffer that incorporates the terms stated in a previous counteroffer. For example, the most recent counteroffer in a series of counteroffers may include language that expresses that party's intent to incorporate the terms of a previous counteroffer by stating something to the effect of “all other terms and conditions in Counter Offer # \_\_ to remain the same and to be incorporated herein.” Absent such language or expression of intent to incorporate terms from a previous counteroffer, the general rule applies.

### **Contracts for Sale**

QUESTION: Agent questions whether “contracts for sale” a/k/a “installment sale contracts” or “contracts for deed” are permissible in the state of Idaho.

RESPONSE: The Legal Hotline is unaware of any Idaho statute or case law from the Idaho Supreme Court that prohibits or makes installment sale contracts illegal in Idaho. Agent is cautioned, however, that installment sale contracts often include very harsh forfeiture provisions or often lack redemption rights or cure rights, and it is possible that a court, in the event of a default on the contract, may strike a forfeiture provision (a forfeiture provision may be prohibited by Idaho law anyway) or may read redemption or cure rights into the contract (i.e. treat the contract more like a traditional mortgage). The rights and obligations of the parties to a land sale contract are a matter of negotiation. If the parties agree to enter into a land sale contract, Agent is strongly encouraged to advise her client to retain a qualified real estate attorney to prepare the land sale contract.

## **DISCLOSURE**

### **Necessity of Property Condition Disclosure Form When Property is Exempt**

**QUESTION:** Agent questions the proper procedure with regard to the property condition disclosure form if the property is exempt from disclosure. Primarily, the agent wants to know if the seller should sign the property condition disclosure form and mark it exempt.

**RESPONSE:** Idaho Code Section 55-2505 states that the Property Condition Disclosure Act (“Act”) does not apply to property that falls under an exemption. Therefore, a property condition disclosure form is not required. Notwithstanding, the property condition disclosure form produced by the Idaho Association of REALTORS® has a section where the seller may mark the property as exempt. It appears the intent of the form is to put the buyer on notice that the property is exempt from disclosure. If the seller elects to use the form, the seller should mark through the inapplicable pages, initial each page, mark the proper box stating why the property is exempt, and then sign the form. As stated above, because the Act does not apply to exempt property, the seller may elect not to utilize the form at the seller’s discretion.

### **Disclosure by Seller of Suicide on Property**

**QUESTION:** An agent represents a seller in a transaction. The seller’s husband committed suicide on the property. The agent questions whether this should be disclosed to potential buyers.

**RESPONSE:** Idaho Code § 55-2801 governs psychologically impacted properties. Real property that is suspected of being the site of a suicide is considered psychologically impacted property. The Act 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.” It is clear, therefore, that there is no duty to disclose the psychological impact that may exist on the property.

However, the Act goes on to state that if “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.” From this provision it is clear that a buyer must request the disclosure in writing. It is also evident that an owner can continue to refuse disclosure so long as the buyer and his agent are made aware that the seller is refusing disclosure.

## **Property Condition Disclosure for Fractional Owners**

**QUESTION:** An agent questions if fractional owners need to fill out the seller's property conditional disclosure form.

**RESPONSE:** Generally, the Idaho Property Disclosure Act requires that in any transfer of residential real property, the seller must fill out the seller's property disclosure form. However, Idaho Code Section 55-2505 lists the exemptions to filling out the seller's property disclosure form. If a particular transaction is not listed among the exceptions listed in Idaho Code Section 55-2505, then the seller(s) must fill out the property disclosure form in order to comply with the Act. Idaho Code Section 55-2505 provides:

**EXEMPTIONS.** The provisions of this chapter do not apply to any transfer of residential real property that is any of the following:

- (1) A transfer pursuant to court order including, but not limited to, a transfer ordered by a probate court during the administration of a decedent's estate, a transfer pursuant to a writ of execution, a transfer by a trustee in bankruptcy, a transfer as a result of the exercise of the power of eminent domain, and a transfer that results from a decree for specific performance of a contract or other agreement between persons;
- (2) A transfer to a mortgagee by a mortgagor by deed in lieu of foreclosure or in satisfaction of the mortgage debt;
- (3) A transfer to a beneficiary of a deed of trust by a trustor in default;
- (4) A transfer by a foreclosure sale that follows a default in the satisfaction of an obligation secured by a mortgage;
- (5) A transfer by a sale under a power of sale following a default in the satisfaction of an obligation that is secured by a deed of trust or another instrument containing a power of sale occurring within one (1) year of foreclosure on the default;
- (6) A transfer by a mortgagee, or a beneficiary under a deed of trust, who has acquired the residential real property at a sale conducted pursuant to a power of sale under a mortgage or a deed of trust or who has acquired the residential real property by a deed in lieu of foreclosure;
- (7) A transfer by a fiduciary in the course of the administration of a decedent's estate, a guardianship, a conservatorship, or a trust;
- (8) A transfer from one (1) co-owner to one (1) or more other co-owners;
- (9) A transfer made to the transferor's spouse or to one (1) or more persons in the lineal line of consanguinity of one (1) or more of the transferors;
- (10) A transfer between spouses or former spouses as a result of a decree of divorce, dissolution of marriage, annulment, or legal separation or as a result of a property settlement agreement incidental to a decree of divorce, dissolution of marriage, annulment, or legal separation;
- (11) A transfer to or from the state, a political subdivision of the state, or another governmental entity;

(12) A transfer that involved newly constructed residential real property that previously has not been inhabited, except that disclosure of annexation and city service status shall be declared by the sellers of such newly constructed residential real property in accordance with the provisions of section 55-2508, Idaho Code;

(13) A transfer to a transferee who has occupied the property as a personal residence for one (1) or more years immediately prior to the transfer;

(14) A transfer from a transferor who 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;

(15) A transfer by a relocation company to a transferee within one (1) year from the date that the previous owner occupied the property;

(16) A transfer from a decedent's estate.

It does not appear from a review of those exemptions that the fractional owners fit any particular exemption. Therefore sellers should fill out a Property Condition Disclosure Form.

When a seller has not personally occupied a home the seller should note on the property condition disclosure form that he has not occupied the property and that any information provided is based on limited knowledge.

### **Client's Request Not to Disclose Selling Price to MLS**

QUESTION: An agent is involved in a transaction where the parties do not want the sales price disclosed and marked out paragraph 21 "Sales Price Information" in the RE-21. The MLS has told the agent that it is mandatory that the sales price be disclosed due to the agent's membership rules and regulations with the local MLS. The agent questions whether she should disclose the sales price when the buyer and seller have specifically requested that it not be disclosed.

RESPONSE: It is important to note that Idaho law does not require an agent to disclose the purchase price of property sold. Idaho Code § 54-2087 defines the real estate licensee's duty to a client. Among other things, the real estate licensee owes the duty to a client to perform the terms of the written agreement with the client; to exercise reasonable skill and care; and to promote the best interests of the client in good faith, honesty, and fair dealing. Also, a real estate licensee has the duty to maintain the confidentiality of specific client information as defined by and to the extent required by Idaho law. Idaho Code Section 54-2083(6) states that "information *generally* disseminated in the market place, including "sold" prices of property, is . . . not confidential client information . . ." Because of this, an argument could be made that the client's request that the information remain confidential made the information confidential because that information is no longer "generally disseminated in the market place." This may lead to an argument that release of purchase price after specific instructions from the client not to do so is a breach of the duty to promote the best interests of the client.

It is true that MLS rules require that subscribers and participants report sales prices to the service. Because such disclosure could arguable lead to the agent's breach of his duties owed to a client, most MLS's have (reluctantly) turned a blind-eye toward infrequent non-reporting. Other Idaho MLS's have amended local rules to ensure that participants and subscribers are not actively promoting the non-reporting of sales price information.

**Update: Between the time of this response and publication of the "Top One Hundred," the Idaho legislature amended Idaho Code Section 54-2083(6) to specifically state that the "sold" price of real property is not confidential information. This change in the law went into effect on July 1, 2008.**

### **Right to Rescind/Disclosure for New Construction**

QUESTION: An agent represents a seller in a transaction involving new construction. The seller filled out the RE-26 Seller's Property Condition Disclosure Form for New Construction Only and gave it to the buyer. Within three days the buyer terminated the contract using the 3 day right to rescind in the RE-26. Buyer based her decision to rescind on windows she did not like and the fact that the neighbor's yard was not finished. Seller's agent questions whether or not the buyer can terminate the contract based on these facts.

RESPONSE: The RE-26 states: "BUYER's rescission must be based on a specific objection to a disclosure in the disclosure statement. . . ." Sellers of new construction are exempt from the disclosure required by sellers of existing residential real property and need only disclose annexation and city services. Therefore, buyer may only rescind the contract due to a specific objection in the disclosure statement with regard to annexation and city services.

### **Necessity of Disclosing Mold That Was Remediated**

QUESTION: An agent listed and sold a home four years ago that had mold. The mold issue was remediated by a professional company and the buyer has not had any further mold problems. That buyer now would like to list the property with the agent and has requested that the prior mold issue not be disclosed. The agent questions whether the remediated mold needs to be disclosed.

RESPONSE: If the parties utilize the RE-25 Seller's Property Disclosure Form, then the mold will need to be disclosed under that form where it asks whether the home has had any mold related problems that have been remediated. The RE-25, however, is not mandatory. As long as the parties follow the mandatory disclosures found in the Property Condition Disclosure Act, the seller is not required to disclose the prior mold issues.

Idaho law generally requires a disclosure of all problems that seller is aware of, or should be aware of. If the seller believes that the mold problem has been fully resolved, then seller is safer to disclose the former mold problem along with a statement that it was remediated. Should the mold problem arise again and a buyer is able to establish that seller knew or should have

known of the existence of the problem and failed to disclose the same, then seller could be subject to a claim for fraud or misrepresentation. A seller is well advised to disclose the circumstances that gave rise to the problem and disclose the steps that were taken to repair the problem.

The agent should also keep in mind those duties owed to a buyer/customer. One of those duties is “to disclose to a buyer/customer all adverse material facts actually known or which reasonably should have been known by the licensee.” Idaho Code Section 54-2083 defines an adverse material fact as something that significantly affects the desirability or value of the property to a reasonable person. Whether a reasonable person will find remediated mold undesirable is a question that depends on the facts and circumstances of each transaction.

### **Disclosure of a Meth Lab**

QUESTION: An agent questions whether a prior meth lab found in a house needs to be disclosed to potential buyers.

RESPONSE: A meth lab needs to be disclosed because the property condition disclosure form asks if there are any toxic or hazardous materials on the property, or if the property has ever been used as an illegal drug manufacturing site. Idaho recently passed the “Clandestine Drug Laboratory Cleanup Act.” That act states that once a residential property owner is put on notice that a drug lab was located on the property, then the property owner shall meet the cleanup standards established by the Idaho Department of Health and Welfare. Once the property meets the cleanup standards and a certificate is issued then the 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.” Therefore, it appears that future disclosure of the meth lab is not required once the property owner receives a certificate evidencing that the cleanup standards have been met.

### **Disclosure of a Men’s Shelter Home**

QUESTION: Agent represents a buyer who is purchasing property and turning it into a men’s shelter home. Some of these men are convicted felons. What duty does the Agent/Buyer have to disclose to the neighbors and community that felons will be occupying the home?

RESPONSE: An Agent’s statutory duties are generally described under Idaho Code § 54-2086 and 54-2087, which identify Agent’s duties to “clients” and to “customers.” These statutory duties do not include or require disclosure to the neighbors or the community in general regarding buyer’s plans with the property. The Idaho legislature, however, passed a few new laws during the 2008 session that may impact buyer’s intended use. A license may be required to operate certain types of group transitional homes. See Idaho Code section 67-6531. Also, convicted sex offenders who are required to register as sex offenders are restricted by law in terms of how many registered sex offenders may live in the same residential dwelling. See Idaho Code section 18-8331. Therefore, the buyer may be required to make certain disclosures to the city or the county where the residential property is located in regards to the nature of the men’s

“shelter home” in order to operate such a facility in a residential dwelling. Depending on applicable zoning ordinances or other ordinances, the city or county may require further hearings or actions on buyer’s part to operate the “shelter home” in a residential area.

In advising the buyer, Agent should also be sensitive to federal fair housing laws, which prohibit discrimination against persons who are considered “disabled.” A person’s status as a convicted felon is not protected under the law, but if the convicted felon also suffers from some other condition that places him in a protected class, discrimination issues may be a concern. Agent should direct buyer to consult with his or her personal attorney for further direction.

### **Property Condition Disclosure Regarding Vacant Land**

QUESTION: Agent questions whether a property disclosure form needs to be utilized when dealing with vacant land.

RESPONSE: Idaho Code § 55-2501 et seq., commonly known as the Property Condition Disclosure Act, provides that any person who intends to transfer any “residential real property” shall complete all applicable term items in a property disclosure form. “Residential real property” is defined as real property that is improved by a building or structure that has one to four dwelling units or an individually owned unit in a structure of any size. It also applies to real property that has a combined residential and commercial use. By definition, vacant property does not come within the statutory requirement. Therefore, seller of a vacant parcel of property need not complete the form.

### **RE-42**

QUESTION: Agent questions whether the RE-42 Property Foreclosure Disclosure Form applies to vacant land or just residential properties?

RESPONSE: The RE-42 is intended to comply with the Property Condition Disclosure Act, Idaho Code Section 55-2501, et. seq. The RE-42 states that it applies to “...any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in Section 45-525(5)(b).” Idaho Code Section 45-525(5)(b) defines residential real property as:

(b) "Residential real property" shall include owner and nonowner occupied real property consisting of not less than one (1) nor more than four (4) dwelling units.

Therefore, the RE-42 applies only if the property in question has at least one, but not more than four, dwelling units. In other words, the RE-42 does not apply to vacant properties.

### **Disclosure Issues**

QUESTION: Agent represents seller, the developer of lots in a subdivision, who is caught in a jurisdictional battle between the County and local Fire District regarding enforcement of state mandated fire codes. Building permits have been issued for some lots, but the Fire Chief

threatens to fine and/or obstruct construction based on fire code enforcement issues. Agent questions the brokerage's potential liabilities and duty to disclose the dispute and potential issues with building on any of the unsold lots.

**RESPONSE:** Under Idaho Code sections 54-2086 and 54-2087, Agent has a duty to disclose adverse material facts to both customers and clients that Agent is aware of, or reasonably should be aware of. While there may be some question as to whether the jurisdictional dispute between the local governing agencies is an "adverse material fact" as that term is contemplated in the statute, there is no question that the dispute may impact a buyer's ability to construct a home on the lots. Since Agent is aware of the dispute and the potential impact on future construction, Agent should err on the side of disclosure to buyers so as to avoid potential liability traps down the road.

### **Disclosure of Possible Meth Lab**

**QUESTION:** Agent represented seller in the sale of a rental property. Buyer ordered an inspection. Agent met buyer's home inspector at the property and both noticed at that time an odd smell from one room, which they initially suspected may have been cat urine in the carpet pad. At that time agent also recalled from different continuing education courses that the smell of animal urine may actually be an indicator of methamphetamine production. Agent warned buyer's home inspector of the potential issues with drug production. Agent also contacted buyer's agent and informed buyer's agent of his concerns regarding potential drug production on the property. Buyer's agent advised agent that he used to do a lot of carpet work and was not concerned about drugs and suspected it was pet dander or waste. Agent also contacted a friend at a local police department and detectives were sent to the home to investigate. Upon conducting their investigation, the detectives advised agent that they did not suspect drug production in the home, but took a light bulb for testing. Agent advised seller of the results of the investigation conducted by the police detectives. After the transaction closed, agent was advised that the further testing on the light bulb revealed the presence of meth in the home. The police, however, advised agent that there is no evidence of a drug lab on the property and declined to report the matter to the Department of Health and Welfare, or pursue the matter any further. Buyer is an elderly gentleman on oxygen. Agent questions what information, if any, should be disclosed.

**RESPONSE:** The primary issue is what Agent knew and what Agent had a duty to disclose to the parties involved in the transaction. Under Idaho's Property Condition Disclosure Act, Idaho Code sections 55-2501 *et. seq.*, the "transferor" of real property (i.e. seller) is required to make certain disclosures in good faith, including the known presence of any hazardous materials or substances. Agent is not the "transferor" for purposes of the Property Condition Disclosure Act and agent has no statutory duty to conduct an independent inspection or investigation of the physical condition of property. It is also relevant that seller did not occupy the home prior to the transaction. It is unknown whether buyer's home inspector followed up on the drug suspicions or reported the matter to buyer or buyer's agent.

As for Agent's duty in this situation, Agent is required under Idaho Code sections 54-2086 and 54-2087 to disclose all "adverse material facts" to customers and clients. Agent, based

on his training and experienced, suspected potential drug production issues and informed the buyer's home inspector and the buyer's agent of his suspicions. Agent also called a local police agency to investigate the possibility of drug manufacturing on the property. From these facts, it appears agent fulfilled his statutory duties of disclosing the information available to him. Nonetheless, testing of the light bulb from the house confirms the presence of drugs. While there is no clear ongoing statutory duty for agent to disclose information related to the physical condition of the property, agent should, at very least, contact buyer's agent and make buyer's agent aware of the results of the police testing of the light bulb, particularly in light of buyer's physical condition.

Agent may also want to direct buyer's agent to the "Clandestine Drug Laboratory Cleanup Act," which is found in Idaho Code section 6-2601 *et. seq.* Under the Act, when a law enforcement agency discovers that drugs were manufactured on a residential property, the agency is required to report that information to the property owner and to the Idaho Department of Health and Welfare. Once it is determined that drugs were manufactured in a home, the property owner is required to clean the property to Department of Health and Welfare standards and the home must remain vacant until the cleanup is accomplished. The property owner has the option of demolishing the home instead of cleaning it up. It appears that because the police agency does not believe a drug lab existed on the property, the applicability of this statute is unlikely.

Finally, as an additional proactive measure agent should also consider contacting his errors and omissions insurance carrier or agent regarding this situation and/or consult with his own attorney for further input.

### **Failure to Disclose**

QUESTION: Agent represented Buyer in a closed transaction. Buyer discovered a problem with the kitchen sink drain after taking possession of the home. Apparently, the kitchen sink drains directly into the backyard instead of the sewer. Seller did not disclose the drain issue at any time. Buyer's home inspector also did not discover the problem. Buyer believes Seller was aware of the problem. Seller's tenants, who occupied the home prior to Buyer, were aware of the problem and informed Buyer after the fact, that Seller was aware of the drain issue. Buyer contacted Seller requesting repairs, but Seller refuses to repair. Buyer contacted Agent to inquire as to what recourse Buyer may have.

RESPONSE: The facts provided to the Legal Hotline suggest that the Property Condition Disclosure Act, Idaho Code § 55-2501 *et seq.* is applicable in this situation. Under the Act, Seller was obligated to make good faith disclosures regarding certain physical conditions of the property, including the water supply and sewage system serving the property. The Act also states, however, that property disclosures are not a warranty of the property conditions and that the "transferor" (i.e. Seller), other than having lived on the property or possessed the property, is not charged with any greater knowledge of the property's condition than what buyer could obtain through inspecting and investigating the property. If Seller is aware of a problem with the property and willfully or negligently fails to disclose it as required by the Act, the Act gives

Buyer a legal claim against Seller for damages. Additionally, if Buyer proves that Seller intentionally failed to disclose known defects, Buyer may have a legal claim for misrepresentation or fraud.

In either scenario, whether Buyer has a legal claim against Seller for damages depends on all the facts related to the transaction. Agent should advise Buyer to contact his/her own legal counsel for a review of the facts and to determine whether to take legal action against Seller. Depending on the amount of actual damages, Buyer may be able to proceed in small claims court where the limit for damage is \$5,000. Attorneys are not allowed to represent parties in a dispute in small claims court.

### **Property Condition Disclosure**

QUESTION: Agent represented seller in a transaction. Prior to listing the property, as part of some work conducted on the property seller had removed the sidewalks and applied to the city for a permit to reconstruct the sidewalks. However, due to a financial situation seller was unable to rebuild the sidewalks and the permit expired. The sidewalks had not been replaced when seller listed the property. Buyer's checked the box in the RE-21 indicating that they intended to conduct an inspection on the property. Buyers never notified agent or sellers of any outstanding issues regarding the inspection and/or repairs that buyers required in order to close the transaction, including the sidewalk condition. The transaction closed in February when there was snow on the ground. Buyers were shown photographs of the property and personally viewed the property when there was no snow on the ground. Buyers now demand that seller rebuild the sidewalks and are raising issues with agent regarding non-disclosure of the sidewalk condition. Agent questions his exposure to liability.

RESPONSE: There are several statutory provisions that come into play based on the facts provided to the Legal Hotline. Primarily, Idaho Property Condition Disclosure Act, which is found at Idaho Code § 55-2501 *et. seq.*, governs disclosure of certain property conditions. Section 55-2504 of the Act states that "any person who intends to transfer residential real property must complete a Property Condition Disclosure Form." Idaho Code § 55-2507 sets forth the mandatory disclosures. That section states, among other things, that "unless the transferee is otherwise advised in writing, the transferor, other than having lived at or owning the property possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential transferee." It also states 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."

The RE-25 Seller's Property Condition Disclosure Form sets forth the mandatory disclosures required by the Act. The final page of the RE-25 includes an "Additional Remarks and/or Explanations Section." It is unclear, though it appears from the facts provided to the Legal Hotline, that seller did not indicate in this part of the RE-25 (assuming one was used in this transaction) that seller was responsible for replacing the sidewalk and that the permit issued by the city had expired.

In addition to the Property Condition Disclosure Act, Idaho licensing law sets for certain duties that real estate licensees must satisfy. Under Idaho Code section 54-2086, agent owes a duty to “customers” to disclose all “adverse material facts” to a customer (i.e. buyer in this case if buyer was not represented). An “adverse material fact” is any fact that would significantly affect the desirability or value of the property to a reasonable person. However, under 54-2086(5), agent does not owe a duty to a customer to conduct an independent inspection of the property.

Based on the facts provided to the Legal Hotline and considering the Property Condition Disclosure Act and other relevant licensing laws, it appears that seller may have had an obligation to at least disclose to buyer that the cost and responsibility for replacing the sidewalks was the seller’s, and that seller had let the permit necessary for the sidewalk work expire despite the fact that it should have been obvious to buyer that the sidewalks were missing. Per the Property Condition Disclosure Act, agent had no independent duty to make disclosures to buyers regarding the sidewalk. It is arguable under the relevant licensing laws whether the missing sidewalks and the property owner’s responsibility for replacing the sidewalks was an adverse material fact. Nonetheless, agent, again, had no independent duty to physically inspect the property and report to buyer regarding physical conditions that buyer and/or buyer’s property inspector could observe or discover on their own. Agent may consider following up with his errors and omissions insurance carrier if buyers continue to push the issue or accuse agent of a breach of duty. Agent should advise his former client, sellers, to contact their own attorney for a review of the facts and assessment of the potential liabilities.

### **Potential Meth Lab**

QUESTION: Agent placed the winning bid for a home at a tax sale/auction. After the purchase, Agent discovered that the house may have been the sight of a meth lab. Agent questions what to do about the possibility that the home was used as a meth lab. Agent also questions whether he may terminate the purchase contract based on the discovery of the possible meth lab.

RESPONSE: Agent should review the “Clandestine Drug Laboratory Cleanup Act,” which is found in Idaho Code section 6-2601 *et. seq.* Under the Act, when a law enforcement agency or property owner suspects or discovers that drugs were manufactured on a residential property, the agency or property owner is required to report that information to the Idaho Department of Health and Welfare. Once DHW confirms that drugs were manufactured in a home, the property owner is required to clean the property to DHW standards and the home must remain vacant until the cleanup is accomplished. The property owner has the option of demolishing the home instead of cleaning it up.

The terms of the purchase and sale contract govern whether Agent may terminate based on the discovery of a meth lab (assuming evidence of drug manufacturing is confirmed by DHW). Agent should review his purchase and sale agreement to determine whether the agreement provides a basis for termination if the home was used to manufacture drugs.

## **EARNEST MONEY**

### **Termination and Earnest Money**

**QUESTION:** Agent/broker represents sellers, who are a separated couple. Buyers terminated the purchase and sale agreement based on their inspection of the home and the home inspection contingency. Buyers also request return of their earnest money deposit. Agent prepared a Notice to Terminate Contract and Release of Earnest Money, which the wife of the selling couple signed, but the husband refuses to sign. Agent has attempted to contact husband numerous times, but he refuses to return calls or meet with agent. Agent questions whether the husband of the selling couple must sign the termination agreement. Agent is also concerned about obtaining signatures on the notice to terminate for auditing purposes by the Idaho Real Estate Commission.

**RESPONSE:** Since buyers have given notice of their unequivocal intent to terminate and not perform under the purchase and sale agreement, signatures on the notice to terminate are not absolutely required. Best practices dictate obtaining signatures in situations where the parties are willing to sign the notice to terminate. However, the husband's refusal to willingly sign the notice of termination has no effect on buyer's intent or right to lawfully terminate the purchase and sale agreement based on the inspection contingency. The buyers have terminated the contract and the husband's signature on the notice to terminate has no legal effect on the termination.

As for the auditing issues, agent should document her file regarding the husband's refusal to sign and, if possible, obtain the signatures of the individuals willing to sign the notice to terminate. Agent should contact the Idaho Real Estate Commission directly if she has additional questions related to IREC's policies or regulations.

### **Necessity of Earnest Money for a Valid Contract**

**QUESTION:** Agent wonders if there is any requirement that earnest money be tendered before a contract is binding.

**RESPONSE:** There is no requirement that earnest money be tendered in order to form a binding contract. Rather, a contract is formed when the parties intend to be bound by the terms and conditions and "consideration" is given.

Earnest money and "consideration" are sometimes incorrectly confused as having the same meaning. Consideration is defined by *Black's Law Dictionary* as "the cause, motive, price, or impelling influence which induces a contracting party to enter into a contract." Consideration may, but need not be, money. Earnest money is "a sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract" and is intended to secure performance and make a good faith showing that the parties wish to proceed with a transaction. *Black's Law Dictionary*. The exchange of mutual promises can serve as a form of "consideration."

## **Earnest Money Dispute**

**QUESTION:** Agent was involved in a transaction as a dual agent. The home inspection failed to satisfy certain FHA requirements for funding, which prevented the transaction from closing. The lender is unwilling to provide a written statement regarding the reasons why financing will not be made available to buyer. Buyer signed and submitted an RE-20 Notice of Termination, but seller refuses to sign the RE-20. Agent questions whether he may construe seller's refusal to sign the RE-20 as a demand for the earnest money.

**RESPONSE:** The purpose of the RE-20 is to terminate the transaction and protect the parties from any claims, actions or demands they may have against each other. Some buyers and sellers refuse to sign the RE-20 because they do not wish to waive such claims. From the facts provided to the Legal Hotline, it appears unclear as to why sellers refuse to sign the RE-20, but their refusal may be an indication that they do not wish to release buyers from claims they may have against buyers or that they are claiming the earnest money as damages. Agent may attempt to clarify seller's intent by indicating to sellers, in writing, that agent construes their refusal to sign the RE-20 as a demand on the earnest money.

Idaho Code 54-2047 governs disputed earnest money. This statute states that anytime more than one party makes a demand for earnest money, 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."

Under Idaho Code section 54-2047(2), the broker may also rely on the terms of the Purchase and Sale Agreement or any other written documents signed by the parties to determine how to disburse the funds. Disbursement of the earnest money is solely within the broker's discretion. Section 54-2047(2) states that the broker's disbursement, based upon a reasonable review of the known facts, is not a violation of license law. Failure to properly disburse the funds, however, may expose the broker to civil liability to the damaged party (i.e. the party who did not receive the earnest money, but was legally entitled to it). To avoid civil liability, section 54-2047(3) provides the broker the option of refusing to release the disputed funds and holding the funds until ordered to release the funds by a court of proper jurisdiction. Such a court order may be obtained by either party initiating legal action, or the broker may initiate legal action through what is known as an "interpleader" action (i.e. the broker essentially deposits the disputed earnest to the court because multiple parties are making a claim to the money and the court then decides which party is entitled to the money). Should the broker decide not to disburse the funds, but rather hold the funds until a court order is issued, the broker must give the parties written notice of his decision to hold the earnest money.

As a final note, part of the decision regarding which party may be entitled to the earnest money requires a review of the purchase and sale agreement and all other relevant written agreements between the buyer and seller. The RE-21 includes some specialized language when FHA/VA funding is involved in a transaction. For example, the last full paragraph of Section 3(C) of the RE-21 states that an FHA/VA buyer does not forfeit an earnest money deposit if certain financing contingencies are not satisfied. Agent and broker should conduct the necessary

investigation to determine whether the FHA/VA financing provisions apply in this situation. In providing the above response, the Legal Hotline assumes the buyer acted in good faith in attempting to obtain financing for the transaction.

### **Earnest Money Dispute**

**QUESTION:** Agent is employed as a dual agent on new construction. Buyer's offer was made utilizing the RE-22 and several extensions were given on the closing date. Buyers decided to not purchase the property because Seller (the builder) was unable to meet the last closing deadline. Agent found Seller a new buyer. If Seller accepts the new buyer's offer, can Seller keep Buyer's earnest money from the prior offer/transaction?

**RESPONSE:** Based on the facts provided to the Legal Hotline, the short answer to this question is no, Seller cannot keep the earnest money paid by Buyer on the previous offer. Foremost, the new buyer's offer, if accepted, is an entirely different contract and transaction. Secondly, as to which party is entitled to the earnest money deposited in the original transaction, the terms of the contract between the original Buyer and Seller control their rights, duties and responsibilities, including to earnest money.

According to paragraph 43 of the RE-22, time is of the essence. With new construction, the Seller/builder is entitled to at least one 30 day extension on closing if delay is caused by weather, labor strikes or some other similar act that is not within the builder's control. The Buyer, however, is not required to extend the closing date out any longer if Buyer does not agree to do so. Based on the facts provided to the Legal Hotline, there do not appear to be facts or circumstances that obligated Buyer to continue to extend the closing date. If Seller/builder was otherwise unable to close on the last agreed upon closing date, it appears Seller/builder is in default of his agreement with Buyer because he was unable to perform (i.e. transfer the property at the closing date). In that case, paragraph 38 of the RE-22 states that Seller/builder shall return Buyer's earnest money deposit to Buyer.

In the event there is a genuine dispute as to the earnest money, Idaho Code § 54-2047 governs disputed earnest money. That section states that "any time more than one 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."

Broker may rely on the terms of the Purchase and Sale Agreement or any other written documents signed by the parties to determine how to disburse those funds. Disbursement of the earnest money is solely within the discretion of the brokerage. This discretionary disbursement by the broker, based upon a reasonable review of the known facts, is not a violation of license law. It may, however, subject the broker to civil liability if the funds are not properly disbursed. Therefore, the law provides Broker with the option of refusing to release the disputed funds and holding the funds until ordered to release them by a court of proper jurisdiction. Should Broker

decide not to disburse the funds, but rather hold them until a court order is issued, the broker must give the parties written notice of his decision to hold the earnest money.

### **Earnest Money Distribution**

QUESTION: Brokerage represents Seller in a transaction that unfortunately failed to close due to Buyer's breach. Seller agreed with the buyer to split the earnest money. Brokerage then informed Seller that brokerage was entitled to half of the earnest money that was returned to Seller. Seller called the Legal Hotline directly to ask about the situation and whether Brokerage was entitled to half the earnest money. Seller was informed by the Legal Hotline that the earnest money should be Seller's, i.e. *as opposed* to the buyer's. Seller was also informed that the payment of money is governed by all the relevant contractual provisions that apply to the situation. When it was determined that Seller was not the broker or the agent, Seller was advised that she needed to address the issue directly with Brokerage. Broker then contacted the Legal Hotline for further clarification regarding distribution of the earnest money because Seller had called Broker after calling the Legal Hotline.

RESPONSE: The rights and obligations of the brokerage and the client (Seller in this case) are determined by the relevant contractual provisions that apply to the situation. Here, a portion of earnest money paid by a buyer in a transaction that ultimately did not close as a result of the buyer's breach was released to Seller. Buyer's default and earnest money is addressed in paragraph 28 of the RE-21 Purchase and Sale Agreement, which is a legally binding contract. Under paragraph 28, upon a breach by a buyer, a seller has the option of accepting a payment of the earnest money as liquidated damages. If the seller accepts this option, paragraph 28 specifies that the holder of the earnest money, after paying certain costs incurred by the broker for the transaction, is required to: "... pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER'S Broker, provided that the amount paid to SELLER'S Broker shall not exceed the Broker's agreed to commission." In short, under the paragraph 28 of the purchase and sale agreement, after certain expenses that Broker already incurred for the transaction are paid, Buyer has agreed that the holder of the earnest money is to pay half the earnest money to Broker and half to Seller.

### **Termination After Winning Auction Bid and Earnest Money**

QUESTION: Agent represents Buyer who purchased property as the high bidder at an auction. The terms for participating in the auction require that: (1) the high bidder enter into a purchase and sale agreement upon placing the winning bid; (2) deposit non-refundable earnest money; (3) closing is set for 30 days from placing the winning bid; and (4) if the high bidder fails to close or follow through with the transaction, the right to purchase is awarded to the second highest bidder. The day after the auction, Buyer called Agent with buyer's remorse and indicated that he no longer wished to purchase the property. Agent called the auctioneer and verbally told the auctioneer that buyer did not want to purchase the property. The auctioneer advised Agent that Buyer would lose his earnest money and Agent stated that he and Buyer were aware of that consequence. The day after that, Buyer spoke with his lender and had a change of heart and decided that he wanted to purchase the property. Agent called auctioneer and was informed that the second high bidder had already signed a purchase and sale agreement and

intended to purchase the property. Agent questions whether Buyer actually terminated the purchase and sale agreement since Agent only verbally told auctioneer that Buyer did not want to purchase the property and Agent questions whether Buyer may receive his earnest money back since the second highest bidder is now in line to purchase the property.

RESPONSE: As for whether Buyer terminated the purchase and sale agreement because Agent only told the auctioneer orally, not in writing, that Buyer did not want to purchase the property, the facts provided to the Legal Hotline suggest that the auctioneer properly treated the agreement with Buyer as terminated. When Agent informed the auctioneer that Buyer did not intend to perform under the contract and close on the property, the auctioneer had a valid basis to consider Agent's representations as an "anticipatory repudiation" of the purchase and sale agreement. Black's Law Dictionary defines anticipatory repudiation as: "[t]he assertion by a party to a contract that he or she will not perform a future obligation as required by the contract. Such occurs when a party ... manifests a definite and unequivocal intent prior to time fixed in contract that it will not render its performance under the contract when that time arrives, and in such a case the other party may treat the contract as ended." In other words, if the auctioneer in this case had a reasonable belief that Buyer's did not intend to close on the transaction, he was not legally required to wait until the closing date to declare Buyer's in breach and move on to the second highest bidder. In fact, when a party knows that the other party does not intend to perform on a contract, the party has a legal duty to mitigate his damages. Auctioneer may argue that when he was advised that Buyers did not intend to perform on the agreement, he was required to enter into an agreement with the second highest bidder to minimize his damages.

It is important for Agent to note that, while signing a termination agreement makes it easier to prove that the parties did in fact terminate the contract, a signed termination is not necessarily required. Parties may orally terminate a contract. Buyers in this case may attempt to argue that since the contract was in writing, any termination must also be in writing. The key, however, is whether Buyers unequivocally communicated that they did not intend to perform under the contract. In this case, the facts suggest that Buyers unequivocally communicated, through Agent, that they did not want to purchase the property. For all of these reasons, the facts provided to the Legal Hotline suggest that Buyers anticipatorily repudiated the contract and written notice of termination was not required to make the termination effective.

As for Agent's question regarding earnest money, the purchase and sale agreement state, in paragraph 4, Other Terms and Conditions, that: "E.M. non refundable." Based on the purchase and sale agreement, Buyer agreed that the earnest money was non-refundable. The fact that Buyers terminated (or breached) the agreement by indicating that they would not close on the property does not alter or change the agreement as to earnest money. The parties simply agreed earnest money was non-refundable, they did not specify conditions where the earnest money may be refundable. This contractual provision is in addition to any other agreement or promises Buyer's may have made with the auctioneer as a condition to participating in the auction, which may also establish that earnest money is non-refundable. Agent should review any such agreement with auctioneer. Agents should also advise Buyers to immediately consult with their own attorney if they wish to dispute termination of the contract and/or auctioneer's retention of the earnest money.

## **Earnest Money Dispute**

**QUESTION:** Agent represents a Seller in a failed transaction. Buyers included a financing contingency in their offer. Buyers received an initial approval from a lender, but ultimately were denied financing. Buyers then received pre-approval from a second lender, but then terminated the financing process before the lender could make a final decision. The second lender did advise Agent that Buyers would have qualified for financing had they not terminated the process. Both the Buyer and the Seller demand the earnest money.

**RESPONSE:** Usually, a buyer may legitimately terminate a purchase and sale agreement based on the buyer's failure to obtain financing (assuming all timing and other requirements for the financing contingency are satisfied). Buyer's inability to obtain financing, however, is somewhat unclear in this situation because Buyer terminated the financing process before the second lender could approve Buyer for financing. Contract law requires that the contracting parties act in good faith and fair dealing – if Buyer terminated the financing process with the second lender in order to terminate the contract, questions may arise regarding whether Buyer acted in good faith in using the financing contingency to terminate the contract.

Since both parties claim the earnest money, there is clearly an earnest money dispute. Idaho Code § 54-2047 governs disputed earnest money disputes. That section states that “any time more than one 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.

Idaho law leaves the decision of whether or how to disburse earnest money to the sole discretion of the broker. Disbursement of the earnest money, based upon a reasonable review of the known facts, is not a violation of license law. The broker may, however, be subject to civil liability if it is later determined that the earnest money was not properly disbursed. The broker also has the option of refusing to release the disputed earnest money and may hold the funds until ordered to release them by a court. If the broker decides not to disburse the earnest money to either party, but rather hold the funds until a court order is issued, the broker must give both parties written notice of his decision to hold the earnest money.

## **FORECLOSURE**

### **Changes to RE-21 Forms**

**QUESTION:** Broker questions whether section 22 of the RE-21 regarding notice of foreclosure applies when the seller has missed payments, but the home is not in foreclosure. Broker also questions whether section 23 of the RE-21 regarding mechanics liens and general contractor disclosure statement notice applies to all new construction. Finally, broker indicates

that she occasionally finds that one spouse is unavailable to sign the RE-21 for purposes of making an offer on a property and questions whether both spouses are required to sign the RE-21 as buyers. In these situations the available spouse usually claims authority to sign on behalf of the other spouse.

RESPONSE: Section 22 of the RE-21 states that if the property is currently subject to foreclosure proceedings (pursuant to Idaho Code section 45-1506), then notice of such foreclosure proceedings must be in writing and affixed to the property disclosure form. Idaho Code section 45-1506 governs the process for foreclosing a trust deed that secures real property, which includes notice of foreclosure and trustee's sale. Therefore, unless such notice of foreclosure proceedings have been issued to the seller and recorded, the notice under section 22 of the RE-21 is not required.

Section 23 of the RE-21 states, among other things, that, pursuant to Idaho Code section 45-525, a general contractor is required to provide certain disclosures to homeowners and purchasers of residential real property relative to work performed by the general contractor and subcontractors on the property. Section 23 is merely a notice to both sellers and buyers regarding this disclosure requirement. It is the responsibility of the seller or buyer, not their agent, to inquire about or obtain such disclosure from the general contractor. In short, the disclosure referenced in section 23 is the responsibility of the general contractor and obtaining such a disclosure is the responsibility of the buyer or seller, not the agent.

Best practice dictates that when married persons make an offer on a home, both should sign the RE-21. Under Idaho community property laws, however, one member of the "community" may bind the community to a contract. Likewise, the "community" is liable for debts created by either spouse. Therefore, it may be legally permissible for one spouse only to sign the RE-21 as an offer to buy real property. The lack of the other spouse's signature does not necessarily make the offer void or unenforceable. The best way to accomplish this is to ensure that the spouses that have a valid power of attorney to sign on behalf of the other. Agent should also note that this changes if the married couple is selling real property. Under Idaho Code section 32-912 they signature of both spouses are required to sell, convey or encumber real property.

In order to validly transfer an interest in real property, however, the signatures of all parties owning an interest in the property must appear on the transfer documents (the deed). While the one signature may be valid to effectuate the Purchase and Sale Agreement, the actual transfer requires all necessary signatures.

### **RE-42 Property Foreclosure Disclosure Form**

QUESTION: Broker questions whether the RE-42 – Property Foreclosure Disclosure Form is required when listing properties for a bank that were acquired through foreclosure proceedings.

**RESPONSE:** Paragraph 21 of the RE-21 Real Estate Purchase and Sale Agreement states that “If the Property described above is currently involved in a foreclosure proceeding (pursuant to Idaho Code § 45-1506) any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in § 45-525(5)(b), Idaho Code, subject to foreclosure must be in writing and must be accompanied by and affixed to Re-42 Property Foreclosure Disclosure form.”

Properties sold by a bank have presumably already been through the foreclosure process and are now owned by the bank. Paragraph 21 only requires the disclosure when the subject property is currently involved in foreclosure proceedings. Therefore, the RE-42 Property Disclosure Form is not required under these circumstances.

### **Use of the New RE-42 Property Foreclosure Disclosure Form**

**QUESTION:** An agent questions the proper time to provide seller and buyer with a copy of the RE-42 Property Foreclosure Disclosure Form.

**RESPONSE:** The RE-42 is a new form, which results from passage of Senate Bill 1431, the Consumer Foreclosure Protection Act, during the 2008 legislative session. The Act is codified at Idaho Code 45-1601 *et seq.* The legislative findings to the Act indicate concerns with fraudulent activities related to home foreclosure. The Act sets forth that a notice is required for every transaction involving the sale of property subject to foreclosure proceedings. The language of the Act and the notice indicate that the legislature intended the notice to benefit buyers, sellers and lenders. An important aspect of the Act is that a party to a contract to purchase or sell property has five (5) days to rescind the contract upon receiving the notice of foreclosure contained in the RE-42.

When an agent enters into the RE-16 Exclusive Seller Representation Agreement with a seller and the seller indicates on the RE-16 that the property is currently in foreclosure, the agent should provide the seller with an RE-42 form at that time. The notice provides important information to sellers regarding the foreclosure proceeding.

Paragraph 21 of the RE-21 Real Estate Purchase and Sale Agreement states that “If the Property described above is currently involved in a foreclosure proceeding (pursuant to Idaho Code § 45-1506) any contract or agreement with the owner or owners of record that involves the transfer of any interest in residential real property, as defined in § 45-525(5)(b), Idaho Code, subject to foreclosure must be in writing and must be accompanied by and affixed to RE-42 Property Foreclosure Disclosure form.” When a buyer submits an offer and the seller has indicated that the property is in foreclosure, the agent should provide the buyer, as part of any written acceptance or counteroffer, a copy of the RE-42 for the buyer’s signature.

In short, the RE-42 should be produced as soon as possible when it is known or discovered the property is in foreclosure. For sellers, this is typically at the time the RE-16 Representation Agreement is entered into. For buyers, this is typically when responding to an offer from the buyer or at the time of the offer. While stated within the RE-42, agents may also

wish to advise clients that upon notice they have five (5) days to rescind the contract if they wish.

### **Short Sales**

QUESTION: Agent represents a number of sellers in short sale transactions. Agent generally negotiates a “net” purchase amount required by the seller’s foreclosing bank and then identifies interested investors/buyers. As part of his negotiations with seller’s foreclosing bank, the bank usually requires a reduction in the Agent’s commission on the sale of the property. Certain of the investors recognize Agent’s efforts in listing, marketing and negotiating the purchase price with seller’s foreclosing bank and wish to further compensate agent for his efforts upon the closing of a transaction. Agent questions how to properly disclose and/or account for such a payment from the buyer/investor.

RESPONSE: Compensation from a buyer or a seller is generally a matter of negotiation and written agreement between the brokerage and the buyer/seller. In this particular case it appears from the facts provided to the Legal Hotline that the buyers/investors have not entered into an RE-14 Exclusive Buyer Representation Agreement or an RE-15 Compensation Agreement with Buyer. It also appears from the facts provided to the Legal Hotline that the compensation contemplated by the investors/buyers is not a traditional percentage commission, but rather is a set dollar amount. It also appears from the facts provided to the Legal Hotline that a “net” sales price is previously negotiated with the seller’s foreclosing bank. It also appears from the facts provided to the Legal Hotline that the compensation proposed by the investors/buyers is a payment to be made “outside” of closing.

Based on the facts provided to the Legal Hotline, there is no Idaho statute or IREC regulation that this arrangement appears to violate. Agent’s instincts regarding disclosure, nonetheless are well founded due to significant issues over the past several years related to mortgage fraud and other serious legal issues. Most illegal schemes involve a situation where certain undisclosed kickbacks are made to interested parties or the buyer’s financial qualifications are misrepresented to the buyer’s lender. The facts presented by Agent do not appear to involve any kind of kickback or misrepresentation of buyer’s financial status or qualifications.

Nonetheless, the arrangement as explained by Agent raises a few potential red flags that Agent should keep in mind. First, the seller’s foreclosing bank is agreeing to a sale price that is less than the outstanding balance of seller’s loan. As a result, the foreclosing bank has also negotiated a reduction of Agent’s commission. It is possible that the foreclosing bank may consider the offer of compensation from the buyer/investor inappropriate given the foreclosing bank’s compromise on the sale price and seller’s unsatisfied loan balance. Therefore, disclosure of investor’s/buyer’s payment to the foreclosing bank is likely important. If no disclosure is made to the foreclosing bank, it may have a potential claim for fraud, fraudulent inducement and/or misrepresentation based on its agreement to compromise on the outstanding balance of seller’s home loan if it later learns of the “additional” payment from the investor/buyer. The foreclosing bank may take a legal position that it negotiated a “net” amount it needed to recover

in the transaction based, at least in part, on the information it was provided regarding the fees to be paid on the transaction.

Second, assuming the investors/buyers finance their acquisition, the bank or lender financing the transaction should be made aware of the compensation arrangement. There does not appear to be any one legally required way to disclose the fact of the payment to the lenders involved in the transaction. Regardless of how disclosure is accomplished, Agent should err on the side of disclosure. Agent may judge the best method of disclosure based on the specific circumstances of the transaction. If the compensation arrangement between the investors/buyers and Agent is properly disclosed to all interested parties, the likelihood of a claim against the Agent is significantly reduced if not eliminated. Agent is certainly better off to learn about an objection to the payment before the payment is made than to be accused of wrongdoing after the fact. If Agent has further questions regarding the specifics of any one transaction, he is advised to retain legal counsel to ensure compliance with any applicable law, rule or regulation.

### **Quitclaim Deed in Foreclosure**

QUESTION: Agent represents a buyer. Sellers/owners are in default of their loan. Sellers/owners basically walked away from the property and signed a quitclaim deed transferring title in the property to buyer. Agent questions whether he may list the property and attempt to negotiate a sale of the property on behalf of his client, who becomes the “seller” in such a transaction.

RESPONSE: Notwithstanding contractual obligations between sellers/owners who walked away from the property and their lender, which may control and/or may impact Agent’s attempts to list and sell the property, the Legal Hotline is not aware of a licensing statute or rule that prohibits Agent from listing this property. Agent’s buyer apparently holds a quitclaim deed to the property. A quitclaim deed is effective in Idaho to transfer ownership of property. When a seller/owner of real property transfers it via a quitclaim deed, the buyer merely acquires whatever title or ownership interest the seller/owner may have had in the property, if any. The seller/owner provides no warranties regarding ownership, title, or right to transfer the title. Agent will have to contact the lender on the property and attempt to negotiate a sale of the property, which that lender may or may not be willing to agree to given the circumstances. There is no law, however, that prohibits Agent from listing the property – Agent’s ability to do so is likely controlled by the relevant contracts the sellers/owners had with their lender and whatever agreement Agent may be able to negotiate with the lender and a new buyer.

### **Buyer Assuming Seller’s Loan**

QUESTION: Agent represents a Seller who is in default on her home loan. A Buyer has proposed a transaction wherein the Buyer “puts” his name on Seller’s deed of trust, brings the loan current, conducts some renovations, and then obtains his own loan to purchase the property. Agent questions whether Buyer’s proposal is even possible.

RESPONSE: The transaction proposed by this Buyer is questionable. It seems unclear how Buyer may “put” his name on Seller’s deed of trust. The deed of trust is an agreement

between Seller, Seller's lender and a trustee. Buyer has no legal right or ability to unilaterally inject himself into this pre-existing agreement. Further, Seller's lender has likely taken steps in the applicable loan documents and/or deed of trust to prevent Seller from assigning the loan to another party, which is essentially what this Buyer appears to propose. Furthermore, since the property is in foreclosure, Seller's lender may have further statutory protections in terms of its security and interest in the property. Without a more concrete approach, which will require the consent and participation of Seller's lender, Buyer's proposal does not appear viable or workable. At this point, Seller's lender very likely has the right to reject or approve to any transaction with any Buyer at the lender's discretion.

### **Charging a Fee in a Short Sale**

QUESTION: Agent currently requires an 8% commission on short sale transactions, which most lenders resist. Agent questions whether he can charge the standard 6% commission and then charge an additional fee for the extra work that is often required to complete a short sale transaction.

RESPONSE: Agent's compensation is largely a contractual matter between Agent and his clients and customer. Also, Idaho Code section 54-2054 addresses compensation issues, including prohibited conduct such as double contracts, fee splitting with unlicensed persons, finder's fees, kickbacks and so forth. Agent's proposal does not appear to violate any licensing law, but short sales introduce some unusual circumstances into the transaction. In considering whether to charge an additional fee outside of the stated commission in a short sale transaction, Agent should keep in mind the interest that the seller's lender has in the transaction. If the seller's lender agrees to a short sale, the lender is agreeing to accept less than is outstanding on the seller's loan. This is the reason that lenders typically will not agree to the usual and customary commission rates on short sale transactions. The key to avoiding any problems is to fully disclose the additional fee to seller's lender and to obtain approval from seller's lender before charging the fee. The fee should be verbally stated and disclosed in writing in a manner that seller's lender is, without question, aware of the additional fee and approves it. The potential danger of not properly and clearly gaining the approval of seller's lender for the additional fee is that Agent could open himself to claims by the seller's lender for misrepresentation or even fraud. Also, because the seller's lender is taking a loss, Agent should keep in mind that the proposed additional fee may meet with resistance.

**Update: Between the time of this response and publication of the "Top One Hundred," Fannie Mae issued a guideline, effective March 1, 2009, that prohibits lenders in pre-foreclosure transactions from reducing the advertised commission. This policy applies only to Fannie Mae serviced or backed loans and does not apply to other lenders/underwriters or loan servicers.**

### **Multiple Signed Offers**

QUESTION: Agent represents a seller in a short sale transaction – i.e. seller's home is in foreclosure. Seller's lender requires that seller submit multiple offers for the lender to review.

The lender also requires that the offers be fully executed by both buyer and seller in order to consider the offer. Agent has submitted several signed offers to the lender. With each offer, Agent ensured that an RE-44 Short Sale Addendum was included. Questions have been raised regarding this practice or requirement and whether it is appropriate for seller to sign multiple offers. A buyer's agent has informed Agent that a buyer may seek legal action against the seller for default if a seller signs an offer and then fails to perform.

**RESPONSE:** Short sales are unique transactions in that a non-contracting third party, the seller's lender, controls the transaction and has the final say on whether to permit the transaction. From a practical perspective, whether Seller signs none or multiple offers is ultimately irrelevant until the lender approves a transaction.

Further, the second paragraph of Paragraph 2 in the RE-44 clearly sets forth that the final decision on the terms of the contract is usually in the control of a third party "whose consent to the transaction is required in order for the seller to convey clear title to the buyer." This paragraph goes on to state that: "Since Third Party Creditors are being requested to accept payment that is less than what is owed to them, it is common that they will require the seller to keep the PROPERTY on the market and deliver to Third Party Creditors additional offers to purchase the PROPERTY."

Paragraph 3 of the RE-44 further states that the purchase and sale agreement is: "contingent upon Third Party Creditors' approval of the terms of the Purchase and Sale Agreement." Taking these contractual provisions together with the practical considerations of a short-sale transaction, it is appropriate for a seller to sign multiple offers and submit to the lender for approval. The RE-44 makes the purchase and sale agreement contingent on the third party lender's approval. There cannot be a binding agreement between the parties absent approval from the lender. For this reason it appears doubtful that any buyer may be successful against a seller for a default of a signed purchase and sale agreement if the lender does not approve the transaction.

## **INSPECTIONS**

### **Terminating Contract During the Home Inspection Period Due to Financing Issues**

**QUESTION:** An agent represents a buyer in a transaction who terminated the contract due to the results of the home inspection. Seller requests the earnest money. Buyer had an appraiser look at the property to determine whether it would meet lender approval, which it did not. The lender also wrote a letter stating it would not loan on the property. The agent questions who is entitled to the earnest money.

**RESPONSE:** Unless the parties agree otherwise in the purchase and sale agreement, a buyer is not entitled to terminate a contract due to the results of a home inspection. Pursuant to the terms of the contract, the buyer must give the seller a list of disapproved items and give the seller a chance to remedy the problems. If seller refuses to fix those disapproved items, then

buyer may terminate the contract. In this transaction the buyer may utilize their financing contingency as opposed to the home inspection contingency to terminate the contract because of the appraisal/lending problem, but based on the facts provided to the Hotline, there is no basis for termination based on the home inspection.

Idaho Code § 54-2047 governs disputed earnest money. That section states that “any time more than one 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.

That code section also states that the broker may rely on the terms of the Purchase and Sale Agreement or any other written documents signed by the parties to determine how to disburse those funds.

Disbursement of the earnest money is solely within the discretion of the brokerage. Idaho law states that discretionary disbursement by the broker, based upon a reasonable review of the known facts, is not a violation of license law, but such disbursement may subject the broker to civil liability if the funds are not properly disbursed. Therefore the broker has the option of refusing to release the disputed funds and may hold the funds until ordered to release such funds by a court of proper jurisdiction. Should the broker decide not to disburse the funds, but rather hold the funds until a court order is issued, the broker must give the parties written notice of his decision to hold the earnest money.

### **Buyer Terminating Contract Due to Lack of Approval of Inspection Report**

QUESTION: An agent represents a seller in a transaction that buyer terminated. Under “other terms and conditions” in the RE-21 Purchase and Sale Agreement, buyer included a term that stated the offer was “subject to buyer’s approval of inspection reports.” The buyer also filled out the inspection portion of the RE-21. After inspecting the property, buyer terminated the contract on the date the list of “disapproved items” was due to seller. Buyer based termination upon the inspection report. Buyer did not give seller a list of disapproved items. Seller’s agent questions whether the buyer must provide a list of “disapproved items,” as contemplated by the inspection provisions of the RE-21 (giving seller an opportunity to fix or remedy the disapproved of items), or if buyer may terminate his offer merely because he did not approve the inspection report as indicated in “other terms and conditions” of the RE-21.

RESPONSE: The terms of the contract between the parties control the transaction. Some buyers do not want to be held to the terms of the home inspection contingency in the RE-21 and want the option of terminating the contract based solely on the results of the home inspection report, regardless of the results. The language inserted by buyer in the “other terms and conditions” provision of the RE-21, stating that buyer’s offer was subject to approval of inspection reports, affords buyer the right to terminate the contract based solely upon the home

inspection report without giving the seller the right or ability to fix disapproved items. In the future when a buyer wishes to make his or her offer contingent on a home inspection report, Agent may wish to include clear and unambiguous language in Paragraph 4 “Other Terms and Conditions” of the RE-21 that sets forth that the home inspection contingency supersedes seller’s right to correct or remedy buyer’s disapproved of items after the home inspection in the event buyer disapproves of the home inspection and declines to provide seller with a list of disapproved of items. Such language may provide additional clarity as to buyer’s intent that buyer may terminate the purchase and sale agreement based solely on the home inspection report without providing seller with a list of “disapproved items” or giving seller an opportunity to remedy or repair the “disapproved items.”

### **RE-10**

QUESTION: Agent questions whether, when utilizing the RE 10 Inspection Contingency Release, should it be identified as an addendum no. 1 or should it be numbered consecutively with prior addendums?

RESPONSE: The purpose of numbering addendums is to document the chronology of the transaction. Line 45 of the RE 10 states “The the extent the terms of this Addendum modify or conflict with any provisions of the Purchase and Sale Agreement including all prior Addendums, 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.”

As the quoted language indicates, the RE-10 contemplates that it will be incorporated into the overall agreement, including with all previous addenda. Therefore, it is the Legal Hotline’s opinion that Agent should number the RE-10 in sequence or consecutively with all prior addenda to the purchase and sale agreement, if any.

### **Habitability Requirements**

QUESTION: Agent represents Sellers in a transaction. Buyers refused to close on the transaction. Sellers received a demand letter from Buyers’ attorney for return of the earnest money deposit and other costs and fees Buyers claim they incurred in relation to the failed transaction. According to the demand letter from Buyers’ attorney, Idaho law requires that Seller’s transfer “habitable” property and because tests on well water to the property failed health department standards for consumption, the property was not delivered in a “habitable” condition. Seller’s Agent indicates that Buyers conducted an inspection of the property and failed to object to any condition of the property based on the inspection.

RESPONSE: Idaho law does impose an implied “warranty of habitability” on landlords who lease their property to tenants (and possibly on builders/contractors to buyers), but there does not appear to be any such warranty or requirement imposed on sellers of existing residential real property in Idaho. While Buyers of residential real property are usually afforded the right to inspect property before purchase and may be entitled to certain disclosures under the “Property

Conditions Disclosure Act” in the Idaho Code, the Legal Hotline is unaware of any Idaho law that requires that the sellers of residential real property deliver “habitable” property to a buyer. Furthermore, whether property is “habitable” is highly depended on the facts related to each case. The claim of uninhabitability in this particular situation appears based on the condition of well water. It is entirely unclear whether the condition of well water has any bearing on “habitability.” Buyers are allowed to conduct inspections to determine habitability.

### **Termination Related to Home Inspection Contingency**

QUESTION: Agent represents Seller in a transaction where the contract was not contingent on the home inspection – Seller sold home “as is.” Buyer conducted an inspection and then submitted an addendum extending the closing date and requiring \$10,000 for roof repairs. Since the home was listed “as is,” Seller did not sign the addendum. Agent then changed the status of the listing. Soon after that, Buyer called agent and stated that he would buy the property “as is” as long as Agent switched the listing back to pending status and remove the transaction history from the MLS. Agent is checking with the MLS to determine whether she can meet Buyer’s request, but questions whether Seller can proceed forward and market the property because the closing date in the original agreement has now come and gone.

RESPONSE: Regardless of whether Agent can satisfy Buyer’s requests with regard to the MLS, both Buyer and Seller are bound by the terms of their agreement. If the agreement specifies a closing date and Seller is otherwise not in breach of the Agreement, Buyer is required to close on the transaction. If Buyer fails to close on the agreed-upon date, Seller may treat the contract as terminated and may proceed forth by re-marketing the property.

### **Inspection**

QUESTION: Agent represents Buyers in a transaction to purchase residential real property. After conducting an inspection of the property, Buyers identified items that they require to be repaired or fixed prior to closing the transaction. Seller has not responded to Buyers’ list of disapproved items and has not provided any of the listed repairs. Agent questions whether Seller is agreeing to fix all items in the inspection report by not responding to the Addendum in which Buyers identify the inspection items that need to be corrected or repaired.

RESPONSE: As to the inspection contingency and a seller’s obligations to conduct repairs, the RE-21 states: “If the Seller elects to not correct the disapproved items, or **does not respond in writing** within the strict time period specified, then the Buyers have 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 that they will not continue with the transaction and will receive their Earnest Money Back.”

Based on the language of the RE-21, by not responding to the list of disapproved items, Sellers are not agreeing to fix the items that Buyers want repaired. Based on the facts provided to the Hotline, Buyers options are to either proceed with the transaction with the property “as is”

or provide notice within the contractually specified time period that they will not proceed with the transaction.

## **LICENSING**

### **Licensing Laws**

**QUESTION:** Broker questions whether an Agent is required to be licensed under the licensing law to run a leasing/property management business.

**RESPONSE:** Idaho licensing law suggests that in order to offer or list properties for lease, a license from the Idaho Real Estate Commission may be required.

Under Idaho Code 54-2002, a person is required to have an active Idaho real estate license if that person engages in the business or acts in the capacity of a “real estate broker” or a “real estate sales person” as these terms are defined in the licensing law. Under Idaho Code section 54-2004(33) a “real estate broker” is:

- (a) Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others;
- (b) Any actively licensed broker while, directly or indirectly, acting on the broker's own behalf;
- (c) Any person who represents to the public that the person is engaged in any of the above activities;
- (d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth;
- (e) A dealer in options as defined in this section.

Under Idaho Code section 54-2004(34) a “real estate salesperson” is: “any person who has qualified and is licensed as a real estate salesperson in Idaho under this chapter, and is licensed under, associated with, and represents a designated broker in the performance of any act described in subsection (33) of this section.”

The relevant language is found in the definition of “real estate broker,” which states that a “broker” includes any person who, among other activities, lists or negotiates: “the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others.” An argument may be made that listing and leasing properties on behalf of another is included in the definition of “broker” and that a license is required to list, offer, market or negotiate a lease because that constitutes an “interest in” property. Therefore, based on the applicable statutes, a person who lists properties for lease and markets or negotiates properties for lease may be subject to licensing laws.

The need for a license to simply manage real property on behalf of a landlord, on the other hand, is much less clear. If a person collects rents, maintains a rental property or engages in those acts that are more akin to maintaining and managing a leased property, those activities seem to be much less likely to bring licensing laws and the need for a license into question.

### **Licensing Laws**

QUESTION: Agent is a licensed real estate and insurance agent and wants to advertise both on her business cards. Agent questions whether this is proper under the licensing laws.

RESPONSE: The Hotline is unaware of any licensing law that prohibits Agent from listing both of her professional licenses on her business cards, provided she is properly licensed for both.

### **Licensing/Receiver**

QUESTION: Agent's brokerage is the exclusive listing brokerage for a resort property that is currently operating under a court-ordered receivership. The Receiver has ordered that the brokerage close. The brokerage has a number of listings for properties that have not yet been built, but have buyers who have paid deposits for the right to purchase the properties once they are built out. These listings will expire relatively soon. Agent has or will propose that she stays on to negotiate with the buyers on these listings for either a return of the buyer's deposit or some incentive to the buyer to amend the listing to extend it into the future if the buyer desires to purchase the properties once they are built. Agent questions whether this type of negotiation must be carried out by a real estate licensee and whether a licensee may conduct these kinds of negotiations after the brokerage closes.

RESPONSE: Idaho licensing law is clear that only an actively licensed real estate agent may "act in the capacity of a 'real estate broker' or 'real estate salesperson'" as those terms are defined. See Idaho Code section 54-2002. "Real estate broker" and "real estate salesperson" and the activities conducted by such persons in real estate transactions is given an extremely broad scope, including negotiations of any kind related to a real estate transaction. See Idaho Code section 54-2004(33). Further, all licensees are required to work through or under the supervision of a designated broker. See Idaho Code sections 54-2038, 54-2039, and 54-2048.

Agent should also be aware of the specific exceptions set forth in the licensing statutes with regards to the licensing requirement. Idaho Code section 54-2003(1)(d)(i) provides an exception to the licensing requirement in "the acquisition or other disposition of any interest in real property" by a receiver or a bankruptcy trustee as long as the "acquisition or other disposition" is undertaken in the performance of the receiver's or trustee's duties. Based on this exception, the receiver may be able to deal with real property without a license as long as any such dealings are within the receiver's scope of duties, which may be dictated by court order or statute.

## **MARKETING/ADVERTISING**

### **Advertising Listings in Two States Under One Brokerage Name**

**QUESTION:** A broker has licensees in both Idaho and Washington. The broker would like to know if he can advertise in both states under one brokerage name.

**RESPONSE:** Idaho Code Section 54-2053 states that all advertising of Idaho property shall contain the broker's licensed business name on file with the Idaho Real Estate Commission. Therefore, if the broker advertises Idaho property in Washington the advertisement would need to contain the Idaho brokerage name to avoid being in violation of Idaho license rules and regulations. The broker may wish to contact his local MLS to determine if it allows its listings to be advertised in another state. The broker may also wish to contact the Washington Real Estate Commission to determine its regulations of advertising in another state.

### **Advertising**

**QUESTION:** Agent questions whether he/she may advertise property that he/she does not have a listing/representation agreement for and is not listed in the MLS.

**RESPONSE:** Agent should keep in mind that advertising property for sale is regulated by law and failure to comply may jeopardize the agent's and/or broker's license. Idaho Code § 54-2053 addresses advertising:

- (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 show 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.

Although the property may not be "listed" (i.e., in an MLS) the term "listed" is not defined in Idaho Code. "Listed" may be interpreted to mean "offered for sale." To err on the side of caution, any advertising by a licensee should comply with the provisions of Idaho Code § 54-2053.

## MISCELLANEOUS

### Well Easement

**QUESTION:** An agent represents a seller in a transaction where the well to the property is not within the legal description of the property, but the owners of the property have used, cared for and maintained the well since 1944. The owner of the surrounding property is refusing to grant a well easement and the agent questions what rights the seller has in this matter.

**RESPONSE:** Idaho courts have longed recognized easements by “implication” or “necessity.” To establish an easement by implication, a party must demonstrate three essential elements: (1) unity of title and ownership and subsequent separation by grant of dominant estate; (2) apparent continuous use long enough before conveyance of dominant estate to show that use was intended to be permanent; and (3) easement must be reasonably necessary to proper enjoyment of dominant estate. *Bear Island Water Association, Inc. v. Brown*, 125 Idaho 717 (1994).

Idaho courts also recognize easement by prescription. For an easement by prescription the plaintiff must show:

To acquire a prescriptive easement in Idaho, a claimant must present reasonably clear and convincing evidence of open, notorious, continuous, uninterrupted use, under claim of right, with the knowledge of the owner of the servient estate for the prescriptive period of five years. *I.C. § 5-203*. A prescriptive right cannot be obtained if the use of the servient estate is by permission of the landowner.

*Wood v. Hoglund*, 131 Idaho 700, 702, 963 P.2d 383, 385 (1998).

An easement by necessity cannot give rise to an easement by prescription. If the necessity ends, so does the easement, and the use is adverse from that point forward.

The Hotline recommends that the seller seek the services of private legal counsel to help determine seller’s legal rights to the well.

### Husband Selling Separate Property Through Agent Wife

**QUESTION:** A broker has an agent who recently got married. That agent’s husband is now listing his home with the broker. The broker questions who should sign the representation agreement and the purchase and sale agreement. The broker also questions whether or not he should disclose to potential buyers that the agent is married to the seller.

**RESPONSE:** Any property owned by a husband or wife prior to marriage is considered their sole and separate property unless specifically given to the spouse in a prenuptial or marriage agreement. Therefore, the husband will be the one who will need to enter into the

representation agreement with broker and the purchase and sale agreement with a buyer. Since the agent/wife may possibly benefit from the sale of the home, it should be disclosed to any potential buyer that the seller is married to an agent.

### **Securities Transaction**

QUESTION: An agent has been asked to take a listing for a seller who is a partial owner. The agent questions whether this type of listing may be considered a securities transaction.

RESPONSE: Based on the facts given to the Legal Hotline, it does not appear that this transaction involves a security. Generally speaking, the sale of an interest in real estate by a single seller to a single buyer does not involve as security. This is generally true even if the buyer intends to rent the property out to vacationers or other short-term users. However, if the property is listed to be sold in fractional shares and is marketed as an investment to multiple buyers with the expectation that the property will be managed and profits will be generated for the buyers based primarily on the efforts of a third party, there is potential that the transaction involves a security. The listing broker should contact his or her legal counsel for advice if he or she believes the transaction may involve a security.

### **Seller's Refusal to Close**

QUESTION: An agent represented both the seller and buyer in a transaction that failed to close. The transaction was scheduled to close on April 30. After numerous requests from the agent to the seller to get his loan information to the title company, the seller finally got the information to the title company on April 28. The seller verbally agreed to extend closing several days and the buyer signed on May 1. Seller was to sign on May 2 but called the agent and said he wasn't going to sell to the buyers anymore because he has a nephew that he wants to sell the home to. Buyer lost approximately \$4,000 because the transaction did not close. The agent questions the Buyer's options.

RESPONSE: Based on the facts given to the Hotline a possible argument can be made that seller did not use good faith during the transaction by failing to timely produce documents to the title company and then refusing to close because seller found another buyer. Seller may be in breach of contract and the buyer is advised to seek the services of private legal counsel for a review of the matter. Seller may be subject to a claim for buyer's damages or a claim for specific performance on the property.

### **Amendment to CC&R's Prohibiting Rentals**

QUESTION: Broker is aware of developers or homeowner's associations that have amended their conditions covenants & restrictions to prohibit rentals within the applicable subdivision or association. In one such case, a homeowner who used, or intended to use, a home as a rental wrote a certified letter to the association claiming an existing use and/or "grandfather" right to rent the premises. Broker questions whether amending CC&R's in this manner is legal

and, if so, whether the homeowner who wrote the letter regarding rental rights has a “grandfathered” right to rent the premises.

**RESPONSE:** The Hotline is unaware of any Idaho law that makes it illegal for a developer or homeowner’s association to amend CC&R’s to prohibit rentals. While federal fair housing laws prohibit discrimination, the Hotline is likewise unaware of any federal law that considers prohibiting rental units as discriminatory. Nonetheless, any developer or HOA contemplating such a change to the CC&R’s should be advised to seek the opinion of legal counsel regarding the potential impacts of such a change, including under the Fair Housing laws. As for the “grandfathering” of the right to rent a property, such matters are governed by the applicable CC&R’s and absent some grandfathering provision in the amendment, the amendment, as written, will control.

### **Listing Agent Contacting Buyer’s Lender**

**QUESTION:** Broker is aware of conduct of a listing agent that she questions as illegal or unethical. Listing agent, on at least two occasions, has contacted the buyer’s lender asking for information from the lender regarding buyer’s financial condition or the status of buyer’s loan or loan application. Broker states that she wants to file a complaint against the listing broker and questions whether she should file such a complaint with the Idaho Real Estate Commission, the local board, or the state association.

**RESPONSE:** As a non-agent, the listing agent owes the buyer those duties owed to a customer set forth in Idaho Code section 54-2086. The duties owed to a customer include a duty to act in good faith and with honesty. If the listing agent’s intent is to interfere with the contract or otherwise violates the duties owed to the buyer as a customer, the agent may be liable for such actions. Further, Article 1 of the Code of Ethics and Standards of Practice promulgated by the National Association of REALTORS® requires generally that all members treat all parties with honesty. Such actions by the listing agent, particularly because the listing agent contacted buyer’s lender directly instead of through buyer’s representative, may possibly implicate Article 1 of the Code of Ethics. The Hotline is unaware of any other specific licensing rule or regulation that prohibits the listing agent’s conduct. The Hotline is also unaware of a specific ethical code that the listing agent may have violated. Finally, it may be possible that such conduct violates general consumer protection or financing industry rules or regulations, but such rules are likely more applicable to the conduct of the lender than the listing agent. Such information is beyond the scope of the Hotline.

If the agent believes the listing agent violated the National Association of REALTORS®’ Code of Ethics, she may file an ethics complaint against the listing agent with the Idaho Real Estate Commission. Agent may also file a complaint with her local board. Any such complaint must set forth the specific rule or standard of conduct broker believes the listing agent may have violated.

## **Listing Property in a Seniors 55+ Community**

**QUESTION:** An agent questions whether he may list a property that requires the residents to be 55 years of age or older without violating federal fair housing laws.

**RESPONSE:** While federal fair housing laws prohibit discrimination based on familial status, the Fair Housing Act and/or the Housing for Older Persons Act of 1995 allow for an exemption for qualified housing or communities for older persons. Therefore, an agent does not, per se, violate fair housing laws merely by listing a property in a Seniors 55+ Community.

The Department of Housing and Urban Development provides certain guidelines to help avoid discrimination in listing or marketing materials. According to HUD guidelines, the general rule is to focus on the property, not the people in listings and/or marketing material. Listing or advertisements for housing designated by HUD for older persons, however, may indicate limitations based on age only. The HUD guidelines state:

“Avoid the following:

- Using words or phrases that convey the preference of one group over another. When in doubt, use words that describe features on the property (“near six mile paved exercise trail through woods”) rather than the buyers who might want to use the feature (“great for joggers”).
- Describing the dwelling, area, or building residents with words that relate to race, color, religion, age, familial status, or national origin (“Hispanics neighborhood or “Adult building”)
- Using catchwords such as “exclusive,” “private,” or “integrated” that convey preferences for one group over another or send signals about a community makeup.
- Making references to well-known racial, ethnic, or religious landmarks nearby.”

Additionally, the Idaho Supreme Court in, *Staff of the Idaho Real Estate Commission v. Russett A. Nordling* provided general guidelines for listing property in a 55+ community. Agent may want to review this case and the applicable MLS rules. Finally, agent may wish to follow up with the Department of Housing and Urban Development regarding such advertising.

## **Use of the Fair Housing Symbol**

**QUESTION:** An agent questions whether the Fair Housing symbol is mandatory when advertising.

**RESPONSE:** Marketing and advertising of properties subject to the federal Fair Housing Act should be undertaken with care. The Act prohibits advertisements that indicate any kind of preference based on race, color, religion, sex, handicap, familial status or national origin. 42

U.S.C. § 3604(c). The Department of Housing and Urban Development, the federal agency charged with regulating fair housing, applies certain “guidelines” in evaluating whether advertisements and marketing materials comply with the Fair Housing Act (these guidelines were part of the federal regulations at one time, but were withdrawn). HUD’s guidelines indicate that all advertising of residential real estate should contain an equal housing logotype, statement or slogan as a means of educating buyers that the property is available to all persons. The size or type of logo or slogan will depend on the type of media used in the advertisement and, if in print, the size of the advertisement. The general rule of thumb for HUD compliance in advertising is to promote the property, not people.

Based on the above information, it does not appear that use of the fair housing logo or a fair housing slogan is mandatory in advertisements and marketing material. Nonetheless, use of the logo or slogan is highly encouraged. It is an indication that the property seller intends to comply with federal fair housing laws. Use of the logo may also mitigate against any inadvertent violation of the Fair Housing Act. HUD has made the logo freely available at: <http://www.hud.gov/library/bookshelf11/hudgraphics/fheologo.cfm>.

Licensees should also keep in mind that Idaho law that expressly prohibits discrimination related to the sale of real property. The Idaho Human Rights Act, Idaho Code section 67-5909(8), states that it is a violation of Idaho law:

- (8) For an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesman:
  - (a) To refuse to engage in a real estate transaction with a person,
  - (b) To discriminate against a person in the terms, conditions or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith,
  - (c) To refuse to receive or to fail to transmit a bona fide offer to engage in a real estate transaction from a person,
  - (d) To refuse to negotiate a real estate transaction with a person,
  - (e) To represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to fail to bring a property listing to his attention, or to refuse to permit him to inspect real property,
  - (f) To print, circulate, post or mail or cause to be so published a statement, advertisement or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto,
  - (g) To offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith, or
  - (h) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if the modifications may be necessary to afford such person full enjoyment of the premises. Provided, that in the case of a rental, the landlord may, where it is

reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior, exterior, or both, of the premises, to the condition that existed before the modification, reasonable wear and tear excepted. The provision for restoration shall be included in any lease or rental agreement.

These prohibitions against discrimination in real estate transactions apply not just to property owners, but specifically include licensees.

### **VA Loan Funding**

**QUESTION:** Agent represents seller in a transaction where buyer is eligible for assistance from the Department of Veterans Affairs (“VA”). The VA approved buyer for a one hundred percent (100%) financing and included the buyer’s “funding fee” in the overall loan amount. Based on Section 3(C), lines 55 through 59 of the RE-21 Real Estate Purchase and Sale Agreement, buyer believes seller is responsible for paying all of buyer’s fees related to closing the transaction, including the buyer’s “funding fee.” The “funding fee” is almost five thousand dollars. Buyer particularly relies on the final sentence of this section of the RE-21, which states: “SELLER agrees to pay fees required by FHA or VA.” Agent questions whether Seller is required to pay the buyer’s “funding fee.”

**RESPONSE:** When a buyer qualifies for loan assistance from the VA, rules and regulations limit the buyer’s responsibility for certain fees associated with closing the transaction. VA regulations allow the buyer to pay for customary and reasonable fees associated with closing a transaction, but do not allow buyers to pay for what the VA considers “junk” fees that are, nonetheless, often charged as part of the closing process.

The fees a VA approved buyer may pay are referred to as “allowable” fees. Allowable fees include, but are not necessarily limited to, items such as appraisals and compliance inspections, recording fees, credit reports, prepaid items, hazard insurance, survey, title exam, and, importantly, the VA Funding Fee. The VA Funding Fee is a non-negotiable fee that is charged by the VA approved lender. The funding fee is usually reflected as a percentage of the total loan amount. The percentage charged for the funding fee usually depends on whether the VA qualifying buyer is obtaining a VA loan for the first time and/or whether the VA qualifying buyer is making a down payment. The VA Funding Fee is not a “junk” or non-allowable fee and is the responsibility of the VA approved buyer.

The fees the buyer is prohibited from paying when VA financing is involved are often referred to as “non-allowable” fees. The non-allowable fees may vary from state to state and often depend on local custom and practice concerning which party customarily pays which costs associated with closing. These non-allowable fees include, but are not necessarily limited to, items such as escrow fees, tax service fees or any other fee the VA does not consider customary or reasonable. If buyer or buyer’s agent has questions regarding which fees are allowable and non-allowable, buyer should contact his or her local VA office or the office or agency that issued any Certificate of Eligibility.

Finally, agent suggests that the language in the RE-21 may be vague or ambiguous regarding which fees a seller is required to pay in a transaction involving VA funding. The language in the RE-21 clearly and unambiguously states that a seller in a VA funded transaction is required to pay only those fees “required by FHA or VA.” Nowhere in the RE-21 is a seller required to pay fees in a VA funded transaction that are “allowable” fees – i.e., fees that are the responsibility of the buyer or the buyer’s fees. The RE-21 only references seller fees, it does not require a seller to pay buyer’s fees.

### **Title Company**

QUESTION: Agent questions whether Seller has the right to require the Buyer to use a specific title company.

RESPONSE: Under the Real Estate Settlement Procedures Act (“RESPA”), a seller may not require the buyer to use the services of a particular lender or settlement service as a condition of the sale. Congress enacted RESPA to enable consumers to understand better the process of purchasing and financing a home, particularly the closing process. The Secretary of Housing and Urban Development (HUD) administers RESPA through guidelines known as Regulation X. RESPA requires certain disclosures related to the closing process and prohibits certain practices that increase the costs of settlement services. These practices include, but are not limited to, kickbacks or fees for referrals of settlement services involving federally related mortgage loans; fee splitting or receipt of fees for services not performed; or requiring the buyer to use a particular title company as a condition of the sale.

Typically, the right to choose the closing agency rests with the buyer. In the absence of a specific direction from the buyer, the seller may recommend a title company. If the buyer is made aware of the seller’s preference of title companies, and buyer does not object after such notification, then the seller’s recommendation of a title company does not run afoul of the RESPA requirements. The seller may not, however, require the buyer to use the services of any particular closing agent or closing service under RESPA.

### **Auctions**

QUESTION: Agent has four properties all in good financial standing. Can he/she place an ad in the newspaper and have a silent auction?

RESPONSE: The Hotline is unaware of any reason why the seller cannot auction the properties. The agent should note that all real estate license laws apply (e.g. advertising). In addition, agent should review the Idaho Real Estate Commission’s Guideline #22 with regard to auctioneers.

### **Confidentiality of Sales Price**

QUESTION: Buyer and Seller entered into a contract that included a term that requiring that the sale price remain confidential. Closing will take place after July 1, 2008. Agent

questions new legislation addressing whether the “sold” price of a property is confidential information requires the parties to disclose the sales price?

RESPONSE: Senate Bill No. 1401, amending Section 54-2083, became effective on July 1, 2008, and states in part:

(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 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 54-28082 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.

Based on this legislation, the “sold” price is not considered confidential client information. It likely does not matter than the transaction was entered into prior to the effective date of the legislation, primarily because nothing in previous law made “sold” data confidential (prior law just did not require disclosure).

Additionally, the applicable MLS rules likely require disclosure or dissemination of the “sold” price through the MLS as a condition to participating. Agent should review the applicable MLS rules and/or contact the MLS if either party has specific concerns regarding confidentiality of the “sold” price. Nonetheless, the parties to the contract may agree that the sale price remain confidential unless disclosure is otherwise required by law or applicable MLS rules.

### **Appraisals**

QUESTION: Seller’s Agent questions whether a potential buyer’s agent may hire an appraiser to enter seller’s property and conduct an appraisal without seller’s knowledge or consent prior to entering into a purchase and sale agreement. Seller’s Agent listed the property pursuant to an RE-16 Exclusive Seller Representation Agreement wherein seller authorized MLS participation and use of a lockbox. Buyer’s agent and the appraiser apparently gained access to the property through the lockbox. Seller’s agent particularly questions whether this kind of access is allowed by the RE-16.

RESPONSE: Paragraph 12 of the RE-16 indicates that, by initialing, seller authorizes a lockbox to be placed on any building on the property, which lockbox will contain a key giving access to the building to MLS keyholders. This access allows MLS keyholders to “enter said property to inspect or show the same.” The terms “inspect” and “show” are not specifically

defined by the RE-16. Common usage of these terms, however, certainly imply or suggest that part of showing or inspecting the property may include a pre-offer appraisal.

The Hotline is unaware of any statute, rule or regulation that prohibits a buyer or a buyer's agent from showing the property for purposes of obtaining a pre-offer appraisal. The Hotline is also unaware of any rule prohibiting an agent who has access to a lockbox from letting an appraiser enter the property in an effort to "show" or "inspect" the property. The inquiring agent may wish to check with the applicable MLS to see if conduct of the buyer's agent violates its rules and regulations.

### **Recording Promissory Note**

QUESTION: Agent fronted money to a client that was in default on the loan to his home to assist him in bringing his loan current. The client signed a promissory note in favor of Agent and was supposed to sign a deed of trust, which would evidence the promissory note's security against the real property, but the deed of trust was never signed and has not been recorded. The client listed the property with another brokerage and a closing on the property is set for the near future. Agent questions whether she can record the promissory note to evidence the debt owed to her by her former client.

RESPONSE: Agent's question is beyond the intended scope of the Legal Hotline. Agent should review Idaho Code section 55-801, which states that any instrument or judgment affecting title to real property may be recorded against the real property. A promissory note usually does not affect title to real property. Since a promissory note is a form of contract, Agent may rely on the remedies available for contracts, but the debt/obligation likely cannot be secured by the real property absent a deed of trust that is eligible for recording. Agent should follow up with her own legal counsel as soon as possible to determine if there are other steps she may take to protect her interests and right to payment under the promissory note.

### **Septic Tank Pumping**

QUESTION: A past client contacted Agent with a question regarding legal information the client received from the "Roto-Rooter man," who informed her that Idaho law requires sellers of properties serviced by a septic tank to pump the tank prior to selling the home.

RESPONSE: After a review of Idaho case law and statutes, the Legal Hotline is unable to locate the law the Roto-Rooter man relies on. Further, under paragraph 17 of the RE-21 Purchase and Sale Agreement, buyers and sellers may indicate which party is responsible to pay certain costs related to the transaction. One of these costs is "Septic Pumping." In other words, "Septic Pumping" (if applicable) is a cost subject to negotiation and agreement between the parties. It appears that the "Roto-Rooter man" provided inaccurate legal advice.

### **House for the Holiday Sales**

QUESTION: Agent indicates that a group of real estate agents are promoting a "Home for the Holidays" sale where certain sellers have agreed to reduce the sale price of their homes

by five percent (5%) for a specified period of time. Agent is concerned that this promotion creates an unfair advantage, destroys the independence of brokers and agents and/or creates price fixing or monopolistic concerns.

**RESPONSE:** Despite Agent's concerns, there does not appear to be anything about the promotion that violates state or federal laws that prohibit monopolies, price fixing or collusion. Anti-trust or anti-competition laws, both state and federal, protect trade and commerce from unlawful trade restraints, price discrimination, price fixing and monopolies. The contemplated promotion does not create the type of trust or monopolistic conduct that state and federal law prohibits because there is not an illegal tying (i.e. requiring consumers to purchase two different products as part of the same transaction) or exclusivity requirement as part of the promotion.

Also, the promotion does not appear to create price fixing concerns because the price, regardless of whether it is increased or decreased by a specified percentage, is set only for that one home. A price is not being set for all homes or all properties of a like kind. As for concerns about this type of promotion destroying the independence of brokers and agents, absent some kind of collusion or other anti-trust conduct, the mere fact that multiple brokerages have mutually engaged in a promotion intended to increase home sales, in and of itself, is not illegal or a violation of licensing laws or regulations.

### **Deeds**

**QUESTION:** Agent represents Buyer and Sellers as a limited dual agent. Buyer is an attorney at a large law firm in Seattle, Washington. The transaction involves the purchase and sale of bare ground. The purchase and sale agreement states that Sellers will provide Buyer a warranty deed to convey the property. The title company involved in the transaction prepared an Idaho form warranty deed, which Buyer rejected. Buyer claims the "warranty deed" prepared by the title company is actually a "bargain and sale" deed. Buyer provided changes that she feels are necessary to make the deed a true "warranty deed." Agent questions whether Buyer's revisions to the title company's deed are necessary and how Sellers should respond.

**RESPONSE:** Issues related to the styling and wording of the deed are generally not within the scope of services that a real estate broker or agent agrees to provide a client, particularly because a deed is a legal document. Further, the statutory duties that an agent owes to a client do not include issues related to the styling and wording of the deed. Agent should advise Sellers to retain their own attorney to review the changes Buyer wants to see in the deed. This is particularly important because the warranties provided for in the deed place certain legal obligations on Sellers relative to the deed, which could expose Sellers to the risk of a legal claim by the Buyer if the warranties are not satisfied.