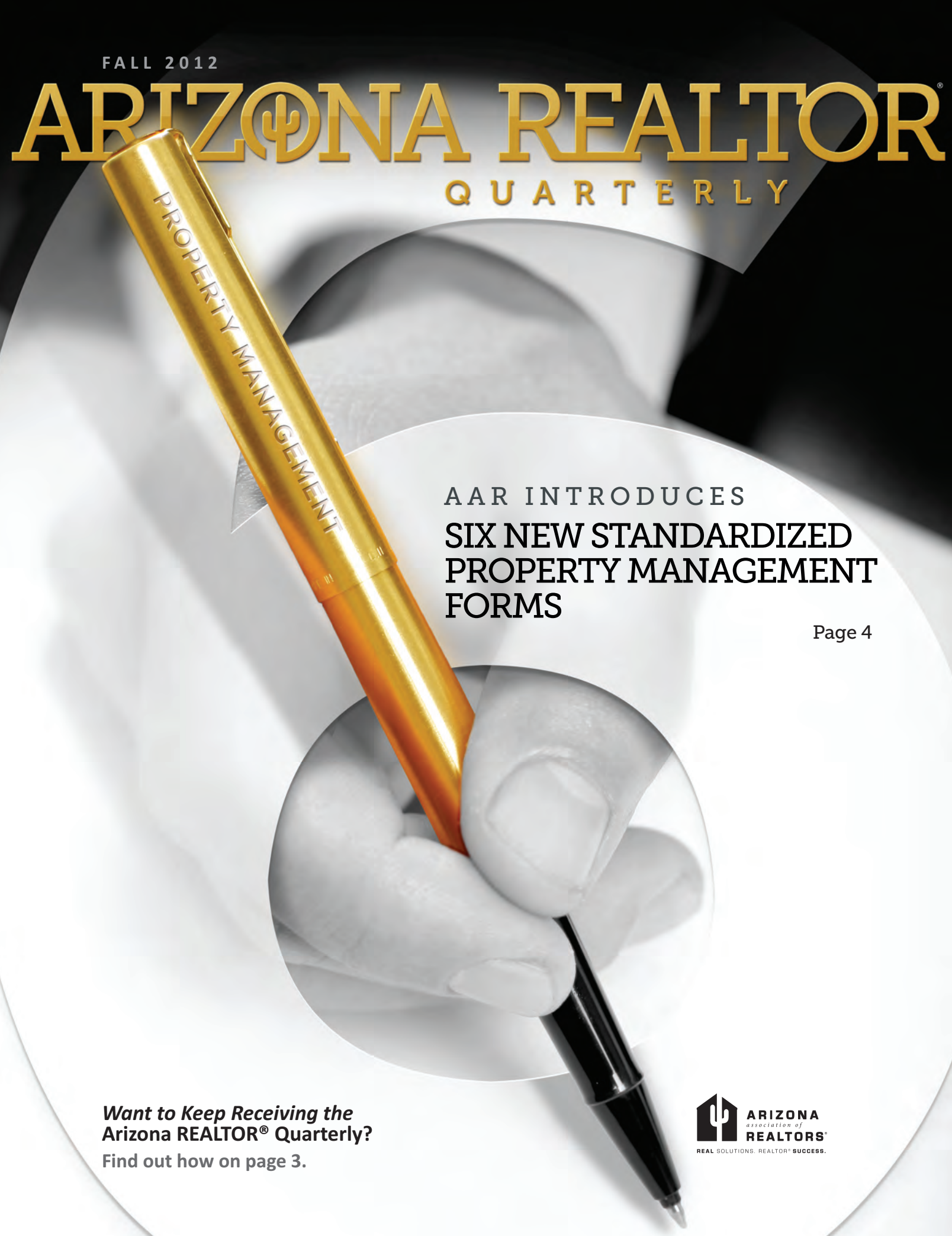
FALL 2012

ARIZONA REALTOR® QUARTERLY



AAR INTRODUCES

SIX NEW STANDARDIZED PROPERTY MANAGEMENT FORMS

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Want to Keep Receiving the
Arizona REALTOR® Quarterly?
Find out how on page 3.

ARIZONA association of REALTORS®
REAL SOLUTIONS. REALTOR® SUCCESS.

A MESSAGE FROM 2012 AAR PROFESSIONAL & BUSINESS DEVELOPMENT COMMITTEE CHAIR PAULA MONTHOFER

Paula Monthofer, ABR, GRI
2012 AAR Professional
& Business Development
Committee Chair

AAR's purpose is "to assist our members become the best prepared real estate professionals with the highest standards."

Education is central to that purpose, and the Professional & Business Development Committee oversees AAR's educational offerings. We pride ourselves on offering top-quality education delivered by engaging instructors at an affordable price for you.

Consider the **GRI** program, which delivers the fundamentals you need to succeed, or AAR's own **Certified Risk Management Specialist (rCRMS)** program, which helps you anticipate possible pitfalls in a real estate transaction. AAR also pairs Arizona instructors with **national designation courses**, such as the Accredited Buyer's Representative (ABR), so that we can charge you less while providing more local perspective.

AAR is setting high standards for real estate education in other ways. Want to spend your CE dollars wisely? **RETeach.us** is like Yelp for real estate education. Write reviews of courses you've taken or read reviews from other agents before signing up for your next class. AAR is also renovating its classrooms for **remote delivery** so that classes hosted at the Phoenix office can be delivered live to REALTORS® around the state. Finally, AAR offers truly useful **broker education**—from focused Broker Management Clinics to the soon-to-launch My Broker Coach program of mentoring combined with interactive online education.

AAR and your local association are your education partners, providing the ultimate in REALTOR® post-licensing education and career development. If you haven't taken an AAR course, do it. You'll be wowed by the quality of the instruction and the usefulness of the information you gain. We hope to see you in class soon!

Arizona REALTOR® Magazine — September 2012

ATTENTION BROKERS:

Sign Up Now to Complete Broker Management Clinic Before Requirement Increases from Three to Nine Hours

Broker University

Effective January 1, 2013, all designated brokers, self-employed brokers and associate brokers who have been delegated authority (in writing) to review contracts and similar instruments on behalf of the designated broker will be required to take a nine-hour broker management clinic (BMC).

If you are within your two-year renewal period (meaning you must renew before August 2014), you are eligible to fulfill your BMC requirement by taking a three-hour clinic through December 2012.

AAR has two scheduled BMC courses coming up in our office:

Wednesday, November 28
(1:00pm – 4:00pm)

Wednesday, December 19
(1:00pm – 4:00pm)

Just $29!

Space is limited. Register today.

http://www.regonline.com/bmc2012

Instructors: Evan Fuchs & Laura Kovacs

For more information on the new BMC requirement, see the Arizona Department of Real Estate's Substantive Policy Statement on this topic.

http://www.azre.gov/LawBook/Documents/SPS_Documents/SPS_2012.01_BMC_Course_Instructor_Requirements.pdf

This update was originally published on AAR's blog on August 24, 2012.

http://blog.aaronline.com/2012/08/attention-brokers-managers-sign-up-now-to-complete-broker-management-clinic-before-requirement-increases-from-three-to-nine-hours/

ARIZONA REALTOR® QUARTERLY

FALL 2012

AAR UPDATES

ATTENTION BROKERS!

CONTINUE RECEIVING THE ARIZONA REALTOR® QUARTERLY

AAR provides designated brokers with a complimentary subscription to the *Arizona REALTOR® Quarterly*.

Starting in 2013, **brokers MUST OPT IN to continue receiving** the quarterly at no charge.

Opt in to your free subscription today! Visit www.aaronline.com/brokers.

AGENT SUBSCRIPTION

Subscriptions will still be available for sales agents at the $28 rate. Subscriptions for 2013 will be available for purchase online after January 1, 2013 at www.aaronline.com/azq.

ARIZONA association of REALTORS®
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EQUAL HOUSING OPPORTUNITY

REALTOR®

Arizona REALTOR® Quarterly & *Arizona REALTOR® Magazine*

Arizona REALTOR® Magazine — September 2012

Buyer Advisory Updates

www.aaronline.com/documents/buy_advis.pdf

The following changes were made to the Buyer Advisory in August 2012:

Page 3: New link for Arizona County Assessors Offices

Page 6: Updated drug lab disclosure information
Updated EPA link

Page 7: Deleted Insurance article link

AAR INTRODUCES SIX NEW STANDARDIZED PROPERTY MANAGEMENT FORMS

BY DENISE HOLLIDAY – HULL, HOLLIDAY & HOLLIDAY, PLC

AAR comes through again! As many of you know, the association has been working night and day for months to come up with new standardized property management forms, and once again, it has done a terrific job meeting the needs of its members. While it is true that Arizona does not require the use of any specific forms for property management, the new AAR forms have been developed by a number of members well versed in this field. As a result, you no longer have to reinvent the wheel and run the risk that your unique creation of the wheel lands you stranded at the most inopportune moment.

Six new standardized forms have been approved by the AAR Executive Committee. These forms are available for your review and use on zipForm® as of August 1, 2012.

APPLICATION FOR OCCUPANCY

http://www.aaronline.com/law-ethics/forms/samples/sample-application-for-occupancy.pdf

This form not only will help you gather the information necessary to decide whether a prospective tenant meets your qualifications, but it also includes some issues you may not have thought about but that are very relevant. The first really helpful piece of information addresses how they heard about you. The successful use of advertising dollars is just one aspect of this question. Knowing that another resident referred them and is happy with your services as a property manager is priceless. The second nice addition addresses the issue of service animals before the applicant submits their application. Finally, knowing whether the applicant has existing pest control issues can save you from incurring expensive damages addressing that issue.

MOVE-IN/MOVE-OUT CONDITION CHECKLIST

http://www.aaronline.com/law-ethics/forms/samples/sample-movein-moveout-checklist.pdf

This standardized checklist is broad enough to include areas that you may not normally have included in your current form. Additionally, this form notifies your tenant that this form is not a repair request. Finally, by adding a line for the form to be signed by the landlord or property manager, you can help eliminate the issue of whether the tenant actually filled out this form and returned it to you at the time of move-out by placing that burden of proof squarely on the shoulders of the tenant.

BREACH NOTICES

Notice of Intention to Terminate Lease Agreement Due to Nonpayment of Rent

http://www.aaronline.com/law-ethics/forms/samples/sample-intent-to-terminate-lease-agreement-nonpayment.pdf

Notice to Terminate Lease Agreement Due to Material Noncompliance

http://www.aaronline.com/law-ethics/forms/samples/sample-terminate-lease-agreement-noncompliance.pdf

Notice to Terminate Lease Agreement Due to Material Noncompliance Affecting Healthy and Safety

http://www.aaronline.com/law-ethics/forms/samples/sample-terminate-lease-agreement-health-safety.pdf

Notice to Immediately Terminate Lease Agreement Due to Material and Irreparable Noncompliance

http://www.aaronline.com/law-ethics/forms/samples/sample-immediate-termination-lease-agreement-irreparable.pdf

Breach notices constitute the final group of forms. AAR did a really good job combining a number of other forms to create notices that are easy to fill out, easy to read and include all relevant information needed to proceed with a court action. Additionally, it reminds all parties that certified mail constitutes legal delivery of the notice.

As usual, a round of applause for the members who tirelessly volunteer their time and their expertise to raise the level of performance in our industry! The Property Management Ancillary Forms Workgroup was chaired by Lisa Suarez and includes Char DuFresne, Diana Erickson, Sue Flucke, Jeff Hockett, Jacquie Kellogg, Kari Maud, Mike Mumford, Brad Snyder, Alberta Shantz and myself. Staff representatives to the workgroup are Michelle Lind, Christina Smalls and Jan Steward.

ABOUT THE AUTHOR

Denise Holliday *is an attorney with Hull, Holliday & Holliday, PLC and is co-author of www.doctorevictor.com. She has been engaged in landlord/tenant law since 1996 and has served as Justice of the Peace Pro Team since 2000. Holliday received her Bachelor of Science from Northern Arizona University and her Juris Doctorate from Oklahoma City University.*

Arizona REALTOR® Magazine — August 2012

LANDLORDS CAN SERVE MULTIPLE NOTICES TO TROUBLESOME RESIDENTS

The Arizona Residential Landlord and Tenant Act provides for a variety of notices for residents who violate their lease or community rules and regulations. However, landlords can serve multiple notices if the circumstances warrant them.

TYPES OF NOTICES

Some of the more common notices landlords use include:

- Five-day notice for nonpayment of rent
  see AAR's new form:
  Notice of Intention to Terminate Lease Agreement Due to Nonpayment of Rent
- Noncompliance notices (five-day or 10-day)
  see AAR's new forms:
  Notice to Terminate Lease Agreement Due to Material Noncompliance & **Notice to Terminate Lease Agreement Due to Material Noncompliance Affecting Healthy and Safety**
- 30-day notice to terminate a month-to-month tenancy or not renew a lease
- Access notice to enter an apartment
- Abandonment notices
- Immediate eviction notice for material and irreparable breaches (violence or criminal activity)
  see AAR's new form:
  Notice to Immediately Terminate Lease Agreement Due to Material and Irreparable Noncompliance

If you have a resident who commits several breaches of the lease, state law allows a landlord to address each situation with a different notice. Also, if you currently have a court date pending for one breach and the resident engages in a different violation, you can serve the appropriate notice for that breach.

For example, you have a court date for nonpayment of rent and then the police arrest the resident for illegal drugs in the apartment. You should serve the resident an immediate eviction notice for the criminal activity. Then, at your eviction hearing, ask the judge to give you the 12 – 24 hour move-out order because of the subsequent breach of criminal activity.

The court can amend or add this new claim to the nonpayment issue. In this case, it is worth it to try for the 12 – 24 hour move-out order. The worst that can happen is the resident is evicted for nonpayment and has to move five days after court.

ANOTHER EXAMPLE

Consider another example in which you have a resident on a month-to-month lease or have a lease expiring soon. The resident's neighbors complain of excessive noise, traffic in and out of the apartment, late night parties and an unauthorized pet. The neighbors suspect drug activity, but you have no proof.

In this case, you initially should serve a 10-day noncompliance notice to correct the noise, traffic

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Arizona REALTOR® Magazine — September 2012

FHFA Announces New Short Sale Guidelines for Fannie Mae and Freddie Mac

The Federal Housing Finance Agency (FHFA) has issued a directive to Fannie Mae and Freddie Mac to align existing short sale programs into one standard short sale program and issue clear guidelines to mortgage services. The new guidelines, which become effective November 1, 2012, will permit homeowners with a Fannie Mae or Freddie Mac mortgage to sell their home in a short sale even if they are current on their mortgage provided they have an eligible hardship. The streamlined program rules will enable lenders and services to quickly and easily qualify eligible borrowers for a short sale. To read the entire announcement, visit: www.fhfa.gov/webfiles/24211/ShortSalesPRFactFinal.pdf

AAR first announced these new rules on our Facebook page on August 21, 2012. Be sure to "like" AAR's page to receive the latest updates!

www.facebook.com/azrealtors

and pet problem. You also should serve the 30-day non-renewal notice effective for the end of the lease term, but a minimum of 30 days from the next periodic rental due date. If the rent is due and not paid, serve a five-day nonpayment notice.

Of course, you can refuse rent if the resident offers it because of the noncompliance notice. You may also wish to serve a two-day access notice to enter the apartment to check for pets and possible damages. If the resident refuses access, this is possible grounds to immediately terminate the lease.

If you enter and find property damage or evidence of illegal drugs, you can serve an immediate eviction notice. Finally, if rent is delinquent and there is no sign of the resident, you can, under appropriate circumstances, serve an abandonment notice.

As an example, consider the following: Leo Nerd Decapitated and his friend, Brad Pitts, rent an apartment at the Stars Apartments for a lease term of six months. The manager, Holly Wood, informs Leo Nerd Decapitated and Brad Pitts that the apartment community does not permit pets or additional occupants.

Five months later, Holly Wood receives a complaint from Lassie Collie, a neighbor of Leo and Brad, of loud parties and a dog barking all night. Holly Wood serves a 10-day noncompliance notice, along with a notice to not renew the lease.

Leo Nerd Decapitated refuses to pay rent since he assumes he and Brad are going to have to move anyway. Holly Wood serves a five-day nonpayment notice. Later that day, Clint Leasewood, a police officer, tells her that he arrested two of Leo and Brad's guests, Adam Sandbag and Richard Gearshift, for possession of illegal drugs in the apartment.

Holly Wood serves an immediate eviction notice, and Judge David Anchovy gives her an immediate eviction order plus all rent owed.

ABOUT THE AUTHOR

Andrew M. Hull, *attorney at law, has engaged in landlord/tenant practice since 1975 and is the author of www.doctorevictor.com. Hull has served as Justice of the Peace Pro Tem since 1989 and is the author of Arizona Rental Rights (currently in 6th edition), Arizona Rental Housing Blue Book (1987) and the Arizona Multihousing Legal Reference Handbook (1996). In addition to being an instructor for the Certified Apartment Manager (CAM) courses, Arizona Department of Real Estate and Arizona School of Real Estate, he also serves on the Board of Directors for the Arizona Multihousing Association and Brookline College.*

Arizona REALTOR® Magazine — July 2012

AAR Ombudsman Program Active Again

In February, AAR suspended its ombudsman program due to changes in our professional liability insurance policy. After several months of research and negotiation, AAR has obtained additional insurance coverage, which made it possible to reactivate the program.

When a consumer calls AAR with a complaint about a REALTOR®, we encourage them to speak directly with the agent or agent's broker. If that doesn't work, the second option we like to suggest is our ombudsman program. The program helps the parties involved resolve issues quickly and avoid the more serious and lengthy complaint process. An impartial REALTOR® volunteer — called an ombudsman — listens to the complainant's story to determine what outcome the complainant is seeking.

With the complainant's permission, the ombudsman reaches out to the REALTOR® who is the subject of the complaint and hears their side of the story as well. Through a series of phone calls and careful diplomacy, an ombudsman is often able to resolve situations before they escalate. If no resolution is possible, the parties are free to file an ethics complaint or pursue other dispute resolution options. The ombudsman program had a 71 percent success rate in 2011.

Learn more about the ombudsman program and AAR's other dispute resolution programs.

http://www.aaronline.com/Disputes/

Arizona REALTOR® Magazine — August 2012

ARE OTHER AGENTS POSTING YOUR LISTINGS ON CRAIGSLIST?

A Look at Rules on Permission, Attribution & Accuracy

Recently, Bea Lueck of Rox Real Estate in Casa Grande noticed one of her pending listings advertised on Craigslist. Another agent was using her MLS photos and description — with incorrect seller carry terms — to draw buyer clients. Nowhere did the Craigslist post mention that Bea's firm was the listing broker. A little digging on Craigslist turned up plenty of variations of listings posted by someone other than the listing agent/broker. "Is this allowed?" she wondered.

"It's free advertising for your listing. Just be grateful!" hollered some. "It's against the rules. Turn them in!" yelled others. But who's right? And who decides? There are at least three entities that weigh in on how agents should handle advertising of listings: the multiple listing service, the Arizona Department of Real Estate and the REALTOR® association. Let's take a look at what these three entities will consider when reviewing a complaint.

MULTIPLE LISTING SERVICE (MLS)

If a complaint is filed with an MLS about a Craigslist post, the MLS will first determine if the post comes from one of its subscribers. If it does, the MLS will review the complaint against its own rules and regulations to determine if a violation has occurred. In Bea's case, the MLS with jurisdiction is ARMLS. Here's what the ARMLS Rules & Regulations have to say:

http://files.flexmls.com/az/20100730193534610365000000.pdf

> **10.11. ADVERTISING OF LISTINGS FILED WITH ARMLS. A Listing shall not be advertised by any Subscriber, other than the Listing Subscriber/Subscriber, in any medium whatsoever, without prior consent of the Listing Subscriber.**
>
> ...
>
> **21.5. A Participant shall cause any listing that is displayed on his or her website or in other advertising media to identify the name of the listing firm or the listing firm and agent in a readily visible color, in a reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.**

"You cannot just post listings on Craigslist," says ARMLS Interim CEO Matt Consalvo. "You must have proper attribution, and you must have permission to do it." However, points out Consalvo, there is one complicating factor about attribution. This May, the Technology & Emerging Issues Subcommittee to NAR's Multiple Listing Issues & Policies Committee adopted new language in the Internet Data Exchange (IDX) Policy as follows:

http://www.realtor.org/topics/internet-data-exchange-idx/policy

> **When displaying listing content, a participant's or user's IDX display site must clearly identify the name of the brokerage firm under which they operate in a readily visible color and typeface. This policy acknowledges that certain required disclosures may not be possible in displays of minimal information (e.g. "thumbnails", text messages, "tweets", etc., of 200 characters or less). Such displays are exempt from the disclosure requirements established in this policy but only when linked directly to a display that includes all required disclosures.**

A Craigslist post is not limited to 200 characters or less (as a tweet on Twitter would be), so would it meet the threshold for "minimal information"? If Craigslist does meet that threshold, identification of the listing firm might not be required, but a link back to an IDX feed with "all required disclosures" certainly would be.

ARIZONA DEPARTMENT OF REAL ESTATE

If a complaint about the Craigslist post is submitted to the Department of Real Estate, it is evaluated against the relevant sections of the Arizona Administrative Code – State Real Estate Department. The code states:

http://www.azsos.gov/public_services/Title_04/4-28.htm

> **R4-28-502. Advertising by a Licensee**
>
> **C. A salesperson or broker shall ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker shall not misrepresent the facts or create misleading impressions.**

>>

A licensee must fully state factual material and must avoid creating a misleading impression. If the non-listing agent posts the property on Craigslist but makes changes to the listing (examples may include: indicating the property is available for lease when the property is offered for sale; changing the home's features; misstating material information relative to the property), the non-listing agent has misrepresented the facts or created a misleading impression.

The code also states:

F. A licensee who advertises property that is the subject of another person's real estate employment agreement shall display the name of the listing broker in a clear and prominent manner.

A simple statement in the Craigslist post, such as "Listing courtesy of XYZ Brokerage Firm," would likely satisfy this provision.

REALTOR® ASSOCIATIONS

A REALTOR® in Arizona may submit a complaint alleging a violation of the Code of Ethics against a fellow REALTOR®. The Arizona Association of REALTORS® handles ethics enforcement in Arizona for all local associations with the exception of SEVRAR, which manages its own ethics enforcement. Professional standards REALTOR® volunteers would evaluate the complaint.

Article 12 of the Code of Ethics states:

http://www.realtor.org/CEAM.nsf/4504b8ecc94d1ab3862569a6006cd47c/9a24fbd43fbb665286257234006f6e89

REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations.

Does the Craigslist post present a true picture if the home is no longer active or if the description contains inaccurate information?

Under the Standards of Practice for Article 12, the code also states:

Standard of Practice 12-4

REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord. (Amended 1/93)

Does the agent posting on Craigslist have the authority to post the listing?

Finally, the code states:

Standard of Practice 12-5

REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner. This Standard of Practice acknowledges that disclosing the name of the firm may not be practical in electronic displays of limited information (e.g., "thumbnails", text messages, "tweets", etc.). Such displays are exempt from the disclosure requirement established in this Standard of Practice, but only when linked to a display that includes all required disclosures. (Adopted 11/86, Amended 1/11)

This standard closely tracks the language included in the Internet Data Exchange (IDX) Policy referenced above under the MLS section. Is a Craigslist post exempt from this disclosure requirement? If so, is there a link back to the required disclosures?

http://www.realtor.org/topics/internet-data-exchange-idx/policy

CONCLUSION

If you are a listing agent or broker, you might consider regularly checking Craigslist for your listings. (This will not only alert you to these posts and help you uncover incorrect information that might be included in them, but it might also lead you to discover scam artists posting the home for lease in order to collect "rental deposits.") If you find an agent posting your listings without proper permission, attribution or accuracy, talk with your broker about contacting the other agent and/or broker. If you decide to file a complaint with one of the entities above against an agent advertising on Craigslist, be sure to take a screenshot of the post to include with your complaint.

If you are an agent who wishes to advertise another firm's listing on Craigslist, your safest course of action would be to:

1. Ask permission of the listing brokerage.
2. Include the name of the listing brokerage in the Craigslist post in a readily apparent manner.
3. If you include a link back to an IDX-enabled website, make sure you are abiding by all IDX rules.
4. Regularly review your Craigslist post for accuracy and remove it if the home is sold during the post's active life on Craigslist.

Alternatively, you might choose to include only your own listings (or only listings within your brokerage, with your broker's permission) on Craigslist.

Arizona REALTOR® Magazine — August 2012

BINSR BASICS

"Is the BINSR the Time to 'Renegotiate' the Price?" and Other Frequently Asked Questions

BY RICHARD V. MACK – MACK, DRUCKER & WATSON

Although the form has been around for several years, we have received multiple inquiries on the Legal Hotline addressing the use of the Residential Buyer's Inspection Notice and Seller's Response (BINSR). The purpose of the BINSR is two-fold. First, the buyers acknowledge that they have done all desired inspections, verified important information, and make certain acknowledgements with respect to the inspection and the information available. The second purpose is for the parties to negotiate the repair of items disapproved during the inspection.

http://www.aaronline.com/law-ethics/forms/samples/sample-residential-binsr.pdf

Below are some frequently asked questions that summarize the issues that we have addressed on the hotline recently:

1. Is the BINSR the time to "renegotiate" the price?

No. The BINSR is not designed to be used as tool to renegotiate the purchase price. The BINSR is designed to give the seller an opportunity to fix or correct items disapproved during the inspection process. In the real world, the parties often use the BINSR as a mechanism to negotiate purchase price. Bear in mind, however, that is not the proper use of the form.

2. Do the parties have to sign the BINSR?

Yes. The BINSR is in effect an addendum to the contract. Accordingly, based on the statute of frauds, the BINSR must be signed by all parties to be enforceable. Additionally, based on community property principals, if a husband and wife are involved, both spouses need to sign the BINSR.

3. Must a licensed contractor be utilized to make the requested repairs?

A contractor's license is required by statute for work that exceeds $1,000 in value. Thus, to the extent that the requested repairs exceed $1,000, the seller should hire a licensed contractor to make those repairs.

4. If the buyer forgets to request that an item be repaired, may he reissue another BINSR?

The BINSR specifically says on the first page that the "Buyer is not entitled to change or modify Buyer's election after this notice is delivered to Seller." Therefore, it is critical that the buyer identify all items to be repaired in the BINSR the first time.

5. Does the buyer need to ask that warranted items be repaired as part of the BINSR?

The seller warrants in section 5(a) of the contract that all heating, cooling, mechanical, plumbing and electrical systems will be in working condition at the close of escrow. The seller is obligated to insure that those warranted items are in working condition regardless of the BINSR. However, the BINSR does provide a section on the second page whereby the buyer can notify the seller of warranted items that are not functioning properly. The better practice to avoid disputes is to identify the non-working warranted items on page 2 of the BINSR.

6. Can a buyer waive the inspection and BINSR process?

Under virtually all circumstances, the buyer should not waive an inspection. However, if the buyer disregards the advice given by the agent and set forth in multiple AAR transaction forms, a buyer may waive an inspection. Assuming that the buyer elects to waive the inspection, the signature line on page 2 of the BINSR should be signed by the buyer. The agent should keep a copy of the BINSR waiving the inspections for safe keeping in case a claim subsequently arises.

ABOUT THE AUTHOR

Richard V. Mack *is a shareholder at Mack, Drucker & Watson, which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.*

http://www.mackdruckerwatson.com/

Arizona REALTOR® Magazine — July 2012

FIRPTA TAX WITHHOLDING AT CLOSE OF ESCROW FOR FOREIGN SELLERS

BY K. MICHELLE LIND, AAR GENERAL COUNSEL

The Foreign Investment in Real Property Tax Act ("FIRPTA") requires that if the seller of real property is a nonresident alien or foreign entity ("foreign person"), the buyer must withhold a tax equal to 10 percent of the gross purchase price at close of escrow, unless an exemption applies. A resident alien is not considered a "foreign person" and therefore not subject to the mandatory withholding under FIRPTA. If the seller is a foreign person, the necessary withholding can be accomplished by the escrow agent, who will require the seller's Taxpayer Identification Number, collect the 10 percent of the purchase price and forward the funds to the IRS at close of escrow.

There are exemptions to the FIRPTA withholding requirement. For example, generally, if the purchase price does not exceed $300,000 and the buyer will use the property as the buyer's residence, no FIRPTA holding will be required. Additionally, under certain circumstances, a seller may obtain a "qualifying statement" from the IRS stating that no withholding is required.

Of course, the most common exemption is when the seller furnishes a non-foreign affidavit stating under penalty of perjury that the seller is not a foreign person. However, be aware that the real estate brokers for either party can be held liable for the tax that should have been withheld (up to the amount of compensation received), if the broker has actual knowledge that the non-foreign affidavit is false and fails to notify the buyer and the IRS.

The AAR Residential Seller's Property Disclosure Statement asks if the seller is a foreign person pursuant to FIRPTA and, if so, advises the seller to consult a tax advisor since mandatory withholding may apply. The AAR purchase contracts also address FIRPTA withholding and require the seller to comply with the IRS reporting requirement and complete the non-foreign affidavit during escrow. Further, the buyer acknowledges in the AAR contracts that if the seller is a foreign person, the buyer must withhold a tax equal to 10 percent of the purchase price, unless an exemption applies.

Foreign sellers should be advised to consult their tax professional regarding FIRPTA withholding. The seller can request the IRS to determine the seller's maximum tax liability with respect to the sale.

For more details about FIRPTA withholding, go to: www.irs.gov/businesses/small/international/article/0,,id=105000,00.html.

ABOUT THE AUTHOR

AAR General Counsel Michelle Lind *is a State Bar of Arizona board certified real estate specialist and the author of* Arizona Real Estate: A Professional's Guide to Law and Practice.

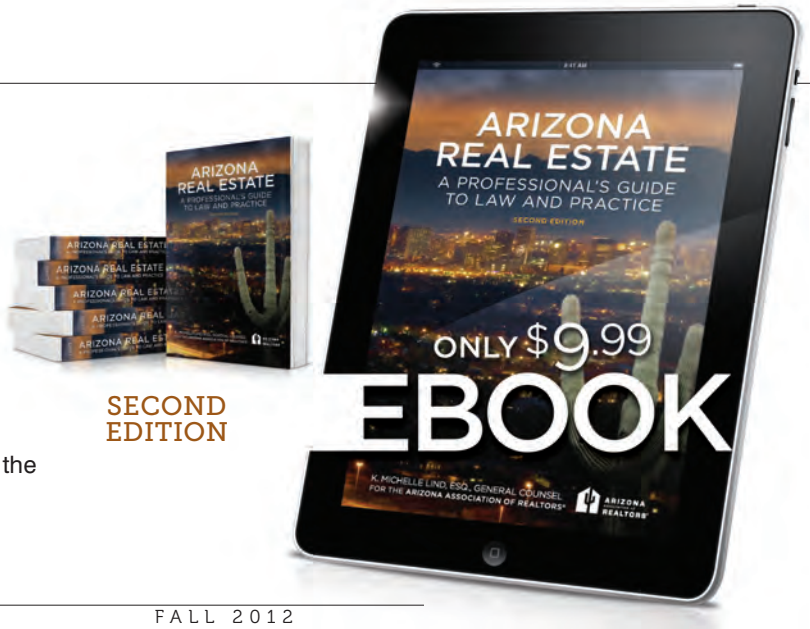
These articles are of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, these articles reflects only the opinion of the author, and are not intended as definitive legal advice and you should not act upon them without seeking independent legal counsel.

Arizona REALTOR® Magazine — April 2012

Legal Answers at Your Fingertips

The second edition of Michelle Lind's book, *Arizona Real Estate: A Professional's Guide to Law & Practice,* is now available in a searchable electronic format. Just type in the term or phrase you are seeking in the search engine on your iPad, Kindle or other mobile device and find the answer. Download the electronic book for just $9.99! Get the details.

http://www.aaronline.com/azre-book



Arizona REALTOR® Magazine — September 2012

DANGEROUS DRUG LAB LAW BECOMES TOUGHER

BY K. MICHELLE LIND, AAR GENERAL COUNSEL

The dangerous drug lab statute (A.R.S. §12-1000 [1]) is now even tougher. The statute was recently amended to prohibit the rental of unremediated property even with disclosure, to increase the sanctions for tampering with the dangerous drug lab notice posted by the police, and to expand its provisions to commercial property. (*See* SB 1438 [2], Second Regular Session 2012.)

[1] http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/12/01000.htm&Title=12&DocType=ARS

[2] http://www.azleg.state.az.us/DocumentsForBill.asp?Bill_Number=1438&Session_Id=107

DISCOVERY OF A DRUG LAB

The dangerous drug lab statute applies to "clandestine drug laboratories," which are defined as property on which methamphetamine, ecstasy or LSD is being manufactured or where a person is arrested for having any chemicals or equipment used in manufacturing methamphetamine, ecstasy or LSD ("dangerous drug labs"). If the police discover a dangerous drug lab, the officer will remove the gross contamination and order the removal of all persons from the contaminated portion of the property. The police will affix a Notice of Removal in a conspicuous place on the property. The notice is bright red with "WARNING" in large bold type at the top and warns that hazardous substances, toxic chemicals or other waste products may still be present on the property and that it is unlawful for any unauthorized person to enter the residually contaminated portion of the property until it has been remediated by a registered drug laboratory site remediation firm.

The police are obligated to deliver a copy of the Notice of Removal to the property owner if on site and the on-site manager if available. Within two business days after the discovery or arrest, the police must send the Notice of Removal by certified mail to the property owner, the on-site manager, the county health department, the local fire department and the Board of Technical Registration.

DISCLOSURE TO BUYERS

Until the remediation is complete, the owner is required to disclose to a buyer in writing that methamphetamine, ecstasy or LSD was manufactured on the property or that an arrest was made pursuant to this statute, within five days after a buyer signs a purchase contract. The buyer must acknowledge receipt of the disclosure and may cancel the purchase contract within five days after receiving the disclosure notice. An owner who does not comply with this requirement is subject to criminal prosecution for failure to disclose.

REMEDIATION REQUIRED

The property owner is obligated to remediate the property within 12 months after the Notice of Removal by retaining a registered drug laboratory site remediation firm. If the owner fails to remediate the property, a county or city may remediate the property with the cost of remediation passed on to the property owner in the form of a lien on the property title.

When remediation is complete, the drug laboratory site remediation firm will remove the posted Notice of Removal and issue a document stating that the residually contaminated portion of the real property has been remediated. Within 24 hours after the remediation is complete, the drug laboratory site remediation firm must deliver the document to each person and entity previously notified and the law enforcement agency that posted the Notice of Removal. The person who was operating the clandestine drug laboratory, if not the owner, is obligated to pay restitution to the owner for all costs that the owner incurred to remediate the property.

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PENALTIES FOR VIOLATIONS

There are significant penalties for removing the Notice of Removal posted by the police. The first time a property owner knowingly allows the posted notice to be disturbed, the state Board of Technical Registration may impose a civil penalty of up to $2,000. The second violation may subject the property owner to criminal prosecution.

It is a Class 5 felony for the owner to knowingly allow a posted Notice of Removal to be disturbed on the real property after a civil penalty was imposed; fail to notify a buyer as required; or contract with a person who is not a drug laboratory site remediation firm to attempt a remediation cleanup. It is also a Class 5 felony to lease or rent the property before remediation is complete; occupy a property that is not remediated except to perform necessary managerial duties or lawfully conduct remediation; or sell any items from the residually contaminated portion of the property before remediation.

Finally, it is a Class 4 felony if the owner knowingly allows a child or vulnerable adult to enter or occupy the real property prior to remediation.

MORE INFORMATION

To locate a drug lab remediation firm and a list of unremediated properties, visit the Arizona State Board of Technical Registration.

http://www.azbtr.gov/listings/drug_lab_site_clean_up.asp

ABOUT THE AUTHOR

AAR General Counsel Michelle Lind *is a State Bar of Arizona board certified real estate specialist and the author of* Arizona Real Estate: A Professional's Guide to Law and Practice.

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Arizona REALTOR® Magazine — September 2012

THE REALITY OF THE "FLIP," THE MYTH OF THE "FLOP" AND THE DANGERS OF BOTH

BY SCOTT M. DRUCKER — MACK, DRUCKER & WATSON

As real estate professionals navigate the choppy waters created by the nation's real estate crisis, they are undoubtedly exposed to a number of schemes to defraud centered around the practice of short sales. Even the most ethical real estate agents will undoubtedly be impacted in some manner by two such schemes, short sale "flipping" and the closely related practice of "flopping." While real estate professionals should unquestionably steer clear of both, upon closer inspection it appears that while flipping is a somewhat common practice that frequently exposes agents to significant liability, flopping has largely been eliminated by the extensive due diligence performed by lenders evaluating short sales.

Fannie Mae, by way of its October 2010 Mortgage Fraud News update [1], defined flopping as a process "wherein the perpetrator influences the loss mitigation process by deflating value so the servicer will accept an artificially low short sale offer. The perpetrator then profits by selling the home to an end buyer at the home's true market value or at an inflated value." The FBI's 2009 Mortgage Fraud Report [2] similarly defines flopping as a practice in which "the perpetrators collude with appraisers or real estate agents to undervalue the property using an appraisal or a broker price opinion to further manipulate the price down (the flop) to increase their profit margin when they later flip the property." While any such practice would undoubtedly constitute fraud, the question that exists is how prevalent is flopping in today's marketplace.

[1] **https://www.efanniemae.com/utility/legal/pdf/fraudnews/mortgagefraudnews1010.pdf**

[2] **http://www.fbi.gov/stats-services/publications/mortgage-fraud-2009**

While the FBI is clearly concerned with fraudulently deflated pricing, its 2009 and 2010 Mortgage Fraud Reports lack any meaningful explanation as to how flopping is effectively perpetrated in today's environment

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in which lending institutions are keenly focused on not falling victim to any such scams. As listing agents in today's short sale market can attest, lenders utilize a variety of valuation tools that make it extremely difficult for a fraudulently deflated sales price to be approved. Even assuming that a dishonest seller and/or real estate agent seeks to undervalue a home's worth, lenders virtually always order an appraisal or broker price opinion (BPO), both of which are performed by licensed and independent third-party professionals. Most lenders will additionally utilize a computerized automated valuation model (AVM) to confirm the results of the appraisal or BPO. Discrepancies between the AVM and the bank's valuation often trigger a second BPO or appraisal from yet another licensed and independent third-party professional.

In most instances, a successful flop will, at a minimum, require the involvement of a buyer, real estate agent and two separate BPO agents or appraisers, all of whom must be willing to provide inaccurate or falsified data to the loan servicer. Furthermore, the scheme to defraud would likely have to involve the assigned bank negotiator as well. Because more than one bank negotiator is typically assigned to a short sale throughout the life of a file, and because these individuals are closely monitored by supervisors, manipulating the bank's valuation is extremely difficult, and it is hard to imagine a scenario in which so many individuals successfully conspire to commit criminal activity.

Unlike flopping, in which the sales price is artificially manipulated, the practice of flipping is often a legitimate business venture when performed outside of the short sale context. Freddie Mac defines property flipping as "the process by which an investor purchases a home and then resells it at a higher price a short period of time later." For example, an investor may purchase a home for $100,000, make $20,000 worth of upgrades and then sell the home months later for an increased price that reflects the home's fair market value. Such is a legitimate business practice. With that said, flipping a short sale often constitutes fraud and is far more common than flopping and substantially easier to perpetrate.

http://www.freddiemac.com/singlefamily/preventfraud/flipping.html

Flipping, in conjunction with a short sale, is typically consummated pursuant to a scenario in which an investor purchases a property via a short sale and, prior to close of escrow, secures a third party to whom the property will be immediately sold for a higher amount. In such a scenario, the perpetrator deceives the lender into approving the short payoff by concealing the existence of a pre-arranged end buyer who intends to purchase the property for substantially more money than the approved short sale price. The problem lies in the fact that the short sale lender is not informed that the buyer is immediately flipping the property for thousands more than that same lender has been told the property is worth.

While it may be assumed that such transactions are difficult to achieve because the short sale buyer must secure a purchaser willing to buy the property for more than the approved short sale price, the reality is that several market factors enable the practice of flipping. Loans in default and scheduled to be foreclosed create a distressed sale in which the seller is often unable to secure a top-dollar offer. By removing the property from foreclosure and eliminating the distressed sale, all while the market continues to improve, the short sale buyer is able to flip the property for a profit. Authorities nonetheless view flipping of short sales as mortgage fraud because the perpetrator fraudulently induces the lender to approve the short sale by hiding the fact that there is a second buyer willing to pay more than the offer presented to the lender for short sale approval.

Short sales are viewed as a critical part of our real estate market recovery. These transactions enable distressed homeowners to get out from under huge debts and allow banks to avoid the expense of a trustee's sale while recovering more money than they would likely receive following a trustee's sale. While flopping is more myth than reality in today's market, the practice of flipping threatens the banks' willingness to effectuate short sales and exposes real estate licensees to great risk and liability.

ABOUT THE AUTHOR

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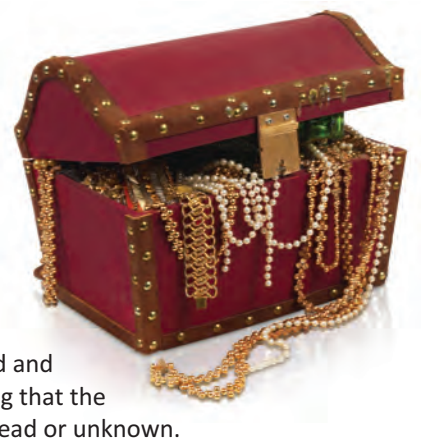
FINDERS KEEPERS?

What the Courts Had to Say about Cash Found in the Wall of a Home Sold "As Is"

BY K. MICHELLE LIND, AAR GENERAL COUNSEL



A buyer purchases a home "as is" and while remodeling, finds a half a million dollars hidden in a wall. Who owns the money — the buyer or the seller? The Arizona Court of the Appeals recently answered this question in *Spann v. Jennings,* 635 Ariz. Adv. Rep. 10 (May 31, 2012).

Robert Spann lived in his Paradise Valley home until he passed away in 2001. His daughter, Karen Spann Grande ("Seller"), became the personal representative of his estate. The seller knew from experience that he had hidden gold, cash and other valuables in unusual places in other homes. Over the course of seven years, she found stocks and bonds, as well as hundreds of military-style green ammunition cans hidden throughout the house, some of which contained gold or cash.

In 2008, the home was sold "as is" to the buyers. The buyers hired a contractor to remodel the home. Shortly after the work began, an employee of the contractor discovered two ammunition cans full of cash in the kitchen wall, and two more cash-filled ammo cans inside the framing of an upstairs bathroom. The contractor did not disclose the found money to the buyers right away and hid the money. Eventually, the contractor told the buyers about the discovery and the police ultimately took control of the $500,000.

The buyers sued the contractor for fraudulent misrepresentation, conversion and a declaration that he had no right to the money, and the contractor filed a counterclaim for a declaration that he was entitled to the found funds. The seller also filed a petition in probate court on behalf of the estate to recover the money. The two cases were consolidated.

The trial court ruled that the money belonged to the seller and the buyer appealed, arguing that the money was abandoned when the home was sold "as is."

The court of appeals stated that a finder's rights depend on how a court classifies the found property. Found property can be classified as:

- **Mislaid:** the owner intentionally places it in a certain place and later forgets about it.
- **Lost:** the owner unintentionally parts with it through either carelessness or neglect.
- **Abandoned:** it is thrown away or voluntarily forsaken by its owner.
- **Treasure trove:** it is verifiably antiquated and concealed for so long that the owner is probably dead or unknown.

Generally, a finder of lost, abandoned property or treasure trove property acquires a right to possess the property against the entire world, except the rightful owner, regardless of where the property was found. However, a finder of mislaid property must turn the property over to the owner of the premises where the property was found, and the premises owner has a duty to safeguard the property for the true owner.

The court also noted an American Law Reports article "Title to Unknown Valuables Secreted in Articles Sold:"

> *Where both buyer and seller were ignorant of the existence or presence of the concealed valuable, and the contract was not broad enough to indicate an intent to convey all the contents, known or unknown, the courts have generally held that as between the owner and purchaser, title to the hidden article did not pass by the sale.*

Ultimately, in this case, the court found that the money was mislaid, and therefore, as a matter of law, the money belonged to the seller.

So the "finders" were not the "keepers."

ABOUT THE AUTHOR

AAR General Counsel Michelle Lind *is a State Bar of Arizona board certified real estate specialist and the author of* Arizona Real Estate: A Professional's Guide to Law and Practice.

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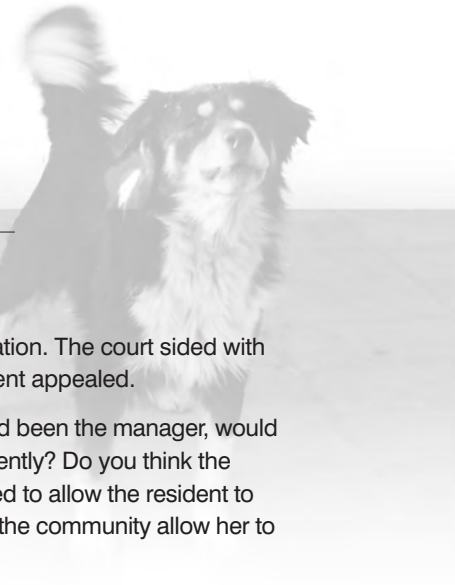
THE CASE OF THE BARKING DOG

Lessons Learned from a Recent Fair Housing Case



Fair Housing Coach *looked at recent court rulings from around the country involving fair housing disputes. The people and particulars of a case may be unique, but that doesn't mean that you can't learn something by examining the details like a detective. By reviewing the clues about what happened — and why — you can gain insight into how to handle similar problems that could arise in your community at any time.*

THE PROBLEM

A resident raised a fair housing claim as a defense in proceedings to evict her for having an unauthorized dog and other lease violations.

WHAT HAPPENED

The resident, who lived in a federally subsidized rental housing community, had a mental illness that qualified her for protection under federal fair housing laws.

When she got a dog, she submitted a doctor's note stating that she would "benefit from a pet companion on a physical and emotional basis." The property manager asked for additional paperwork, including proof that the dog was licensed and vaccinated, but instead of providing the paperwork, the resident sent the dog to live with friends.

The resident later signed a pet policy agreement. Since the dog wasn't living with her then, she checked a box indicating that she didn't have a dog. Although she took the dog back, she didn't inform the community or request an accommodation.

Meanwhile, her lease was renewed for another year, and the property manager conducted an inspection a short time later. As she entered the unit, the manager said that the smell of pet urine and feces was overwhelming. She said there was substantial damage to the unit and that the dog barked constantly during the inspection.

The manager later explained that this was her first opportunity to confirm that the resident had a dog in the unit, although neighbors had filed written complaints about the dog's incessant barking and the overwhelming smell of animal urine and feces seeping into their units.

During eviction proceedings, the resident accused the community of violating fair housing law by failing to grant her a reasonable accommodation. The court sided with the community, and the resident appealed.

What would you do? If you had been the manager, would you have done anything differently? Do you think the community was legally required to allow the resident to remain in the unit? If so, must the community allow her to keep the dog?

COURT RULING

Upholding the eviction, the South Dakota Supreme Court ruled that the community did not violate fair housing law.

Although the resident qualified for protection under fair housing law, the court ruled that the community wasn't liable for failure to make a reasonable accommodation because she never asked for one. The community tried to get information about the dog so that a reasonable accommodation could be made, but the resident refused to cooperate and denied she even owned a dog. A landlord is obligated to provide a reasonable accommodation to a resident only if a request has been made *(Meadowland Apartments v. Schumacher, April 2012).*

LESSONS LEARNED

Keep good records to defend the community against fair housing claims — whether raised in a formal discrimination complaint or as a defense in eviction proceedings.

Follow standard procedures for handling requests for reasonable accommodations and document the dates and details of interactions with the resident to ward off allegations that the community ignored or delayed response to accommodation requests.

Adopt a process to handle neighbors' complaints about lease violations by residents. Written records of the complaints, the results of a prompt investigation and the outcome can protect the community from allegations of unlawful discrimination.

For more recent cases and "lessons learned," see the current issue of *Fair Housing Coach,* "What Would You Do? Lessons Learned from Recent Fair Housing Cases," available at www.fairhousingcoach.com.

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http://www.flickr.com/photos/gabofr/5578481206/

LEGAL HOTLINE

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white,"

so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

ADVERTISING

http://www.aaronline.com/law-ethics/legal-hotline/advertising.aspx

Agent Must Disclose that She Is a Principal in the Transaction before a Contract Is Signed

FACTS AS PRESENTED BY THE CALLER:

Agent A, acting only as a principal, is selling her home. Agent B is listing the home for sale for Agent A and acting as the listing agent.

ISSUE:

Does the for-sale sign need to state "owner/agent?" Does the MLS listing need to state "owner/agent?"

ANSWER:

See Discussion.

DISCUSSION:

The for-sale sign does not need to display "owner/agent" since Agent A is not representing herself in the real estate transaction. Only if a salesperson or broker is advertising the salesperson's or broker's own property for sale, lease or exchange should she disclose her status as a salesperson or broker and as the property owner by placing the words "owner/agent" in the advertisement. *See* A.A.C. R4-28-502.

However, the MLS listing and any other advertisement should disclose that the seller of the property is a licensed real estate agent. "A real estate salesperson or broker shall not act directly or indirectly in a transaction without informing the other parties in the transaction, in writing, before the parties enter any binding agreement, of a present or prospective interest or conflict in the transaction, including that the seller is the salesperson's or broker's employing broker, or owns or is employed by the salesperson's or broker's employing broker." *See* A.A.C. R4-28-1101. In addition, the purchase contract should disclose that the seller is a licensed real estate agent.

Category: *Advertising*
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ADVERTISING

http://www.aaronline.com/law-ethics/legal-hotline/advertising.aspx

Brokerage Firm Cannot Pay a Referral Fee to a Non-Licensee

FACTS AS PRESENTED BY THE CALLER:

See Issue.

ISSUE:

Is a brokerage that manages residential, single-family residences permitted to solicit referrals or recommendations from their client base to attract additional business? If so, to what extent, if any, is a brokerage permitted to offer incentives or gifts to non-licensed owners that refer or recommend management services? Specifically, can a brokerage offer one month of free management services to an existing client for successfully recommending a new client?

ANSWER:

See Discussion.

DISCUSSION:

A non-licensee cannot be paid a referral fee from a broker for referring a potential client to the broker. *See* A.R.S. § 32-2155(A). Accordingly, a broker cannot offer one month of free management services to an existing client if the offer is contingent upon a referral. Any such offer would constitute a referral fee, which is prohibited by Arizona law.

Note: A.R.S.§32-2176 states that a finder's fee may be paid to an unlicensed person who is a tenant in an apartment complex. The fee may not exceed $200. The tenant may receive multiple finder fees up to five times in 12 months.

Category: *Advertising*
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BROKERAGE

http://www.aaronline.com/law-ethics/legal-hotline/brokerage.aspx

A Licensee May Conduct an Auction

FACTS AS PRESENTED BY THE CALLER:

A seller wishes to sell his business and the attendant real property in an auction.

ISSUE:

May the broker perform the auction?

ANSWER:

See Discussion.

DISCUSSION:

Yes. Pursuant to A.R.S. § 32-2101(48)(e), a "real estate broker" is one who "auctions or offers, attempts or agrees to auction real estate, businesses and business opportunities or timeshare interests" for compensation. As such, the broker may auction the business.

Category: *Brokerage*
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BROKERAGE

http://www.aaronline.com/law-ethics/legal-hotline/brokerage.aspx

Property Manager Must Maintain Records for Three Years

FACTS AS PRESENTED BY THE CALLER:

A landlord and his property manager became entangled in a dispute regarding the cost of a repair performed at the subject rental property. As a result of the dispute, the landlord has demanded that the property manager produce receipts for each and every repair performed at the property at the direction of the property manager over the last five years.

ISSUE:

Must the property manager comply with the landlord's request?

ANSWER:

See Discussion.

DISCUSSION:

A.R.S. § 32-2175(c) requires property managers to "keep all financial records pertaining to clients for at least three years from the date each document was executed, including bank statements, canceled checks or bank generated check images, deposit slips, bank receipts, receipts and disbursement journals, owner statements, client ledgers and applicable bills, invoices and statements." Therefore, although the landlord is not required to produce five years of receipts, three years of receipts will need to be conveyed.

Category: *Brokerage*
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BROKERAGE

http://www.aaronline.com/law-ethics/legal-hotline/brokerage.aspx

Designated Broker May Appoint Replacement for 30 Days or Less

ISSUE:

What are a broker's obligations if the broker intends to leave the state or country for one to four weeks?

ANSWER:

See Discussion.

DISCUSSION:

According to A.R.S. § 32-2127, if a designated broker is unable to act within 24 hours, he may designate a licensee whom he employs or another designated broker to act in his behalf. The designated broker shall make this designation in writing and shall keep the original designation at his office for one year from its effective date. A copy of this designation must be attached to any hire, sever or renewal form submitted to the department which is signed by the designated broker's designee. This designation shall not exceed 30 days duration and may authorize the designee to perform any and all duties the designated broker may legally perform, except that a salesperson shall not be authorized to hire or sever licensees. A written designation is required for each temporary absence.

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BROKERAGE

http://www.aaronline.com/law-ethics/legal-hotline/brokerage.aspx

Licensee May Sell or Lease a Mobile Home Under Certain Conditions.

ISSUE:

Can an agent list a mobile home for long-term rental?

ANSWER:

See Discussion.

DISCUSSION:

Generally, a license issued by the Office of Administration of the Arizona Department of Fire Building and Life Safety is required to act as a broker or salesperson in the sale of a mobile home. *See* A.R.S. §41-2194(3-4). However, this licensure requirement does not apply to a real estate

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HAVE YOU SIGNED UP FOR THE LEGAL HOTLINE?

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Find out how brokers can access the Legal Hotline.
http://www.aaronline.com/law-ethics/legal-hotline/hotline-access.pdf

Browse more Legal Hotline topics.
http://www.aaronline.com/law-ethics/legal-hotline/

licensee if the mobile home is listed in the contract for the lease or sale of the real property executed by its owner and the mobile home is installed on the real property. *See* A.R.S. §41-2178(B) (1).

Category: *Brokerage*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract-general.aspx

Buyer May Seek Alternative Financing If VA Loan Is Denied

FACTS AS PRESENTED BY THE CALLER:

The agent represents a buyer under a standard form residential purchase contract that contains a financing contingency. The buyer had originally intended to obtain VA financing. The lender issued a letter to the buyer and the seller's agent that VA financing had been denied well in advance of the close of escrow date. The seller's agent treated that letter as a cancellation and placed the property under contract with a new buyer.

ISSUE:

Does the lender's notice of a denial of VA financing constitute a cancellation?

ANSWER:

See Discussion.

DISCUSSION:

The lender's notice of denial does not constitute a notice of cancellation. Pursuant to lines 59-61 of the contract, the buyer may continue to attempt to secure financing until three days prior to the close of escrow. The lender's notice was simply a notice that VA financing had not been approved. That notice does not prohibit the buyer from obtaining FHA, conventional or alternative financing. Accordingly, the seller is still obligated to perform.

Note: Lines 81-84, Financing Changes, state: "Buyer shall immediately notify Seller of any changes to the loan program, financing terms, or lender described in the Pre-Qualification Form if attached hereto or LSU within five (5) days after Contract acceptance and shall only make any such changes without the prior written consent of Seller if such changes do not adversely affect Buyer's ability to obtain loan approval without PTD conditions, increase Seller's closing costs, or delay COE."

Category: *Contracts*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract-general.aspx

Contract Was Formed on Date Acceptance Was Delivered

FACTS AS PRESENTED BY THE CALLER:

Buyer submitted an AAR Residential Real Estate Purchase Contract, and the parties thereafter exchanged multiple counteroffers. The final counteroffer was signed and delivered by the parties on March 11, forming a contract. In the final counteroffer, it stated that the buyer would provide a pre-qualification form to the seller on or before March 13. The parties now have a dispute as to when the inspection period began, March 11 or March 13.

ISSUE:

On what day did the inspection period commence?

ANSWER:

See Discussion.

DISCUSSION:

The contract was fully formed when the final counteroffer was signed and delivered by both parties on March 11. Thus, pursuant to paragraph 8(i) of the contract, the inspection period began on March 12. The March 13 delivery of the pre-qualification form is simply another contractual obligation the buyer had to perform and does not determine when the contract was created.

Category: *Contracts*
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CONTRACT

http://www.aaronline.com/law-ethics/legal-hotline/contract-general.aspx

Buyer Who Disapproves of CC&Rs May Cancel Contract

FACTS AS PRESENTED BY THE CALLER:

Buyer reasonably disapproves of items contained in the homeowner's association documents.

ISSUE:

Can the buyer cancel the contract and recover the earnest money deposit?

ANSWER:

Yes, provided that the buyer timely issues a cancellation notice to the seller.

DISCUSSION:

Pursuant to Section 3(c) of the Purchase Contract, the buyer has five days after receipt of the Title Commitment, which includes the association's Conditions, Covenants, and Restrictions ("CC&R's"), to provide notice of any items disapproved. In turn, Section 6(j) of the Purchase Contract provides that the buyer can elect to immediately cancel the contract and recover his or her earnest money deposit

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for any disapproved items, which would include the items referenced in Section 3(c). A buyer may therefore cancel the contact and recover the earnest money deposit based upon the buyer's reasonable disapproval of the CC&R's, as long as the buyer delivers the notice of disapproval and cancellation to the seller within five days after the buyer's receipt of those documents.

Category: *Contracts*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Seller Is Required to Repair Septic Deficiencies Up to One Percent of Purchase Price

FACTS AS PRESENTED BY THE CALLER:

Buyer and seller entered into the AAR Residential Resale Purchase Contract and the On-Site Wastewater Treatment Facility Addendum. The property has a septic system. An inspection of the septic revealed roots growing into the septic lines.

ISSUE:

Who is responsible for removal of the roots?

ANSWER:

See Discussion.

DISCUSSION:

Per lines 16-19 of the On-Site Wastewater Treatment Facility Addendum, provided the cost of the removal does not exceed one percent of the purchase price, the seller is responsible for removal of the roots. If, however, the cost of removal does exceed one percent of the purchase price, the buyer may immediately cancel the contract or agree in writing to pay the cost of removal. If the buyer refuses to pay the cost of removal, the seller may cancel.

Category: *Contracts*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

A Refrigerator Is Generally Personal Property

FACTS AS PRESENTED BY THE CALLER:

Buyer and seller enter into an AAR standard form Residential Resale Real Estate Purchase Contract. Seller wishes to remove a high-efficiency refrigerator from the home. Buyer alleges that the refrigerator conveys at the time of purchase.

ISSUE:

Does the refrigerator convey?

ANSWER:

See Discussion.

DISCUSSION:

Per Section 1(g) of the contract, the buyer is entitled to specify the personal property that conveys at the time of sale, subject to agreement by the seller. Per line 45 of the contract in that same section, the buyer may specifically elect to have the refrigerator convey. If that box has been checked, the refrigerator conveys; if not, the refrigerator does not convey.

Category: *Contracts*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Mattress in a Murphy Bed Is Personal Property Belonging to the Seller

FACTS AS PRESENTED BY THE CALLER:

The AAR Residential Resale Purchase Contract specifies that the Murphy bed will remain with the property after the close of escrow. Upon closing, the buyer discovered that the seller removed the mattress from the Murphy bed.

ISSUE:

Is the mattress personal property or a fixture?

ANSWER:

See Discussion.

DISCUSSION:

The frame for the Murphy bed would be considered a fixture because it is affixed or mounted to the wall. However, a mattress, which merely sits inside of the frame, would be considered personal property. The seller therefore had the right to remove the mattress upon close of escrow.

Category: *Contracts*
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CONTRACTS

http://www.aaronline.com/law-ethics/legal-hotline/contract.aspx

Seller Contractually Required to Provide Paid Receipts for Repairs Made per the BINSR

FACTS:

The agent represents a seller under a standard AAR purchase contract. Buyer provided a BINSR requesting minor repairs to the property. Seller agreed to make the repairs, which were completed well before the close of escrow. Following completion, the buyer requested

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receipts for all repairs as part of the buyer's inspection. Seller had "called in favors" to have the repairs completed, and as a result, has no receipts for the work. Buyer is claiming the seller is in breach for failure to obtain or provide receipts.

ISSUE:

Is the seller contractually obligated to provide copies of repair receipts?

ANSWER:

See Discussion.

DISCUSSION:

The contract states: "If Seller agrees in writing to correct items disapproved, Seller shall correct the items, complete any repairs in a workmanlike manner and deliver any paid receipts evidencing the corrections and repairs to Buyer three (3) days or _____ days prior to COE date." (AAR residential contract, page 6, lines 243-245). However, if the seller did not pay for the repairs and has no receipts, the seller is not in breach of contract, provided the repairs were completed in a workmanlike manner. Pursuant to Section 6m of the contract, the buyer is provided "reasonable access to conduct walkthrough(s) of the Premises for the purpose of satisfying Buyer that any corrections or repairs agreed to by Seller have been completed…" As a result, the buyer has a contractual mechanism for determining whether repairs have been completed.

Category: *Contracts*
Arizona REALTOR® Magazine — September 2012

COMMISSIONS

http://www.aaronline.com/law-ethics/legal-hotline/commissions.aspx

Two Brokerages May Jointly List a Property For Sale

FACTS AS PRESENTED BY THE CALLER:

A seller simultaneously retains Brokerage A and Brokerage B to list a property for sale. As such, Agent A will list and market the property on behalf of Brokerage A, and Agent B will list and market the property on behalf of Brokerage B. The seller will pay a commission to the brokerage of whichever agent first secures a ready, willing and able buyer.

ISSUE:

In the event that Agent B secures a ready, willing and able buyer so that a commission is paid to Brokerage B, can Brokerage B pay a referral fee to Agent A?

ANSWER:

Yes.

DISCUSSION:

Brokerage B can provide a referral fee to Agent A, provided that the referral fee is paid to Agent A through Brokerage A. Brokerage A and Brokerage B should also ensure that their respective listing agreements with the seller are not exclusive in nature.

Category: *Commissions*
Arizona REALTOR® Magazine — July 2012

COMMISSIONS

http://www.aaronline.com/law-ethics/legal-hotline/commissions.aspx

Lender in Short Sale Cannot Force Buyer's Agent to Reduce Commission

ISSUE:

In a short sale transaction where a lender's authorized compensation is less than the MLS advertised commission, can the listing agent require the buyer's agent to agree in writing to such a reduction in compensation?

ANSWER:

No

DISCUSSION:

The MLS is a means by which a listing broker can make a unilateral offer of compensation to another broker and entitlement to that advertised commission is determined by the cooperating broker's performance as procuring cause of the sale. *See* NAR MLS Handbook (2004) Statement 7.56. The commission arrangement in MLS is between the brokers, and a third party cannot require a reduction in the commission. Although the transaction may not close because the co-broker will not reduce the commission, there is no legal requirement to do so.

Category: *Commissions*
Arizona REALTOR® Magazine — September 2012

COMMISSIONS

http://www.aaronline.com/law-ethics/legal-hotline/commissions.aspx

BPO Fees Cannot Be Paid Directly to an Agent; They Must Come Through the Brokerage

ISSUE:

Can a broker assign a lender-paid fee ($50-$100/transaction) for a broker price opinion (BPO) in a short sale or real estate owned (REO) transaction directly to the agent?

ANSWER:

No.

DISCUSSION:

Pursuant to A.R.S. § 32-2155(A), a licensee is required to receive commissions only from their broker. The >>

compensation for a BPO must therefore be paid to the agent only through the broker.

Category: *Commissions*
Arizona REALTOR® Magazine — September 2012

FORECLOSURES, REOS & LIENS

http://www.aaronline.com/law-ethics/legal-hotline/foreclosures-reos-liens.aspx

The "Protecting Tenants at Foreclosure Act" Does Not Apply to Unreasonable Leases

FACTS AS PRESENTED BY THE CALLER:

Shortly before a trustee's sale is scheduled to occur, the owner enters into a 10-year lease with a tenant with rental payments that are unreasonably low.

ISSUE:

Must the successful bidder at the trustee's sale honor the lease even if the terms of the lease are unreasonable?

ANSWER:

No.

DISCUSSION:

The "Protecting Tenants at Foreclosure Act" states in part:

"In the case of any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to — (2) the rights of any bona fide tenant, as of the date of such notice of foreclosure — (A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1)."

The act defines the term bona fide as follows:

"For purposes of this section, a lease or tenancy shall be considered bona fide only if — (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy."

Accordingly, if the terms of the lease are not bona fide, the lease need not be honored by the new owner following the trustee's sale. Independent counsel should be consulted.

Category: *Foreclosures, REOs & Liens*
Arizona REALTOR® Magazine — August 2012

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TWO WAYS TO MEET THE QUADRENNIAL CODE OF ETHICS REQUIREMENT

All REALTORS® must complete a Code of Ethics class that fulfills the NAR quadrennial Code of Ethics requirement by December 31, 2012. AAR has several upcoming classes that are approved for this requirement:

http://www.realtor.org/mempolweb.nsf/pages/COEtraining

1. GRI 308 – SAFE REAL ESTATE

CE: 5-Commissioner's Standards
3-legal issues / 3-disclosure / 3-agency law

In this two-day course, a requirement for the GRI designation, students focus on the obligations of the Code of Ethics, study related Standards of Practice and Case Interpretations, review case studies, compare the obligations of the Commissioner's Rules to the Code of Ethics, and look at commission issues that lead to commission disputes and how they are resolved. View a class preview.

http://www.azgri.com/instructors-providers/videos/module-308/

There are two GRI 308 courses scheduled around the state before the end of the year:

Wednesday, November 7 – Friday, November 8
Tucson Association of REALTORS® | Flyer
http://www.azgri.com/calendar-flyers/Module308-flier_Tucson2012.pdf

Thursday, December 13 – Friday, December 14
West Maricopa County Regional Association of REALTORS® | Flyer
http://www.azgri.com/calendar-flyers/121213_GRI308.pdf

View a calendar of all upcoming GRI courses.
http://www.azgri.com/calendar-registration/

Here's another option to meet the quadrennial ethics requirement:

2. NAR'S FREE ONLINE CLASS

http://www.realtor.org/mempolweb.nsf/pages/COEtraining

The online class takes about 2 ½ hours to complete. No CE is available for the free online class.

FORECLOSURES, REOS & LIENS

http://www.aaronline.com/law-ethics/legal-hotline/foreclosures-reos-liens.aspx

Lender Not Responsible to Pay HOA Fees Incurred Before Foreclosure

FACTS:

Broker has the listing on a bank-owned property. The homeowners' association (HOA) is demanding that the lender pay assessments owed prior to the date of foreclosure. The lender's position is that it is only responsible for assessments from the date of foreclosure forward.

ISSUE:

Can the HOA rightfully demand that the lender pay assessments owed prior to the date of foreclosure?

ANSWER:

No.

DISCUSSION:

The lender's foreclosure action extinguished any lien right of the HOA with respect to assessments owed prior to the date of foreclosure. *See* A.R.S. § 33-1807(B)(2). Moreover, assessments may only be levied against the owner of property, and the lender has no obligation to assume the debts of the previous owner. As such, the lender is only responsible for the payment of assessments starting from the date of the foreclosure sale.

Please note, however, that while the foreclosure extinguishes the HOA's lien, the HOA may still have a valid claim against the prior owner for the non-payment of assessments owed prior to the date of foreclosure.

Category: *Foreclosures, REOs & Liens*
Arizona REALTOR® Magazine — September 2012

MISCELLANEOUS

http://www.aaronline.com/law-ethics/legal-hotline/miscellaneous.aspx

Seller Violates RESPA by Dictating Title Company for a Transaction

ISSUE:

Is it a violation of RESPA for the seller in a real estate transaction to specify the title company which will close the transaction?

ANSWER:

See Discussion.

DISCUSSION:

Section 9 of RESPA provides: "No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company." *See* 12 U.S.C. § 2608.

The Department of Housing and Urban Development ("HUD") has indicated that it will not enforce Section 9 of RESPA against a seller who selects the title insurance company *if* the seller is paying for the owner's title insurance policy and does not require the buyer to use the title insurance company for the simultaneously issued lender's policy. HUD would take action under Section 9, however, in situations where a seller required a buyer to pay the seller an amount towards closing costs and the seller used a portion of the buyer's paid closing costs for the owner's title insurance without providing the buyer with a choice of that title company.

Category: *Miscellaneous*
Arizona REALTOR® Magazine — September 2012

SHORT SALES

http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Listing Agent Is Not Required to Provide a Third-Party Negotiator His Equator Username and Password

FACTS AS PRESENTED BY THE CALLER:

The seller has retained a third party to handle the negotiation of the residential short sale. That third party has requested that the listing agent provide the agent's Equator username and password to facilitate the negotiation.

ISSUE:

Is the listing agent required to provide this information?

ANSWER:

See Discussion.

DISCUSSION:

No. Per Equator's user license agreement with its subscribers, an Equator user expressly agrees that the user will not "provide any other entity [with] your password or otherwise allow them to use or access your Account." In practice, Equator's policy has been to strip users of their account for violating this policy.

In addition, an agent owes a fiduciary duty to the agent's clients. See A.A.C. § R4-28-110(A)(1). It therefore bears noting that an Equator username and password provides the user with access to all listings under the account. Accordingly, an agent that provides an Equator username and password to a third party will necessarily also be providing that third party with sensitive information regarding the finances, addresses, etc. of the agent's other clients, in breach of the agent's fiduciary duty to those clients.

Category: *Short Sales*
Arizona REALTOR® Magazine — August 2012

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SHORT SALES

http://www.aaronline.com/law-ethics/legal-hotline/short-sales.aspx

Short Sale Buyer Must Disclose to the Lender That He Is an Agent Seeking a Commission

FACTS:

The agent is representing a seller attempting to short sell a home. The buyer of the property is a real estate licensee and wants to obtain a co-broke commission for the sale of the property. The lender has recently submitted an arms-length addendum requiring that "the parties acknowledge and agree that none of the parties shall receive any proceeds from this transaction."

ISSUE:

Must the fact that the buyer is representing himself in the purchase and expecting a commission be disclosed to the lender? Is there any basis for the buyer to cancel the contract because the seller's lender is now requiring execution and compliance with the arms-length addendum?

ANSWER:

See Discussion.

DISCUSSION:

The fact that the buyer is representing himself and expecting a commission should be disclosed to the lender, such that the lender is aware of the arrangement. The fact that the buyer is not entitled to a commission is not a basis to cancel the contract.

Category: *Short Sales*
Arizona REALTOR® Magazine — September 2012

TITLE & INTEREST IN PROPERTY

http://www.aaronline.com/law-ethics/legal-hotline/title-interest-property.aspx

The Sale of "Landlocked" Property Is Legal but Discouraged

FACTS AS PRESENTED BY THE CALLER:

See Issue.

ISSUE:

Is it legal to sell landlocked property?

ANSWER:

See Discussion.

DISCUSSION:

The sale of a landlocked property is generally lawful. However, because lenders are unwilling to finance landlocked property, an alternative form of financing will be required. On the other hand, the buyer can purchase the landlocked property with cash. Generally speaking, Arizona recognizes that a landowner is entitled to a right of ingress and egress to his or her property. Therefore, a landlocked property may be entitled to a private way of necessity. *See* A.R.S. § 12-1201-02; *Bickel v. Hansen,* 169 Ariz. 371, 819 P.2d 957 (App. 1991). Because there is no guarantee that an easement by necessity will be attained, a buyer should seek legal advice prior to contracting for the sale of landlocked property to discuss the inherent risks of owning a property with no legal access.

Category: *Title & Interest in Property*
Arizona REALTOR® Magazine — July 2012

TITLE & INTEREST IN PROPERTY

http://www.aaronline.com/law-ethics/legal-hotline/title-interest-property.aspx

A City May Take Property by Eminent Domain

ISSUE:

Can a city take land from a private landowner in order to widen an existing drainage ditch that runs along a public roadway and the owner's parcel of land?

ANSWER:

See Discussion.

DISCUSSION:

The Fifth Amendment to the United States Constitution provides that "no person shall… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Arizona Constitution also requires payment of just compensation to the owner of property that is taken or damaged by eminent domain. (Ariz. Const. Art. 2, section 17.) However, the taking of private property by the government is not absolute, as the government can only take property for a public use. Under Arizona eminent domain law, for instance, the government can take private property for the public's possession, occupation and enjoyment of the land, but it cannot take private property solely to benefit private development.

Based on the above, if the city is taking the land for public use and justly compensating the owner, it may proceed.

Category: *Title & Interest in Property*
Arizona REALTOR® Magazine — September 2012

ABOUT THE AUTHOR

Richard V. Mack *is a shareholder at Mack, Drucker & Watson, which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.*

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