ARIZONA

SECOND QUARTER 2017

ARIZONA BROKER & MANAGER QUARTERLY

MOBILE & MANUFACTURED HOME SALES RESTRICTIONS EASING

ARIZONA association of REALTORS®

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SECOND QUARTER 2017 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

Mobile & Manufactured Home Sales Restrictions Easing

BY NICOLE LASLAVIC, V.P. OF GOVERNMENT AFFAIRS

You may have seen them on the MLS, but did you know that you cannot legally sell a mobile home located in a mobile home park in Arizona?

Under current state law, a real estate agent or broker is prohibited from selling mobile or manufactured homes in a mobile home park *without* a separate broker or dealer license from the Arizona Department of Housing (ADH) Manufactured Housing Division.

So, why are you seeing listings for mobile homes in mobile home parks in the MLS? Simply put, the demand exists, but the supply of who can sell has diminished.

In Arizona, there are very few ADH-licensed, manufactured homes dealers remaining. Consequently, if an owner of a manufactured or mobile home wanted to sell, they would find that the process often results in a deeply discounted sale price.

In other states where REALTORS® are able to sell manufactured or mobile homes, these homes receive more exposure and ultimately a higher selling price.

At the REALTOR® Caucus in September 2016, the issue of selling manufactured and mobile homes in mobile home parks was brought forward and ultimately placed on the Arizona REALTORS® 2017 legislative agenda. Recognizing the need for this legislation, Representative Jeff Weninger introduced HB 2072: manufactured homes; real estate transactions where it easily sailed through the legislative process.

On March 21, 2017, Governor Doug Ducey signed HB 2072 into law. The bill will become effective 90-days after the legislative session adjourns Sine Die.

The bill as passed-into-law does the following:

- Allows a real estate broker and/or sales person to act on behalf of a licensed manufactured housing dealer in the sale of mobile homes and new or used manufactured homes located in a mobile home park, if the licensed dealer (through the Arizona Department of Housing) submits the required fees and paperwork

- Allows a real estate broker and/or sales person to act on behalf of a private party in the sale of mobile homes or used manufactured homes located in mobile home parks, if the broker and/or sales person remains in compliance with the Arizona Department of Real Estate requirements.

https://blog.aaronline.com/2017/04/mobile-manufactured-home-sales-restrictions-easing/

Legalities of a Medical Marijuana Dispensary Lease

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

Although Arizona has legalized the use of marijuana for medical purposes, federal law does not recognize or protect medicinal marijuana possession or use. This contrast creates a number of potential legal implications, including an interesting real estate lease issue decided on April 18, 2017 by the Arizona Court of Appeals in the case of *Green Cross Medical, Inc. v. Gally.*

The facts of the case are not in dispute. In 2012, John Gally, the owner of a commercial property located in Winslow, Arizona, entered into a lease agreement with Green Cross Medical. The intention of the lease was for Green Cross Medical to operate a medical marijuana dispensary if it obtained the necessary approval from the Arizona Department of Health Services.

However, less than two weeks later, Gally sought to revoke the lease.[1] In response, Green Cross Medical filed a breach of contract lawsuit. Ultimately, the Najavo County Superior Court ruled in Gally's favor, holding that because the lease was for the operation of a medical marijuana dispensary, it violated the law and was void for illegality.

Green Cross Medical proceeded to appeal the Superior Court's decision. At issue before the Court of Appeals was whether a contract for the lease of real property to a party applying to operate a medical marijuana dispensary is void for violating Arizona and/or federal law. Rather quickly, the Court of Appeals concluded that the lease is not illegal under Arizona law in light of the Arizona Medical Marijuana Act (AMMA), which exempts from prosecution dispensaries such as the one Green Cross Medical intended to operate. *See* A.R.S. § 36-2811(E).

Specifically, the court held:
"An interpretation that allows a dispensary to lease premises for use compliant with the AMMA, but authorizes the State to prosecute a landlord leasing property to a dispensary associated with the AMMA (or a court to void an AMMA-compliant lease) would render the statute futile and violate A.R.S. § 36-2811(E)."

The Court also determined that to declare the lease illegal under Arizona law, so as to preclude Green Cross Medical's breach of contract action, would contradict the intent of the parties and the public policy underlying the AMMA. After all, both Green Cross Medical and Gally knew the purpose of lease at the time it was executed.

While the application of Arizona law to the subject facts was fairly straightforward, the issue of illegality under federal law proved more challenging. The federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, makes it unlawful to lease, use, rent or maintain any place for the purpose of distributing or using any controlled substance.

Simply stated, it's illegal under federal law to lease property knowing it will be used for the illegal production or distribution of a controlled substance such as marijuana.

However, in citing a 2016 District of Colorado case captioned *Green Earth Wellness Ctr. v. Atain Specialty Ins., Co.*, the Court noted, "the United States had shown an ambivalence in prosecuting medical marijuana cases when the use or distribution was authorized by state law."

In fact, beginning in 2009, before the Green Cross Medical lease was signed, the United States Justice Department instructed U.S. Attorneys not to prosecute persons acting in compliance with state medical marijuana laws.2 This caused the Court to determine that "while the lease might technically be in violation of 21 U.S.C. § 856(a)(1)-(2), Congress has, for the time being, forbidden enforcement of that section for all purposes relevant to this case."

The Court went on to hold:
"Given the federal government's lack of interest in prosecuting individuals in compliance with the AMMA, as well as a public policy that favors enforcement of the lease compliant with state law, the purported illegality here does not render the lease void as illegal, at least for purposes of a damages claim."

In reaching this decision, the Court was able to support what it considers to be a strong public policy, namely, enforcing contracts and leases that comply with state law. It also allowed the Court to avoid undermining the medical marijuana program approved by Arizona voters.

Potentially, Gally may file a Petition for Review with the Arizona Supreme Court. Furthermore, the federal government may change its position and begin using federal funds to prosecute violations of the Controlled Substances Act, but for now, Green Cross Medical's contract to lease real property for purposes of a medical marijuana dispensary is not void for illegality.

[1]At the time Gally purported to terminate the lease, Green Cross Medical had not yet received permission from the State of Arizona to operate a dispensary. Nothing in the lease suggested it would be void or voidable if Green Cross Medical did not obtain such approval.

[2]Furthermore, Congress has barred the Department of Justice from using federal funds to prosecute the use or distribution of medical marijuana in compliance with state law.

Scott M. Drucker, Esq., *a licensed Arizona attorney, is General Counsel for the Arizona Association of REALTORS® serving as the primary legal advisor to the association. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.*

Introducing – The Team Toolkit

Real estate teams continue to increase in popularity in Arizona and across the country. As this business model becomes more prolific, brokers, team leaders and team members are in need of resources to ensure that this business model is appropriate and mutually beneficial.

For this reason, Arizona REALTORS® has prepared a Team Toolkit (CLICK HERE to download the PDF) with the stated purpose of:

1. Providing brokers with supervisory information and considerations for employing a team within their office; and

2. Assisting those Arizona REALTORS® considering forming, managing or becoming a member of a team.

A critical part of forming and employing a team is documenting the relationship between the Designated Broker and team/team leader, as well as the relationship between the team leader and their team members. To assist in the formation of such agreements, sample contract provisions are set forth on pages 19 through 22 of the Toolkit. The Toolkit also contains sample correspondence a team leader can use to introduce the client to the Designated Broker as well as the members of the team, and explain the role that each individual plays.

While the Toolkit itself does not contain legal advice, we are confident that it will prove helpful to brokers, team leaders and team members seeking to navigate this popular business model. Finally, please note that the Toolkit will be updated on a routine basis to reflect any changes in the law, as well as to reflect the ever-changing nature of teams operating throughout the state.

Broker University

Want a Profitable Brokerage? Get the formula from this 7-part webinar series. Two hours a day (7AM – 9AM) for 7 weeks beginning June 19th. Topics covered include: Ten Laws of Business Environment, Delegating Tasks vs. Directing, Seven Management Principles, Managing for Profit, Operational Business Plans, Recruiting & Training, Sales Management & Motivation. Cost: $140 which is only $20 per session. **Register before June 5th.**

"I took this program last year, and I am taking it again this year! Dan Elzer, the instructor, is great. The program material is awesome, and the content is right on point. Whether you are a new Owner/Broker just starting your company or an experienced Owner/Broker looking to refocus on the nuts and bolts of profitably operating your company, this course is for you." - Duane Fouts

Register now: https://www.floridarealtors.org/newsandevents/broker-profitability-program-registration-form.cfm?

View full flyer: https://www.aaronline.com/upload/aar_event_calendar/969/c56c065d81a3a7825e4be7cc1f4ba673.pdf

Standard of Care

BY NIKKI SALGAT, ESQ.

What is standard of care?
Standard of care is generally defined as the degree of care an ordinary, reasonable, and prudent person would exercise in given circumstances. Put another way, how would a similarly qualified practitioner manage the client's care under the same or similar circumstances?

The standard of care may vary depending on the facts, as well as the skills and knowledge of your client. For example, a first time buyer would most likely require more guidance than someone who routinely invests in real estate.

Is there a standard of care in real estate?
Yes, all professions have a standard of care which is required either by law or custom. In Arizona, State statutes set forth the basic standard of care. Specifically, A.R.S. § 32-2124(E)(2) provides that:

At a minimum, an understanding of the general purpose and legal effect of any real estate practices, principles and related forms, including agency contracts, real estate contracts, deposit receipts, deeds, mortgages, deeds of trust, security agreements, bills of sale, land contracts of sale and property management, and of any other areas that the commissioner deems necessary and proper.

The Arizona Department of Real Estate's Commissioner's Rules provide further guidance. The rules discuss fiduciary duty, disclosure with regard to the agent's knowledge about the condition of the property or interest in the property, and compensation, amongst other requirements. See A.A.C. R4-28-1101.

Who determines if the standard of care is met?
Whether the standard of care was met is typically brought into question by a client or customer. More specifically, unhappy clients or customers may complain about the services that were provided or believe that you failed to perform a duty owed to them.

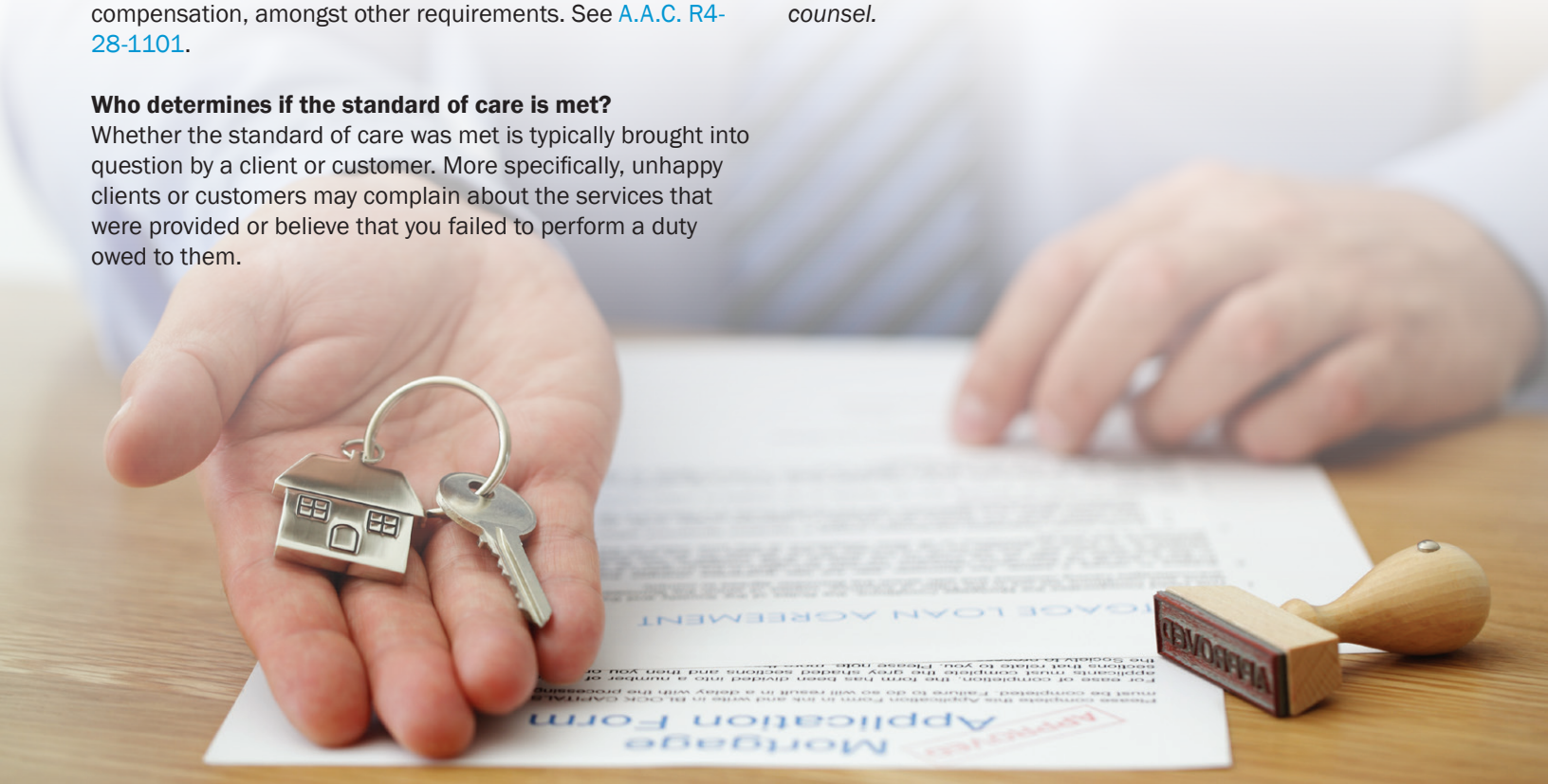
If a lawsuit ensues, one of your peers, typically a broker, may opine as to whether you met or fell below the standard of care. Generally, this occurs when the broker furnishes an expert opinion on how you handled the transaction. Based on the facts presented and the broker's expert testimony, a jury of your peers may then determine whether you met the standard of care.

What happens when the standard of care is not met?
A claim for wrongdoing will usually appear as a negligence claim. In order to find negligence, a jury must determine the following: (1) Did you owe a duty?; (2) Was there a breach of that duty?; (3) Did the breach of duty cause injury?; and (4) Was there any damage?

If you are found to owe a duty and do not meet the standard of care, you could be held legally liable and have to pay damages to the client or customer.

Best practice . . . Stay Informed!
The best way to ensure you do not fall below the standard of care is to be educated and stay educated. Attend classes and trainings, read the statutes and rules, and, if you don't know, ask your broker!

__Nikki J. Salgat, Esq.__, is Associate Counsel to the Arizona Association of REALTORS®. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

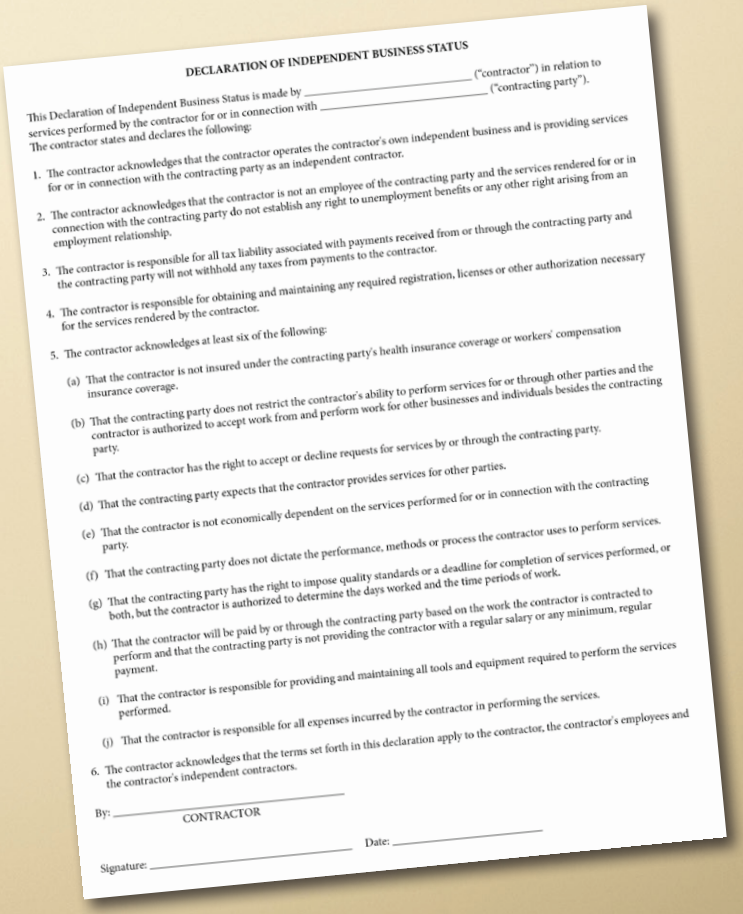


Declaration of Independent Business Status

A recently enacted statute, A.R.S. § 23-1601, titled Declaration of Independent Business Status, provides a new resource that can assist brokers in documenting a salesperson's status as an independent contractor.

As employing brokers know, a brokerage and a salesperson can establish an independent contractor relationship by complying with certain requirements. By doing so, the salesperson will not be treated as an employee, meaning that the brokerage will not be responsible for withholding taxes or participating in unemployment and worker's compensation programs.

While a mutually executed independent contractor agreement can help document the parties' intent to establish an independent contractor relationship, a new tool set forth in A.R.S. § 23-1601 can be of further assistance. That tool is a Declaration of Independent Business Status, the text of which is contained within the statute.



DECLARATION OF INDEPENDENT BUSINESS STATUS

This Declaration of Independent Business Status is made by _____ ("contractor") in relation to services performed by the contractor for or in connection with _____ ("contracting party"). The contractor states and declares the following:

1. The contractor acknowledges that the contractor operates the contractor's own independent business and is providing services for or in connection with the contracting party as an independent contractor.
2. The contractor acknowledges that the contractor is not an employee of the contracting party and the services rendered for or in connection with the contracting party do not establish any right to unemployment benefits or any other right arising from an employment relationship.
3. The contractor is responsible for all tax liability associated with payments received from or through the contracting party and the contracting party will not withhold any taxes from payments to the contractor.
4. The contractor is responsible for obtaining and maintaining any required registration, licenses or other authorization necessary for the services rendered by the contractor.
5. The contractor acknowledges at least six of the following:
   (a) That the contractor is not insured under the contracting party's health insurance coverage or workers' compensation insurance coverage.
   (b) That the contracting party does not restrict the contractor's ability to perform services for or through other parties and the contractor is authorized to accept work from and perform work for other businesses and individuals besides the contracting party.
   (c) That the contractor has the right to accept or decline requests for services by or through the contracting party.
   (d) That the contracting party expects that the contractor provides services for other parties.
   (e) That the contractor is not economically dependent on the services performed for or in connection with the contracting party.
   (f) That the contracting party does not dictate the performance, methods or process the contractor uses to perform services.
   (g) That the contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the contractor is authorized to determine the days worked and the time periods of work.
   (h) That the contractor will be paid by or through the contracting party based on the work the contractor is contracted to perform and that the contracting party is not providing the contractor with a regular salary or any minimum, regular payment.
   (i) That the contractor is responsible for providing and maintaining all tools and equipment required to perform the services performed.
   (j) That the contractor is responsible for all expenses incurred by the contractor in performing the services.
6. The contractor acknowledges that the terms set forth in this declaration apply to the contractor, the contractor's employees and the contractor's independent contractors.

By: _____
CONTRACTOR

Signature: _____ Date: _____

Although use of the Declaration is *not* required to form or document an independent contractor relationship, doing so "creates a rebuttable presumption of an independent contractor relationship between the independent contractor and the employing unit with whom the independent contractor contracts." However, the Declaration does not act as a substitute for a thorough independent contractor agreement signed by both the broker and salesperson.

To be clear, use of the aforementioned Declaration is not mandated by law and a failure to use the document "does not create any presumptions and is not admissible to deny the existence of an independent contractor relationship." But because the Declaration can prove advantageous, brokers should consider using it with all salespersons within the brokerage. To assist brokers in this regard, a Declaration of Independent Business Status template can be found on AAR's website at https://www.aaronline.com/manage-risk/sample-forms/miscellaneous-forms/.

Finally, it is important to remember that the existence of an independent contractor relationship is governed by action, not words. Although having an independent contractor agreement and Declaration of Independent Business Status are important parts of establishing such a relationship, alone they are not enough to avoid misclassification. When employers exercise a significant degree of control and dictate when, how, and where tasks are performed, an employer-employee relationship is likely to be established regardless of any written agreement to the contrary.

Key Points

- A Declaration of Independent Business Status, as set forth in A.R.S. § 23-1601, creates a rebuttable presumption of an independent contractor relationship.
- Use of the Declaration of Independent Business Status is not required.
- A Declaration of Independent Business Status is not a substitute for a comprehensive independent contractor agreement signed by the salesperson and broker.

Buyer Advisory Revisions – April 2017

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

The Arizona Association of REALTORS® has released a revised Buyer Advisory with an effective date of April 2017. In addition to updated links, the following five substantive revisions have been made:

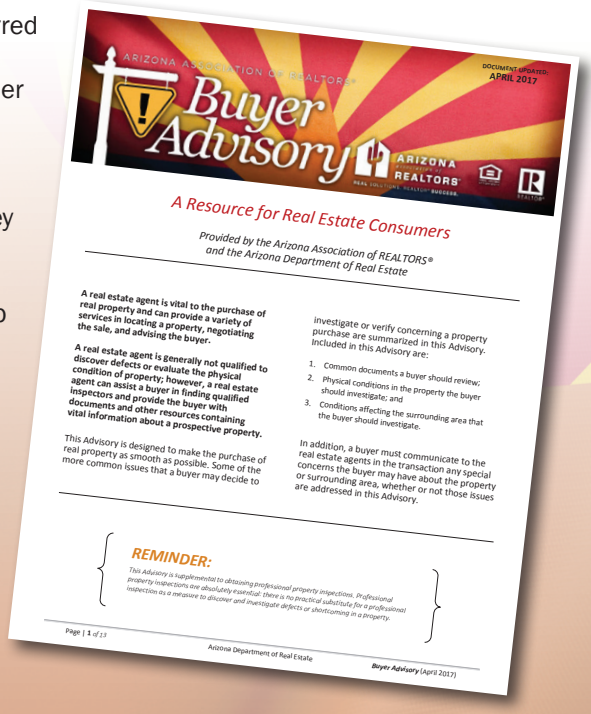
- **Homeowners Association (HOA) Governing Documents.** *See* Page 4, #6. In 2016, the Arizona legislature passed legislation moving the Homeowners Association Dispute Process from the Arizona Department of Fire, Building and Life Safety to the Arizona Department of Real Estate (ADRE). Accordingly, HOA complaints are now filed with ADRE, which then refers cases to the Office of Administrative Hearings as may be appropriate. The Buyer Advisory has been revised to reflect this change.

- **Foreign Investment in Real Property Tax Act.** *See* Page 5, #16. Previously, the Buyer Advisory explained that FIRPTA may impact the transaction if the legal owners of the property are foreign persons *or non-resident aliens*. However, the Internal Revenue Service defines the term "Foreign Person" to include non-resident aliens. For this reason, the two terms were duplicative and the revised Buyer Advisory now makes reference only to "Foreign Persons."

- **Interior Environmental Concerns.** *See* page 8, #13. What was previously referred to as "Chinese Drywall" is now commonly known throughout the industry as "Imported Drywall." The Buyer Advisory was therefore revised to use this broader term. Additionally, language was added explaining health issues residents may experience as a result of imported drywall.

- **Flood Insurance/Flood Plain Status.** *See* page 9, #15. A flood elevation survey is an important tool that determines a building's elevation. In turn, a flood elevation certificate is a document that ensures that a building meets FEMA's minimum elevation requirements. Because this survey and certificate may help determine a property's insurability and premium rate, language addressing these items has been added to the Buyer Advisory.

- **Wire Fraud.** *See* page 12. Wire transfer fraud is on the rise in Arizona and across the entire country. Because fraudulent wiring instructions conveyed to a buyer can result in the loss of substantial amounts of money, language has been added to the Buyer Advisory warning of this scheme to defraud.



The links contained in the Buyer Advisory periodically change without notice. If you find a link that is broken, or if you have a recommendation to other websites that you feel would be beneficial for the Buyer Advisory, please contact Jan Steward at JanSteward@aaronline.com

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Buyer May Wish to Reconsider Lengthy BINSR Repair List

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

Managing client expectations is an important part of being a REALTOR®.

Unlike the majority of buyers and sellers, REALTORS® have an understanding as to what is customary and reasonable to expect throughout the transaction. When this knowledge is shared, clients are less likely to convey unreasonable demands or experience disappointment when unrealistic expectations are not met.

By way of the Arizona REALTORS® Residential Buyer's Inspection Notice and Seller's Response (BINSR), the buyer can choose to provide the seller with an opportunity to correct identified items of which the buyer disapproves. In considering this verbiage, it should be noted that the term "correct" is akin to "fix" or "repair."

Determining which items the seller is asked to correct by way of the BINSR lies exclusively with the buyer.

Nonetheless, before the buyer proceeds to convey ill-conceived demands, it may be appropriate for their REALTOR® to provide them with information of the nature set forth below that can assist the buyer in this process.

- The buyer is not purchasing a new home and, consequently, it is unreasonable to expect or demand that the home be in the same condition as a new build.

- It is the buyer's obligation to perform all desired inspections. The buyer, by way of the BINSR, should therefore avoid asking the seller to perform further inspections of the property.

- In completing the BINSR, the buyer should not merely restate the home inspector's recommendations. For example, it would be pointless for a BINSR to state "Home inspector recommends that dryer vents be cleaned every five years." By way of such a statement, the buyer has not identified a condition or item of which they disapprove.

- Requests for upgrades are inappropriate. The BINSR is the buyer's opportunity to request that disapproved items be corrected, not ask for the home to be remodeled. So if the inspection report were to note that a portion of the carpet is fraying, the BINSR should not be used to request the installation of hardwood floors throughout the home.

- Although the buyer is free to identify on the BINSR whatever items they choose, in doing so they should be mindful of the condition of the item and the cost the seller will incur in addressing the issue. For example, a home inspector may note on the inspection report that the air-conditioning unit is nearing the end of its useful life. Such a remark may tempt the buyer to ask that the air-conditioning unit be replaced. However, the air-conditioning unit is currently in working condition and the cost to install a new unit is substantial. It is therefore possible that the seller will be put off by such a request and deem it unreasonable.

- The buyer should consider the nature of the market before completing the BINSR. In the event of a "seller's market," or when a property is highly sought after and has received numerous offers, it is unlikely that the seller will agree to a lengthy list of repairs.

While the REALTOR® cannot control or dictate the manner in which the BINSR is completed, they can share information with their buyer to help manage the buyer's expectations.

Since excessive and unrealistic BINSR demands often prove counterproductive, taking the time to educate buyers as to what's customary throughout the industry is likely time well spent.

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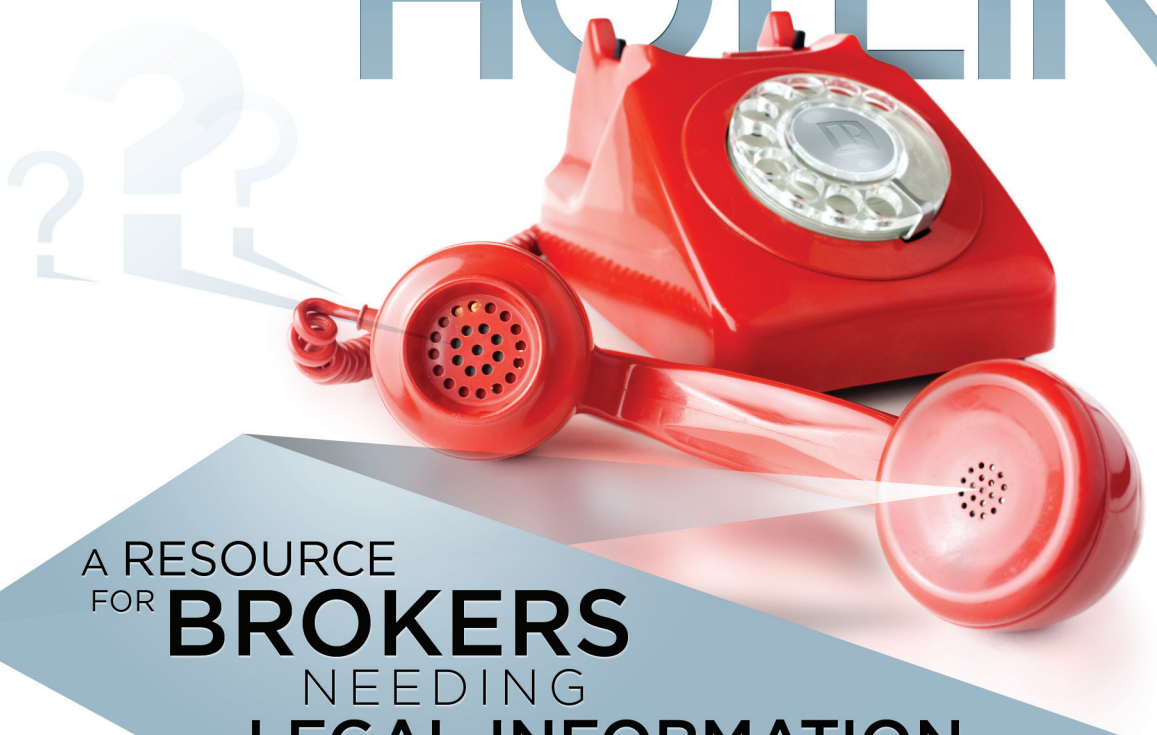
ARIZONA ASSOCIATION OF REALTORS®

LEGAL HOTLINE



A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The AAR Legal Hotline is designed...

* As a member benefit for Designated REALTORS® (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
* To answer legally related questions about the many diversified areas of today's real estate industry.

The Hotline is provided by the attorneys at Manning & Kass

Primary access to the Hotline is for Designated Brokers, who may also give access to one REALTOR® or REALTOR-ASSOCIATE® member per office and/or branch.

For More Information

Please contact Jamilla Brandt, AAR Risk Management Coordinator, at jamillabrandt@aaronline.com or 602-248-7787.

ARIZONA association of REALTORS®

Get Answers Today!

www.aaronline.com/legal-hotline

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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.

Medical/Dental Records are Protected Under HIPPA Laws

FACTS: A dental office was foreclosed. All of the dental equipment and patient records were left behind by the dentist.

ISSUE: May the buyer, who purchases the dental office from the bank, take possession of the dental records?

ANSWER: Probably not.

DISCUSSION: A.R.S. § 12-2292. Confidentiality of medical records and payment records

A. Unless otherwise provided by law, all medical records and payment records, and the information contained in medical records and payment records, are privileged and confidential. A health care provider may only disclose that part or all of a patient's medical records and payment records as authorized by state or federal law or written authorization signed by the patient or the patient's health care decision maker.

Further, HIPAA allows for up to a $50,000 fine per record if violated (capped at $1.5 million per year).

Therefore, the buyer should not take possession of the records. The bank should contact the dentist and make arrangements for the dentist to take possession of the patient records.

Independent legal counsel should be consulted.

Real Estate Agents are not Parties to the Contract

FACTS: A buyer makes an offer to purchase a residential property. The seller signs acceptance of the buyer's offer and delivers the acceptance. However, the listing agent failed to provide her brokerage information on page 9. The buyer's agent counters the seller because of the missing broker information on page 9.

ISSUE: Do the buyer and seller have a binding contract even if the brokerage information is not provided on page 9?

ANSWER: Yes.

DISCUSSION: The buyer and seller are the only parties to the contract; agents are not parties typically. Therefore, the buyer should proceed with opening escrow.

Seller Cannot Cancel Contract When Asked to Repair Items on BINSR

FACTS: Within the inspection period, buyer delivered to seller a Residential Buyer's Inspection Notice and Seller's Response (BINSR). The BINSR listed multiple items for seller to correct. Seller does not want to correct any of the listed items and now wants to cancel the AAR Residential Resale Real Estate Purchase Contract (Contract).

ISSUE: Can the seller elect to cancel the Contract?

ANSWER: No.

DISCUSSION: The BINSR does not provide seller with the opportunity to cancel the Contract. Rather, page 2 of the BINSR provides seller with the following options: (i) seller agrees to correct the items disapproved; (ii) seller is unable to correct any of the items; or (iii) seller's response to the buyer's notice which includes blank lines for a response.

The third option is included, so that seller may elect to correct some of buyer's listed items and decline to correct others. Accordingly, seller cannot cancel the Contract based on buyer's request to correct items.

Previous Contract Terms Should be Included in Rewritten Contract

FACTS: Agent B submitted an offer to Agent A using a contract from 2015. Agent A countered with Counteroffer #1, and Agent B then countered with Counteroffer #2. Escrow was opened. Broker A advised all parties to use the February 2017 contract. Seller and Buyer agreed and executed the February 2017 contract. However, Counteroffers #1 and #2 were not re-executed and their terms were not included in the rewritten contract. Counteroffers #1 and #2 refer to lines from the 2015 contract. →

Have you signed up for the Legal Hotline?

The Legal Hotline provides all AAR broker members (designated REALTORS®) free access to a qualified attorney who can provide information on real estate law and related matters.

FIND OUT HOW BROKERS CAN ACCESS THE LEGAL HOTLINE
www.aaronline.com/wp-content/uploads/2016/02/Legal-Hotline-Memorandum-2016-02-11.pdf

BROWSE MORE LEGAL HOTLINE TOPICS ONLINE
www.aaronline.com/manage-risk/legal-hotline

ISSUE: Should the rewritten contract have included the terms previously agreed to by the parties in Counteroffers #1 and #2?

ANSWER: Yes.

DISCUSSION: When the buyer and seller agreed to execute a February 2017 contract, to avoid confusion, the terms set forth in Counteroffers #1 and #2 should have been incorporated into the new contract.

Because this was not done, buyer and seller should now execute an addendum to clarify all terms and memorialize they had a meeting of the minds.

Note: As a best business practice, the addendum should also clarify the original contract date as the date all inspection periods began, so there is no confusion

"As-is" Addendum Not Needed with February 2017 Contract

FACTS: The listing agent received an offer on the February 2017 AAR Residential Purchase Contract. The listing agent advised the seller to counter the buyer with an "As-is" addendum. The buyer's agent said no "As-is" Addendum is needed.

ISSUE: Should the seller request the buyer sign an "As-is" Addendum?

ANSWER: No.

DISCUSSION: The amended February 2017 contract states in section 5a: "BUYER AND SELLER AGREE THE PREMISES ARE BEING SOLD IN ITS PRESENT PHYSICAL CONDITION AS OF THE DATE OF CONTRACT ACCEPTANCE." And, "Buyer and Seller acknowledge and understand they may, but are not obligated to, engage in negotiations for repairs/improvements to the Premises."

Therefore, the "As-is" addendum is unnecessary as the property is already being conveyed in its present physical condition.

Title Company Paying Salary of a Marketing "Employee" for Brokerage is Improper

FACTS: A broker wants to hire a person to perform marketing services for the brokerage. A title company offers to pay the salary of the marketing person.

ISSUE: Can the title company pay the salary of an employee performing marketing services for the brokerage?

ANSWER: No.

DISCUSSION: The Real Estate Settlement Procedures Act (RESPA) Section 8(a) prohibits the transfer of a thing of value pursuant to an understanding that business will be referred to any person. It states:

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

The title company's payment of the brokerage employee's salary violates RESPA as it is a thing of value. Furthermore, it defrays expenses that the brokerage would have otherwise incurred. Accordingly, the brokerage should not enter into such an arrangement with the title company.

No Requirement for Property to be on MLS to Establish Agency

FACTS: A seller approaches a real estate agent asking the agent to draft and negotiate a residential real estate contract for the seller's property. The seller has already found a buyer to purchase the property.

ISSUE: Is the agent permitted to draft and negotiate a purchase contract for the Seller's benefit even if the property is not listed on the Multiple Listing Service (MLS)?

ANSWER: See Discussion.

DISCUSSION: Article 26, Section 1 of the Arizona Constitution states: Any person holding a valid license as a real estate broker or a real estate salesman...when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale...shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto.

Therefore, *as long as the real estate agent is representing the seller in the transaction*, there is no requirement for the property to be listed on the MLS. The real estate agent may proceed to draft a contract and negotiate the sale on behalf of the seller.

However, if the agent is not representing a party to the sale, they are not permitted to draft the purchase contract. →

Interest and Insurance Premiums are Loan Costs as Defined in Section 2j

FACTS: The buyer and seller executed the February 2017 version of the AAR Residential Resale Real Estate Purchase Contract.

In Section 2j, the seller agreed to Seller Concessions of up to 4-percent of the purchase price. As a condition to funding the loan for the buyer, the lender is requiring that interest from the date-of-closing through the first mortgage payment and twelve months of homeowner's insurance premiums be paid at closing.

The title company has taken the position those items are not "loan costs" and therefore are not part of Seller Concessions as the term is defined in Section 2j.

ISSUE: Do Seller Concessions as defined in Section 2j include interest from the close-of-escrow through the first mortgage payment and homeowner's insurance premiums?

ANSWER: See discussion.

DISCUSSION: Both interest and the homeowner's insurance premiums are costs that the lender requires to be paid as a condition to funding a loan. Thus, those items are considered to be loan costs as that term is used in Section 2j. Accordingly, the interest and homeowner's insurance premiums would be included in the Seller Concessions as agreed by the parties.

No Signature Required When No Repairs Requested

FACTS: Within the Inspection Period, the buyer delivered the Residential Buyer's Inspection Notice and Seller's Response ("BINSR") to the seller. The buyer marked the box under the first election: "Premises Accepted – No corrections requested. Buyer accepts the Premises in its present condition and no corrections or repairs are requested." The BINSR was sent to the seller.

The buyer's agent is now insisting that the seller sign page 2, and return a copy to the buyer.

ISSUE: Does the seller have to sign page 2 if no repairs are requested?

ANSWER: No.

DISCUSSION: Because the buyer has made no request for repairs, the seller is not obligated to respond on the BINSR. However, if the buyer is asking for the seller's signature on the BINSR to "acknowledge receipt of a copy," then the seller may elect to mark through the seller response section and indicate "no repairs requested." Thereafter, the seller may elect to sign the BINSR.

Landlord May Hire Property Manager After Lease Execution

FACTS: A landlord entered into an AAR Residential Rental Agreement lease with a tenant. Two months later, the landlord realized she travels too much and wouldn't be available to perform her duties as a landlord. She therefore decided to hire a property management company.

The landlord gave proper notice to the tenant that payments would now be collected by a property management company. The tenant refused to acknowledge the property management company and stated he would only make payments to the landlord, because that's who he contracted with.

ISSUE: Can a tenant refuse to make payments to a property management company at the direction of the landlord?

ANSWER: No.

DISCUSSION: Arizona courts have recognized an agency relationship between a broker and a client in a real estate transaction since the early 1900s. *See Jenkins v. Irvin*, 20 Ariz. 164, 178 P. 33 (1919). Therefore, the landlord has the ability to hire a property manager as her agent.

The landlord gave proper notice pursuant to page 6 of the lease. The lease has not been affected. Therefore, the tenant should now submit payment to the property manager as the Landlord has directed.

ABOUT THE AUTHOR

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Richard V. Mack is a partner at Manning and Kass, 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.

Q&A Legal Hotline

5 Common Real Estate Safety Myths

BY TRACEY HAWKINS, REALTOR® MAGAZINE, APRIL 2017

Most professionals believe these ideas will improve their personal security in the field. Sometimes, they're wrong.

Real estate brokers and agents have hyped certain safety protocols in an effort to beef up personal security in the field, but some of the ideas that have become popular in the industry don't necessarily make you less vulnerable to attack. In fact, some may have the opposite effect.

It's not that these suggestions don't have any value in the pursuit of safer practices, but none of them are foolproof. You shouldn't rely too heavily on any one safety practice; to truly conduct business in a safer manner, you must incorporate a multitude of safety measures. As a longtime real estate safety educator, I offer these five personal security myths from agents around the country, along with my suggestions for how to work around them. (Request a handout to learn 7 More Safety Myths That Can Get You Hurt or Worse.)

1

MYTH NUMBER ONE: Meeting prospects at the office first will enable you to vet them properly and ensure you work with only legitimate clients.

It's always a good idea to ask prospective clients to come to your office or meet in a public place before taking them out on showings. But you are not equipped to properly vet prospects to determine whether they are criminals. Making judgment calls based on how a person looks, acts, or talks is not a science, and while you may be able to spot obvious red flags during a face-to-face meeting, you cannot guarantee that a prospect won't intend to do you harm. Many offenders are repeat or career criminals, and they know how to present themselves in a manner that makes you feel comfortable and safe. Never consider yourself safe after meeting with a prospect.

Asking for a prospect's ID and mortgage approval letter can provide some clues as to their legitimacy as a client, but you should do background research on new clients to get a fuller picture of who they are. Searching for them on Google is the typical place to start, but also search court records and public documents online as well as sites such as Anywho.com and Spokeo.com, which combine public records, social network information, and other online references.

If you want to go a step further, customer relationship management tools such as Great Agent provide prescreened customer leads. The program conducts a soft background check on potential clients and delivers a report of the findings to you. Though this decreases the level of danger in the prospecting process, you must remain alert and vigilant once you begin working with a new client.

2

MYTH NUMBER TWO: Using a code word is a good way to discreetly signal you're in distress.

Who doesn't know what the "red file" is? It's probably the most commonly used safety code word—and not just in the real estate industry—so you can bet criminals know what it means. Could you use a less conspicuous code word? Sure. But here's the problem with code words in general: In a perfect world, the person you're calling for help will immediately know that the code word means they should call authorities and have them dispatched to your location. That requires *everyone* at your office—all brokers, agents, and administrative staffers—to be properly and uniformly trained on the code word procedure. How likely is that to happen?

Unfortunately, when you make that call using your safety code word, there's a high risk that the person on the other end of the line will have no idea what you're talking about. If you can safely make a phone call and talk to someone—even briefly—your best option is to call 911 and give police as much information as possible about your situation. If you can't speak freely, try using apps such as Life 360, which sends covert notifications to your predesignated contacts that you need help.

3

MYTH NUMBER THREE: Safety apps will save you in a dangerous situation.
Speaking of safety apps, more agents are embracing them. Forty-two percent of REALTORS® use a smartphone safety app, according to the National Association of REALTORS®' 2016 Member Safety Report. While those are a good tool in the real estate professional's safety arsenal, the problem is that some agents rely solely on them to save their lives. But if you're in a situation where your cell phone isn't accessible, you lose a signal, or a criminal takes your phone away, those apps become useless. Safety apps should be part of a layered plan; they alone will not save you.

Investigate standalone or wearable safety devices that offer added features, such as Alert Lion, a pendant-type device that can be used to call for help with the press of a button. Once the button is pressed, an Alert Lion representative can listen in and make the call to authorities or medical personnel.

4

MYTH NUMBER FOUR: Dressing to impress will always attract the right customer.
For real estate professionals, the appearance of being successful is an important marketing tactic. Do you broadcast on social media how many millions of dollars in real estate you've sold? If you're a luxury agent, do you take marketing photos of yourself in a high-end car or in front of a mansion?

Wearing expensive jewelry, watches, and other accessories, or carrying around costly gadgets such as tablets and high-end cameras, may project the image you want your clients to see. But it can also garner unwanted attention from criminals who see the cash you've got on you. If you think dressing to impress will only attract people who are qualified to work with you, you're wrong.

Dress professionally, but leave the bling and flash at home. And you typically don't need expensive devices—aside from your smartphone—when you're out on showings with a client. Limit the places you take your gear. While trend-conscious clients may appreciate your fashion forwardness, the people you want to attract will be more interested in your service than your cachet.

5

MYTH NUMBER FIVE: Avoiding working in the "bad" parts of town will keep you safer.
I always get agents in my classes who tell me they don't do business in dangerous neighborhoods and never work at night, so they feel safe. These same agents also say they don't work with "strange" or "scary looking" people. As long as criminals are mobile, there is no safe part of town. Some areas may be safer than others, but agents need to be alert wherever they are. The worst thing you can do is let down your guard because you think you're in a nice neighborhood; some criminals target higher-end areas where they can find more valuable items. They also may perceive agents who work those markets to be wealthier.

Your prejudgments on what kinds of people look legit may also cause you to miss out on business. I always reference Sam Walton, the late founder of Walmart and Sam's Club, and his signature overalls and old pick-up truck. Many may have assumed based on his appearance that he couldn't afford high-end property. By the same token, famed serial killer Ted Bundy cleaned up quite nicely.

Instead of judging people or neighborhoods by their appearance, agents should rely on taking the proper screening steps and always trusting their intuition, gut, or instinct. We all possess a built-in warning system designed to protect us from danger. Too often, we ignore that feeling in the pit of our stomachs. If your body sends these signals, listen to them and get out of the situation. Do not try to rationalize your feelings.
Read More: NAR Resource: Realtor Magazine April 2017

REALTOR® SAFETY PROGRAM

Helping NAR members understand the risks they face through knowledge, awareness, and empowerment. To learn more about the program, click here.

If you need assistance or have suggestions, email: safety@realtors.org