ARIZONA BROKER MANAGER QUARTERLY

THIRD QUARTER 2017

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BROKER MANAGER

THIRD QUARTER 2017 | ARIZONA BROKER/MANAGER QUARTERLY

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2017 Broker Claims Survey Results

BY NIKKI SALGAT, ESQ.

In an effort to stay apprised of current issues affecting the real estate industry, the Arizona REALTORS® Risk Management Department distributed a broker claims survey to REALTOR® Brokers throughout Arizona in July of this year. The survey sought information related to the types of issues, claims, and/or allegations that brokers received from demand letters, lawsuits, and Arizona Department of Real Estate (ADRE) complaints. Unfortunately, as compared to the 806 responses the state association received in 2015, it received only 220 responses this year. The following are the results:

Demand Letters
Out of 218 responses to this question, 19 brokers reported receiving at least one demand letter. The most common issue involved property condition, which most frequently related to mold/water intrusion, insects/vermin/termites, and plumbing. Additional issues reported mostly related to earnest money disputes and commission/referral fees. Issues discussed in more detail were security deposit disputes and disclosure claims.

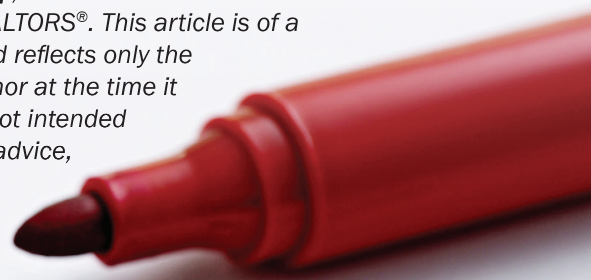
Lawsuits
Of the 219 brokers that responded to this question, 11 acknowledged that their brokerage had been sued in the last 12 months. The broader allegations were misrepresentation, breach of fiduciary duty, negligence, breach of contract, and fraud. Specific issues most often addressed related to return of security deposits, commission disputes, and bodily injury. Property condition was the highest reported issue. The most common property conditions addressed in lawsuits were square footage, structural defects, and mold/water intrusion.

ADRE Complaints
Out of 215 responses to this question, 14 brokers received at least one ADRE complaint. The specific claims most frequently concerned non-disclosure with regard to property condition and non-disclosure of a tenant's background. The remaining top complaints involved fiduciary duty, advertising, and failure to disclose.

Finally, the survey asked brokers to provide any additional comments, concerns, or information of which they would like other brokers to be aware. Issues specifically discussed were the importance of properly disclosing whether the property is hooked up to sewer or septic, and the need to ensure that purchase contracts are contingent on buyers' successful assumption of a solar lease.

Among the words of advice offered were "become knowledgeable and always be truthful."

***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.*



Selling Mobile/Manufactured Homes Not Legally Affixed

BY GUEST BLOGGER MICHAEL A. PARHAM, ESQ.

> 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. – Mobile and Manufactured Home Sales Restrictions Easing (April 26, 2017)

Arizona House Bill 2072 (HB 2072) is effective August 9, 2017. This allows Arizona Department of Real Estate (ADRE) licensees to sell mobile and manufactured homes not legally affixed to the land in manufactured housing communities.

Although physically attached, homes in mobile home parks are not *legally* affixed. Arizona Motor Vehicle Division (MVD) certificates of title cover them, but ownership does not pass with ownership of the land. The ownership document for these is the same as an MVD title.

For someone to broker these homes under pre-August 9, 2017 laws, he or she needed to be separately licensed by the Manufactured Housing Division of the Arizona Department of Housing (ADOH). Homes on rented land are off limits to ADRE licensees not separately licensed by the ADOH.

There are around 2,000 Arizona manufactured housing communities with about 200,000 homes. These range from high-end communities with homes valued up to $200K, down to small, older communities with homes priced at only a few thousand dollars.

In recent years, the number of ADOH licensed brokers and dealers has declined and in many areas there are not enough to serve industry needs. The Manufactured Housing Communities of Arizona (MHCA) industry trade association has been looking at ways to open this market up. It has learned that in other states, allowing real estate brokers and salespersons to sell these homes has been helpful. So, this year MHCA successfully lobbied HB 2072 opening this business up to ADRE licensees.

HB 2072 amends A.R.S. § 41-4028 to allow this in two ways:

- It allows real estate brokers and salespersons to act on behalf of a Department of Housing licensed dealer in the sale of mobile homes and new or used manufactured homes located in mobile home parks, if the licensed dealer submits the required fees and paperwork.

- Alternatively, it allows real estate brokers or salespersons to act in the sale of mobile homes and used manufactured homes located in mobile home parks, if the broker or salesperson remains compliant with ADRE requirements. They cannot sell new ones under this alternative. New home sales must still be through an ADOH licensed dealer.

So, an ADRE licensee can sell all homes through an ADOH licensed dealer without being licensed by it, as long as the sale closes through the dealer. Or, the ADRE broker and salesperson can independently sell used homes without being involved with a dealer by simply following ADRE requirements.

ADRE licensees getting involved in this business need to be aware of a number of subtleties in the law:

1. The home must be located in a "mobile home park", defined at A.R.S. § 33-1409 as a parcel of land with four or more rental spaces for these kinds of homes.

2. The home must be either a "manufactured home" or a "mobile home". A manufactured home is one built after June 15, 1976 and identified as such by an ID plate attached to it. A mobile home is a dwelling unit made before that date but built as a residence.

3. Do not rely on the certificate of title to identify the unit as a mobile or manufactured home. MVD definitions are different from the landlord/tenant definitions used in this law and many recreational vehicles that are not mobile or manufactured homes are titled as if they are.

4. The authority does not extend to RV's including "park models" that look like small manufactured homes (though there are no laws requiring any license to sell them).

5. Closing on these is different from normal real estate sales. Deals are closed by escrowing the purchase price except any part required to pay off existing liens, and not releasing money to the seller until the MVD accepts the old title and issues a new one to the buyer.

6. For new homes, the sale must always be through an ADOH licensed dealer. ADRE licensees not working through a dealer cannot sell new units.

There is a new opportunity here for interested ADRE licensees, but this industry is different from the normal single-family residence business and this is going to be important to understand. Normal sales forms are not going to suffice since mobile and manufactured homes are chattel sales, not land sales.

MHCA is working on developing a purchase contract and related forms for use in these types of transactions and they should be available on the Arizona REALTORS® website by the time the new law is effective. In addition, ADRE licensees need to become familiar with mobile home parks landlord tenant laws. They are quite different from normal residential laws.

***Mike Parham** was Manufactured Housing Communities of Arizona legal counsel from 1987 until 2016 at which time Melissa Parham replaced him. Both are members of Williams, Zinman & Parham P.C.*

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.

LIKE A BOSS

BROKER INVOLVEMENT PROGRAM

Brokers, REALTORS®, and property owners are the most influential players in our economy, which is why government actions from the White House to City Hall can have a massive impact on our industry.

The Arizona Association of REALTORS® is hosting an exclusive, brokers only reception where you'll learn how you can help leverage the political muscle of Arizona's REALTORS® to protect our industry and your business. You'll hear from Arizona Real Estate Commissioner Judy Lowe and NAR Director of REALTOR® Mobilization and Communications Jim MacGregor about how you can easily build a culture of advocacy within your brokerage.

This event is space limited, so please RSVP with me as soon as possible at charles@aaronline.com to reserve your spot.

Join us and other top brokers Thursday, September 7 from 4PM-6PM at Phoenix Marriott Tempe at the Buttes in the Cholla Vista room and see how easy it is to participate in and influence the political system "Like a Boss." The Resort is located at: 2000 W Westcourt Way, Tempe, AZ 85282.

Photo: Phoenix Marriott Tempe at the Buttes | Photo Source: www.marriott.com

Photographs and Copyright Infringement in Real Estate Marketing

BY AARON FINTER, ESQ.

The use of the internet as a marketing tool for real estate professionals continues to become more and more prevalent. No doubt, there are countless studies evidencing the fact that the use of high quality photographs and videos reduces the length of time it takes to sell a property. While perhaps not commonplace, it is not unheard of for an out-of-state buyer to purchase a property based in large part on photographs. Yet it can be costly to retain a professional photographer to photograph a property. While this may make sense when listing high end properties, it may not be cost effective for a standard listing. It can be time consuming for a busy real estate professional to take high quality photographs for each of the properties he/she is listing.

If there are existing photographs of the property available on the internet or in an expired MLS listing, why not simply utilize the existing photographs? The answer is that the real estate professional may, unwittingly, be committing copyright infringement. There is no intent requirement under the federal Copyright Act; therefore, ignorance of the law is not a defense in a copyright infringement action.

It is not difficult to imagine a situation where a client provides a real estate professional with a thumb drive containing photographs of the client's property and asks that the photographs be utilized in connection with any marketing of the property. It would not be uncommon for the real estate professional to utilize the photographs without inquiring as to their origin. What if it turns out that the photographs are owned by a professional photographer that had photographed the property in connection with an expired listing? In utilizing the photographs without permission from the photographer as the copyright holder, the real estate professional is potentially liable for copyright infringement. The copyright holder can then recover actual damages suffered or statutory damages under the federal Copyright Act. The Copyright Act provides for a wide range of damages from $750 per work up to $150,000 per work. *See* 17 U.S.C. §504. The copyright holder also has the ability to recover attorneys' fees and costs associated with a copyright infringement lawsuit.

Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc., 722 F.3d 591 (4th Cir. 2013) is a case that brought copyright infringement to the attention of many real estate professionals. The *Metro* case addressed the issue of whether a real estate listing service had properly registered the individual photographs of properties contained within its listings by registering the listings as a database. In *Metro*, a competing real estate listing service had utilized individual images contained in the database without the copyright holder's permission. The Fourth Circuit held that Metro had an ownership interest in the photographs contained in its database and affirmed a preliminary injunction prohibiting American Home Realty Network, Inc. ("American") from utilizing Metro's photographs on American's website. The Ninth Circuit Court of Appeals, in *Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d 673, 683 (9th Cir. 2014), agreed with the holding in the Metro case. This is important because Arizona is also in the Ninth Circuit. Each MLS has its own set of rules pertaining to the utilization and ownership of photographs used in listings. It would be worthwhile to familiarize yourself with the rules of the MLS of which you are a member.

As a matter of practice, it is advisable to never utilize a photograph taken from the internet to market a property without a written license or other written agreement with the copyright holder since oral agreements are not recognized under the law. This article is certainly not intended to serve as a lengthy treatise on copyright infringement law. Rather, it is to serve as a warning to the unintentional, but no less culpable, use of copyrighted images by a real estate professional who is seeking to save time and money in connection with the sale of real property in Arizona.

Additional sources of information on this topic can be found at:
http://www.realtor.org/law-and-ethics/managing-listing-content/how-to-manage-and-protect-listing-content; and
http://www.realtor.org/publications/realtor-ae-magazine/copyright-listing-ownership-under-the-law

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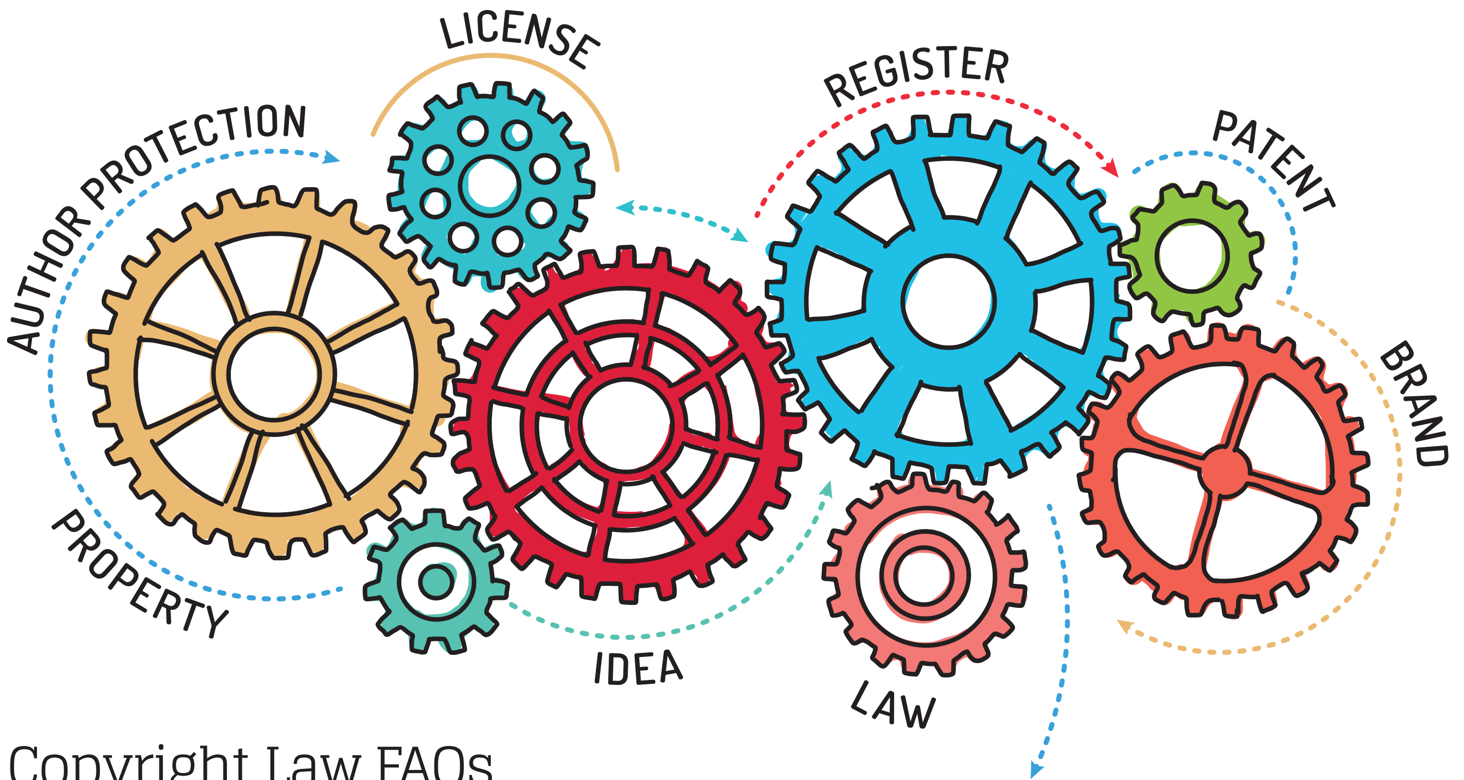
***Aaron Finter** is a partner at the law firm of Schern Richardson Finter Decker, PLC practicing in the areas of real estate, commercial and general litigation. Aaron represents homeowners, real estate professionals, title companies, lenders, landlords, tenants, and contractors and can be reached at (888) 464-9958.*



Copyright Law FAQs

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

Copyright law affects real estate licensees in a number of ways including, but not limited to, the use of photographs and listing content. It is therefore important for licensees to know the basics of copyright law as set forth below in the following frequently asked questions.

1. What is a copyright? – A copyright is a form of protection for original works of authorship fixed in a tangible medium including, but not limited to, literary, dramatic, musical and artistic works such as poetry, novels, movies, songs, photographs, artwork, and computer software. Copyright protection does not apply to facts, ideas, systems, or methods of operation.

2. What does "fixed in a tangible medium of expression" mean? – This means that the work must exist in some physical form for at least some period of time. In other words, the work must be recorded in some physical medium, whether on paper, audio recording, or computer software. As such, spontaneous speech or music that is not recorded is not protected by copyright.

3. Must the work be creative in nature? – Yes. To qualify for copyright protection, the work must be of at least some creative effort on the part of its author. Although there is no hard and fast rule as to how much creativity is required, it is generally acknowledged that a telephone book's white pages, which involve a straightforward alphabetical listing of telephone numbers, is not creative in nature.

4. When does the work become protected? – An original work is subject to copyright protection the moment it is created in a tangible form. For example, the second a photograph is taken, the photographer owns a copyrighted work.

5. Must the work be registered with the United States Copyright Office to receive copyright protection? – No. Although registration may prove beneficial, doing so is voluntary and not required to obtain a copyright.

6. What does a copyright not protect? – Among other items, a copyright does not protect names, titles, slogans, or short phrases. However, in some cases these things may be protected by trademarks.

7. How is a copyright different from a patent or trademark? – A copyright protects original works of authorship, while a patent protects inventions or discoveries. Ideas are not protected by copyright law, although the way in which they are expressed may be. A trademark protects words, phrases, symbols, or designs identifying goods or services of one party and distinguishing them from those of others.

8. Does the employer own the copyright for work created by their employee? – Yes. Any employer whose employee creates a copyrighted work as part of their job owns the copyright on that work. This is often referred to as a "work for hire." As for independent contractors, a work created by an independent contractor can be a work made for hire only if there is a written agreement between the parties to this effect.

9. What rights do copyright owners possess? – Copyright owners can: (i) make copies of the work; (ii) perform and display the work publicly; (iii) distribute copies of the work; (iv) make derivative works; and (v) license the work.

10. What is copyright infringement? – Infringement is any violation of the exclusive rights of the creator. Examples include: (i) use of an image without permission; (ii) use of the work beyond the scope of a license or permission; (iii) copying the work; and (iv) adapting or modifying the work.

11. If an image is on the internet and therefore in the public domain, is a license or permission required to use or reproduce the image? – Yes. Even under these circumstances, use of the image would constitute infringement absent a license or permission.

12. If a user alters the original work, is a license or permission still required? – Yes. A license or express permission is required to alter or modify a copyrighted work.

13. Can portions of a real estate listing be subject to copyright? – Yes. A listing's original content elements, including photographs of the property, list price, floor plans, drawings, and remarks by the listing agent on aspects of the property or neighborhood are eligible for protection under copyright law. Therefore, copying, distributing, or displaying listing content without a license or permission from the owner constitutes infringement of the owner's rights. However, it must be noted that MLS's rules provide that by submitting listing content to the MLS, a subscriber grants the MLS a license to use the listing content "for any purpose consistent with the facilitation of the sale, lease and valuation of property."[1]

14. When a photographer is hired by a real estate licensee to photograph a home, who owns the copyright – the photographer, the owner of the home, or the real estate licensee? – Unless otherwise agreed, the copyright is owned by the photographer.

15. How long does a copyright last? – For works published after 1977, the copyright lasts for the life of the author plus 70 years.

[1] Most vendors, including IDX vendors, will require that the broker or MLS represent and warrant that it has the right to license the listing content to the vendor.

Related article: Protect Yourself Against Copyright Claims – REALTOR® Mag (May 2017)

***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.*

Substantive Policy Statement (SPS) 2017.01: Unlicensed Assistants

On June 9, 2017, after consultation with the Arizona Association of REALTORS®, the Arizona Department of Real Estate released a new Substantive Policy Statement (SPS) titled: Unlicensed Assistants.

The new SPS, numbered 2017.01, replaces SPS 2005.04 which after 12 years was seen as outdated. By way of this new SPS, guidance is offered as to those tasks unlicensed assistants can and cannot perform, and better reflects the role of unlicensed assistants in today's real estate world. It also clarifies and emphasizes that: (i) unlicensed assistants can be hired by an Arizona licensed real estate broker or salesperson; and (ii) employing brokers are "responsible for all activities of licensed individuals within the brokerage."

SPS 2017.01 can be found on the Arizona Department of Real Estate website.

There's No Place Like Home

BY K. MICHELLE LIND, ESQ., CHIEF EXECUTIVE OFFICER

There is no place like Arizona – it is one of the most unique states in America. Many things make Arizona unique, such as the Grand Canyon, our diverse geography, and our law establishing an official state neck-wear. Arizona real estate brokers and salespersons are also unique when compared to the rest of the nation. In some states, buyers and sellers are required to have an attorney involved in the drafting and execution of the purchase contract, or at close of escrow. But not in Arizona.

Article 26 of the Arizona Constitution authorizes real estate brokers and salespersons to engage in the limited practice of law by drafting the purchase contract and other documents incident to the transfer of real property. This constitutional right affects legal responsibilities of brokers and salespersons.

THE HISTORY OF ARTICLE 26

In 1961, the Arizona Supreme Court held that real estate licensees and title companies were practicing law without a license by preparing purchase contracts and other legal documents. (State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), supp. 91 Ariz. 293, 371 P.2d 1020 (1962).

The court stated that, "[R]eal estate brokers, agents, and salesmen … may not, as agents, draft or prepare any instruments purporting to create legal rights or impose legal responsibilities as between third parties."

The court also stated that the legislature had no power to authorize real estate licensees to practice law by drafting purchase contracts because the unauthorized practice of law is governed by the court, not by the legislature.

As a result, Arizona REALTORS® drafted the language of Article 26 of the Arizona Constitution and circulated initiative petitions to put a proposal on the ballot to amend the Arizona Constitution and allow real estate licensees to draft purchase contracts. See, Robert E. Riggs, Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment, 37 So. Ca. L. Rev. 1 (1964). In an effort to get the amendment approved by the electorate, Arizona REALTORS® undertook an extensive campaign. Despite vigorous opposition by the Arizona State Bar, the voters adopted Article 26 as an amendment to the Arizona Constitution in the 1962 election.

Article 26 states:

Section 1. Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.

LEGAL RESPONSIBILITY

With power comes responsibility. The court of appeals stated: Having achieved, by virtue of [Article 26 Section 1 of the Arizona Constitution], the right to prepare any and all instruments incident to the sale of real property, including promissory notes, real estate brokers and salesmen also bear the responsibility and duty of explaining to the persons involved the implications of these documents. Failure to do so may constitute real estate malpractice. Morley v. J. Pagel Realty & Insurance, 27 Ariz. App. 62, 550 P.2d 1104 (1976).

In other words, real estate brokers and salespersons have the responsibility to explain the transaction documents to their clients or be liable for malpractice.

In another case, the court said: "Article 26, §1 of the Arizona Constitution … authorizes brokers and salesmen to engage in limited law practice involving real property transactions. If a broker can practice law in the area of real property sales, it is reasonable to hold him to a full understanding of the implications and ramifications of the Statute of Frauds." Olson v. Neale, 116 Ariz. 522, 525, 570 P.2d 209 (App. 1977). A contract for the sale of real property must be in writing and signed by the party to be charged to be enforceable. A.R.S. §44-101(6). All material modifications and amendments to a contract covered by the Statute of Frauds must also be evidenced by a signed writing. Many disputes would be avoided if all contract modifications were put in writing and signed.

These cases, and subsequent clarifications by the Arizona courts, indicate that Article 26 imposes a duty upon brokers and salespersons to give competent advice to their clients and to understand the legal implications of the documents they prepare. In addition, a broker or salesperson acting as an agent, has a fiduciary duty to protect and promote the client's interests.

So, there's no place like Arizona when it comes to the practice of real estate. And there's no place like Arizona for official state neck-ware – the Bola tie. A.R.S §41-857.

For more information: www.aaronline.com/2006/03/aar-and-article-26-of-the-arizona-constitution/

K. Michelle Lind is an attorney and the CEO for the Arizona Association of REALTORS® the largest trade association in Arizona, representing more than 46,000 members. Visit www.aaronline.com for more information about other issues affecting Arizona REALTORS® and property owners.

Earnest Money: How Much is Reasonable?

BY K. MICHELLE LIND, ESQ., CHIEF EXECUTIVE OFFICER & NIKKI SALGAT, ESQ.

In all of the Arizona Association of REALTORS® (“AAR”) contract forms, earnest money is designated as liquidated damages for the seller in the event of a buyer’s breach. Liquidated damages is the term used when a specific sum of money has been agreed upon by the parties as the amount of damages to be recovered for breach of contract. Liquidated damages serve as an economical alternative to the costly and time consuming litigation involved in a breach of contract lawsuit.

When liquidated damages are specified in a contract, the terms are generally enforceable. However, be aware that if there is an unreasonably large amount of the earnest money at issue, the court may refuse to enforce the liquidated damages clause and deem it to be an unenforceable penalty. A liquidated damages clause will be considered a penalty unless two conditions are met: (1) the amount fixed in the contract must be a reasonable forecast of just compensation for the harm that is caused by any breach; (2) the harm that is caused by any breach must be one that is incapable or very difficult of accurate estimation.

In a recent Arizona Supreme Court case – *Dobson Bay, et al. v. La Sonrisa De Sienna, LLC*, —P.3d —, 2017 WL 1458856 (Ariz. 2017) – the court opined that a 5% (almost $1.4 million) late fee assessed on a final loan balloon payment was an unenforceable penalty. In this case, the lender loaned $28.6 million to the borrower to purchase four commercial properties. The borrower was not able to pay the entire principal when the balloon payment came due and the parties extended the loan maturity date for three years. The lender sold its interest to an LLC. The LLC noticed a trustee’s sale and claimed the borrower owed more than $30 million, including a nearly $1.4 million late fee as liquidated damages.

In analyzing whether the liquidated damages were enforceable, the Supreme Court examined factors such as, whether the amount was a reasonable prediction of the lenders loss, other fees triggered by the breach and whether the amount was proportionate to the lenders loss. Ultimately, the Court determined that the liquidated damages clause was not a reasonable forecast of just compensation for harm that was caused by the breach, and the harm caused was not incapable or very difficult of accurate estimation. Therefore, the liquidated damages clause was an unenforceable penalty.

Not all large liquidated damage sums are unenforceable. For example, in *Pima Sav. and Loan Ass’n v. Rampello*, 168 Ariz. 297, 812 P.2d 1115 (App. 1991), the buyer contracted to purchase a condominium complex from Pima Savings for $4.7 million. The contract’s liquidated damage clause stated in the event of the buyer’s breach Pima would be paid $290,000.00 as liquidated damages. When the buyer failed to close, the buyer argued that the liquidated damage clause was unenforceable as a penalty. The court noted that the: “liquidated damage amount was little more than six percent of the total contract price and was reasonable on its face and, when all the facts were considered, reasonable at the time of the contract.” Therefore, the clause was enforceable.

In applying these cases to the AAR contracts, how much earnest money is reasonable so that a court will find the liquidated damages clause enforceable? It depends on the type of transaction and the circumstances surrounding the transaction. Some things to take into consideration are how complicated the transaction is, the length of the transaction, and the amount of damages the party would incur from harm in the event of a breach. Generally speaking, most earnest money deposits are fairly modest and likely be found to be an acceptable amount of liquidated damages.

***K. Michelle Lind** is an attorney and the Chief Executive Officer and **Nikki Salgat** is Associate Counsel for the Arizona REALTORS®, the largest trade association in Arizona, representing more than 46,000 members. This article reflects only the opinion of the authors and is not intended as definitive legal advice.*

Know Restrictions Before Buying Near a Military Air Base

Arizona's military airbases benefit the state and country in innumerable ways. For example, did you know that virtually every F-16 combat mission flown in Afghanistan and Iraq was flown by a pilot trained at Luke Air Force Base (Luke AFB) or in airspace and ranges located within the state? In fact, Luke AFB is the premier training base for F-16 and F-35 pilots and it will soon be home to 144 F-35A Lightning IIs.

In order for Air Force bases in Arizona to accomplish their mission, accommodations must be made by the surrounding areas. It is for this reason that, through legislative protections, Arizona has removed approximately 32,788 acres from the threat of incompatible development in the areas surrounding Luke AFB, Auxiliary Field 1, and the Gila Bend Auxiliary Field.

Similar protections are in place surrounding the other military facilities throughout the state. Furthermore, in 2001, Arizona's Revised Statutes were amended to define compatible land uses with a military airport and to codify permissible development options within the noise contours and accident potential zones.[1] It is therefore critical that potential buyers familiarize themselves with these use restrictions before purchasing property in the vicinity of a military airport.

Two critical issues define compatibility of uses: noise and safety. Arizona statutes therefore seek to: (i) limit the exposure of people and noise sensitive businesses to high decibel levels; and (ii) limit the concentration of people and safety sensitive activities in areas of highest probable accident impact. This is particularly important considering that Arizona's two largest Air Force bases, (Luke AFB and Davis-Monthan AFB), are located in close proximity to Phoenix and Tucson respectively.

According to A.R.S. § 28-8481, all political subdivisions in the vicinity of a military airport must adopt land use plans and enforce zoning regulations to assure development compatible with the high noise levels and accident potential generated by military airports. Furthermore, A.R.S. § 28-8481 contains tables outlining compatible uses within various Day-Night Average Sound Level ("Ldn") zones, most notably the 65 decibel Ldn noise zone.[2]

There are many land uses incompatible with high noise levels, particularly within the high noise zones defined as the 65 Ldn and higher. These include, but are not limited to, places where people normally sleep, such as residences, hotels, and hospitals. It is for this reason that...

> **A.R.S. § 28-8481 does not consider single-family residential uses compatible in any of the hazard or noise zones.** Uses such as schools, libraries, theaters and concert halls are similarly incompatible.

As for accident potential zones as defined by A.R.S. § 28-8461, they are incompatible with uses that result in a high concentration of people such as residences, apartments, hotels, offices, labor-intensive industrial centers, retail establishments, and sports arenas. This leaves permissible uses such as sparsely-populated industrial centers that do not emit dense smoke, agriculture that does not pose safety concerns to planes by attracting large flocks of birds, and other similar low density, height restricted uses.

So, how do residential buyers and their representatives know if the land they are considering purchasing can house a residential structure? Can they simply look to the surrounding area? The answer is a resounding "no."

It is impossible to judge a land's permitted uses by the surrounding area. Pre-existing structures may have been grandfathered-in and do not reflect the current restrictions. For that reason, buyers should ask questions, research applicable statutes and, for Luke AFB, input the Assessor's Parcel Number (APN) into the Maricopa County website as explained below.

To research a property's location within a restricted area of Luke AFB, interested parties can visit the Maricopa County PlanNet site. Once there, click the box titled "Military" on the left side of the page and then click the "Find Parcel" APN icon at the top of the page. Once you enter the property's APN, it's location within a potentially restricted zone will be revealed.

Buyers can also access military airport maps, auxiliary airfield maps, restricted airspace maps, and military training route maps, all of which can be found on the Arizona Department of Real Estate website. These maps outline high noise and accident potential zones surrounding military airports. Once identified, buyers can match the zone to the use and restriction tables found in A.R.S. § 28-8481.

While these search tools are a great resource, it is critical that property usage and restrictions be researched before a property is purchased. This sentiment is echoed by Barbara Plante, Deputy Director of Luke AFB's Community Initiatives Team. According to Plante, "If you wait until you're signing paperwork at closing to research the issue, it's too late." For

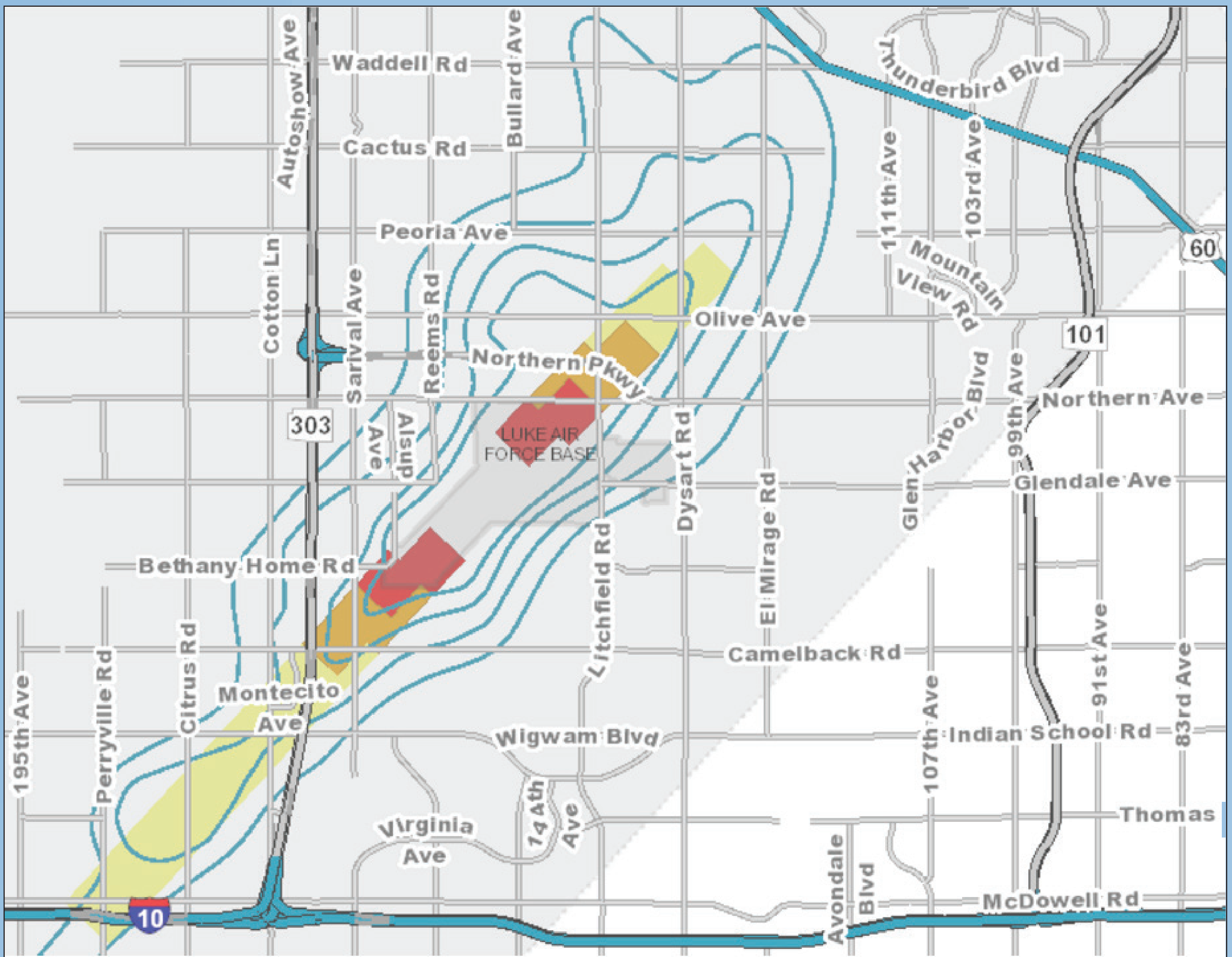
this reason, she makes herself available to all prospective buyers and their agents in the Phoenix metropolitan area, all of whom are free to contact her at Barbara.Plante@us.af.mil. Not only does Ms. Plante help buyers and their representatives understand applicable use restrictions, she takes pride in working with the public to ensure that Luke AFB ingratiates itself to the surrounding community.[3]

Unfortunately, buyers continue to purchase property in the vicinity of a military airport under the false impression that they can construct a residence or utilize the property for a high-density or noise-sensitive commercial structure when it is simply not permitted under Arizona law. However, steps can and should be taken to research use restrictions prior to purchase, thereby benefiting and protecting both the buyer and their agent.

[1] Luke AFB is not the approval or denial authority on any land uses external to its property line.

[2] Sound levels from aircraft between 55 and 60 decibels are considered moderate and generally acceptable for residential use. Residential use in the 65 Ldn contour and higher is discouraged.

[3] For Davis-Monthan AFB, Nicole Dalrymple is the Chief of Community Relations and can be reached at Nicole.Dalrymple@us.af.mil.



Screenshot from the Maricopa County PlanNet site.

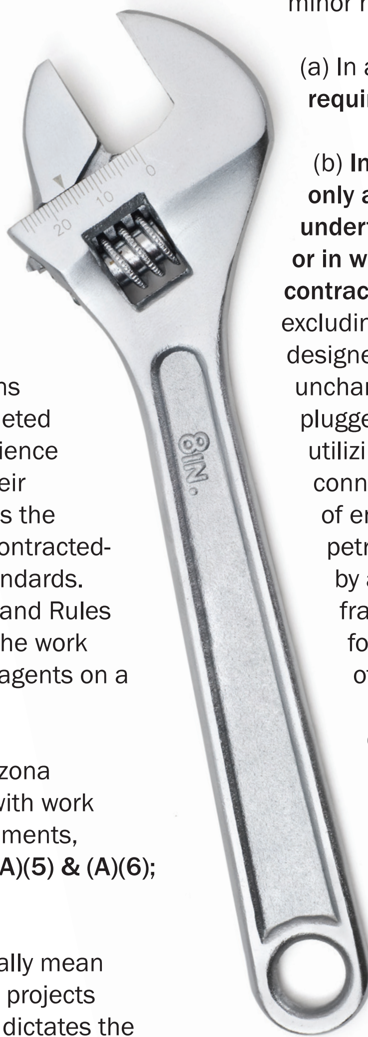
Arizona Registrar of Contractors Licensing Requirements

COURTESY OF THE ARIZONA REGISTRAR OF CONTRACTORS

Just as an individual working unlicensed as a real estate agent negatively impacts the livelihoods of licensed agents and poses untold financial and safety risks for the public, contracting work performed by unlicensed entities poses devastating effects on the safety and welfare of the public and livelihoods of Arizona's licensed contracting professionals.

The Arizona Registrar of Contractors is a state agency and serves two core functions; licensing and regulation of the licensing of contractors.

Currently, there are approximately 38,000 licensed contracting entities in the State of Arizona with 106 classifications ranging from landscaping and painting to general contracting and carpentry, remodeling and repairs.



The importance of a residential buyer or seller using a licensed contracting professional begins with the assurance that the work will be completed by an individual with the knowledge and experience required to perform the work and ends with their potential access to a restitution fund, known as the Registrar's Residential Recovery Fund, if the contracted-for work fails to meet professional industry standards. As one can imagine, Arizona Revised Statutes and Rules related to contracting can intimately relate to the work encountered by Arizona's licensed real estate agents on a daily basis.

Though certainly not an exhaustive list, the Arizona real estate industry likely comes into contact with work impacted by ROC contracting licensure requirements, including **ARS 32-1121(A)(14); ARS 32-1121(A)(5) & (A)(6); ARS 32-1151; and ARS 32-1169**.

The term *handyman* is one many use to generally mean an individual who can fix many, if not all, small projects around the home. In Arizona, however, statute dictates the work allowed to be done by an unlicensed individual acting as a handyman. The so-called "handyman exemption," is as follows:

§32-1121. Persons not required to be licensed; penalties
A. This chapter shall not be construed to apply to:

14. **Any person other than a licensed contractor engaging in any work or operation on one undertaking or project by one or more contracts, for which the aggregate contract price, including labor, materials and all other items**, but excluding any electrical fixture or appliance that was designed by the manufacturer, that is unaltered, unchanged or unmodified by any person, that can be plugged into a common household electrical outlet utilizing a two pronged or three pronged electrical connector and that does not use any other form of energy, including natural gas, propane or other petroleum or gaseous fuel, to operate or is attached by a nail, screw or other fastening device to the frame or foundation of any residential structure, **is less than one thousand dollars**. The work or operations that are exempt under this paragraph shall be of a casual or minor nature. This exemption does not apply:

(a) In any case in which the **performance of the work requires a local building permit**.

(b) **In any case in which the work or construction is only a part of a larger or major operation, whether undertaken by the same or a different contractor, or in which a division of the operation is made in contracts of amounts less than one thousand dollars**, excluding any electrical fixture or appliance that was designed by the manufacturer, that is unaltered, unchanged or unmodified by any person, that can be plugged into a common household electrical outlet utilizing a two pronged or three pronged electrical connector and that does not use any other form of energy, including natural gas, propane or other petroleum or gaseous fuel, to operate or is attached by a nail, screw or other fastening device to the frame or foundation of any residential structure, for the purpose of evasion of this chapter or otherwise.

(c) To a person who utilizes any form of advertising to the public in which the person's unlicensed status is not disclosed by including the words "**not a licensed contractor**" in the advertisement. **(emphasis added)**

According to the Arizona Republic, more homes were flipped in Maricopa County, AZ than anywhere else in the nation between April 2013 and March 2014. Did you know there are specific licensure and statutory requirements addressing a property owner attempting to sell such property after improving or building structures or appurtenances with the intent to sell. The specific statutes are as follows:

§32-1121. Persons not required to be licensed; penalties
A. This chapter shall not be construed to apply to:

5. Owners of property who improve such property or who build or improve structures or appurtenances on such property and who do the work themselves, with their own employees or with duly licensed contractors, if the structure, group of structures or appurtenances, including the improvements thereto, are intended for

occupancy solely by the owner and are not intended for occupancy by members of the public as the owner's employees or business visitors **and the structures or appurtenances are not intended for sale or for rent. In all actions brought under this chapter, except an action against an owner-occupant as defined in section 33-1002, proof of the sale or rent or the offering for sale or rent of any such structure by the owner-builder within one year after completion or issuance of a certificate of occupancy is prima facie evidence that such project was undertaken for the purpose of sale or rent.** For the purposes of this paragraph, "sale" or "rent" includes any arrangement by which the owner receives compensation in money, provisions, chattels or labor from the occupancy or the transfer of the property or the structures on the property.

6. Owners of property who are acting as developers and who build structures or appurtenances to structures on their property for the purpose of sale or rent and who contract for such a project with a general contractor licensed pursuant to this chapter and owners of property who are acting as developers, who improve structures or appurtenances to structures on their property for the purpose of sale or rent and who contract for such a project with a general contractor or specialty contractors licensed pursuant to this chapter. **To qualify for the exemption under this paragraph, the licensed contractors' names and license numbers shall be included in all sales documents. (emphasis added).**

Finally, licensed real estate agents often encounter questions surrounding the permitting of projects and whether a seller secured them and whether a buyer needs to secure one for a project.

AZROC would recommend real estate agents be familiar with **ARS 32-1121**(A)(14)(a)1, **ARS 32-1151**2 **and ARS 32-1169**3 as they relate to the need for a licensed contractor to perform work requiring a permit, the prima facie evidence of the existence of a contract when permits are secured, and the need to list a licensed contractor when pulling a permit. Just as for real estate, requirements for contractors are detailed, extensive and explicit in rule and by statute. If you have specific questions regarding involvement you may have in any of the activities listed above, AZ ROC recommends consulting with an attorney.

If you have questions regarding which licensed contractor you would suggest a buyer or seller to hire to complete a project, you can refer them to the Contractor Search at AZROC.gov or call 877.692.9762.

[1]**§32-1121.A.14** Any person other than a licensed contractor engaging in any work or operation on one undertaking or project by one or more contracts, for which the aggregate contract price, including labor, materials and all other items, but excluding any electrical fixture or appliance that was designed by the manufacturer, that is unaltered, unchanged or unmodified by any person, that can be plugged into a common household electrical outlet utilizing a two pronged or three pronged electrical connector and that does not use any other form of energy, including natural gas, propane or other petroleum or gaseous fuel, to operate or is attached by a nail, screw or other fastening device to the frame or foundation of any residential structure, is less than one thousand dollars.

The work or operations that are exempt under this paragraph shall be of a casual or minor nature. This exemption does not apply: (a) In any case in which the performance of the work requires a local building permit.

[2]**§32-1151**. Engaging in contracting without license prohibited
It is unlawful for any person, firm, partnership, corporation, association or other organization, or a combination of any of them, to engage in the business of, submit a bid or respond to a request for qualification or a request for proposals for construction services as, act or offer to act in the capacity of or purport to have the capacity of a contractor without having a contractor's license in good standing in the name of the person, firm, partnership, corporation, association or other organization as provided in this chapter, unless the person, firm, partnership, corporation, association or other organization is exempt as provided in this chapter. Evidence of securing a permit from a governmental agency or the employment of a person on a construction project shall be accepted in any court as prima facie evidence of existence of a contract.

[3]**§32-1169**. Local proof of valid license; violation; penalty

A. Each county, city or other political subdivision or authority of this state or any agency, department, board or commission of this state which requires the issuance of a building permit as a condition precedent to the construction, alteration, improvement, demolition or repair of a building, structure or other improvement to real property for which a license is required under this chapter, as part of the application procedures which it utilizes, shall require that each applicant for a building permit file a signed statement that the applicant is currently licensed under this chapter with the applicant's license number. If the applicant purports to be exempt from the licensing requirements of this chapter, the statement shall contain the basis of the asserted exemption and the name and license number of any general, mechanical, electrical or plumbing contractor who will be employed on the work. The local issuing authority may require from the applicant a statement signed by the registrar to verify any purported exemption.

B. The filing of an application containing false or incorrect information concerning an applicant's contractor's license with the intent to avoid the licensing requirements of this chapter is unsworn falsification pursuant to section 13-2704.

September is National REALTOR® Safety Month

Agent Safety Alert Program (ASAP)
ASAP is a program to alert REALTORS® of critical safety issues. Members may submit reports of incidents they see or know about using the link below. A response team will evaluate the report and may take action, up to and including issuing a text alert to all affected members.

Click here to submit an Incident Report (must be an active REALTOR®)

To ensure that your cell phone is in our system for alerts, please contact your local association or edit your own information at NAR's site. For details about the ASAP program, here is a list of FAQs.

Visit AAR's REALTOR® Safety Page:
https://www.aaronline.com/manage-risk/realtor-safety/

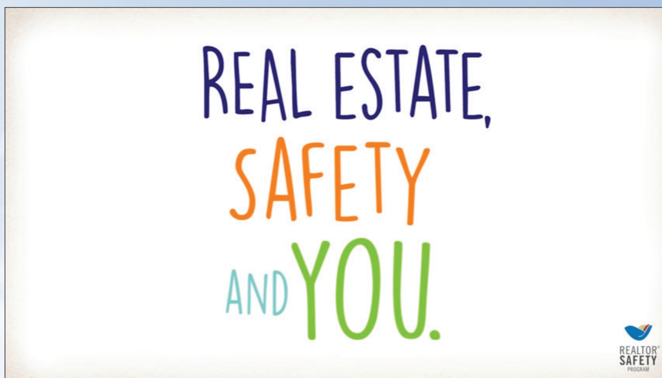
NAR has put together a list of articles and tips for use in promoting REALTOR® Safety. They include tips for Brokerages, Safety at Open Houses, Safety for Commercial and Rural Real Estate, Safety Tips to Share with Your Clients, Convention Safety and more. See the list below:

REALTOR®
SAFETY
PROGRAM

- Brokerage Safety
- 14 Simple Steps for Safeguarding Your Office
- A National Open-Door Policy (via REALTOR® Magazine)
- Let's All Open Doors for REALTOR® Safety (via REALTOR® Magazine)
- Make Safety a Brokerage Priority (via REALTOR® Magazine)
- Convention Safety
- Featured Safety Providers
- Personal and Professional Safety
- Safety and Technology
- Safety at Open Houses and on Property Showings
- Safety for Commercial and Rural Real Estate
- Safety Tips to Share With Your Clients

Videos

Real Estate, Safety, and You



*Winner of Best Associations Online Video by the Web Marketing Association's 2016 Internet Advertising Competition Awards. Winner of a Bronze Stevie at the 2016 American Business Awards.

In this award-winning video*, consumers learn about the potential safety protocols they may encounter when working with a REALTOR®. It's a great resource to share with clients to educate them about the importance of REALTOR® safety.

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

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

REAL SOLUTIONS. REALTOR® **SUCCESS.**

LEGAL HOTLINE

Q&A

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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.

Team Leader and Member May Agree Upon Dispute Resolution Methods

FACTS: Team leader continues to increase the size of her real estate team. As the team grows in size, so too does the number of disputes between the team leader and various team members. As such, the team leader wants to execute an agreement with all team members governing how such disputes will be addressed.

ISSUE: Can the team leader and team members execute an agreement governing how disputes will be resolved and, if so, what options are available?

ANSWER: See discussion.

DISCUSSION: Team leaders are encouraged to enter into agreements with each team member documenting the nature of their relationship. These agreements can and should include a dispute resolution provision.

> To assist team leaders and team members in crafting such an agreement, Arizona REALTORS® has developed a Team Toolkit that includes a comprehensive list of provisions that the parties can use to draft a Team Leader / Member Agreement. Among the provisions provided is a dispute resolution provision that outlines various options (excerpt below). In the event a dispute arises, TM (Team Member) and TL (Team Leader) agree that Broker will act as a mediator to resolve any and all disputes.

In the event that mediation does not resolve all disputes or claims, the unresolved disputes or claims shall be:

- Submitted to Broker who will decide the matter in Broker's sole discretion
- Submitted for binding arbitration with an agreed upon third-party arbitrator
- Submitted for binding arbitration with the Arizona Association of REALTORS® if the dispute involves entitlement to a commission or compensation
- Other

Unlicensed Assistants Cannot Collect Rent

FACTS: A real estate licensee manages a number of rental properties. As part of their management, the real estate licensee directs tenants to deliver payment to the licensee's unlicensed assistant who is to count the money and issue a receipt.

ISSUE: Is the unlicensed assistant permitted to perform this task?

ANSWER: No.

DISCUSSION: The Arizona Department of Real Estate has issued Substantive Policy Statement (SPS) 2017.01 titled Unlicensed Assistants. That SPS states, in part, that an unlicensed assistant shall not "collect or offers, attempts, or agrees to collect rent for the use of real estate." As a result, the unlicensed assistant in this case would be prohibited from collecting rent, counting the money and issuing a receipt.

Fair Housing Poster Must be in a Language That Reaches Most of the Population

FACTS: A brokerage is in an area where a significant portion of the population speaks Spanish. The brokerage has a Fair Housing and Equal Opportunity (FHEO) poster displayed in the office, but the notice is only in English.

ISSUE: Should the brokerage also display the FHEO poster in Spanish?

ANSWER: Yes.

DISCUSSION: Title VI of the Civil Rights Act of 1964 is the federal law that protects individuals from discrimination on the basis of their race, color, or national origin in programs that receive federal financial assistance. In certain situations, failure to ensure that persons who are limited English proficient ("LEP") can effectively participate in, or benefit from, federally assisted programs may violate Title VI's prohibition against national origin discrimination.

Therefore, because the brokerage is in an area where a significant portion of the population speaks Spanish, the brokerage should display the FHEO poster in Spanish and in English.

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

Leased Space Must be Licensed as a Branch Office

FACTS: A licensee owns and manages several rental properties. The licensee leases space out of an office complex to meet potential tenants because he does not live close to the brokerage.

ISSUE: Does the broker need to license the office space as a branch office?

ANSWER: Yes.

DISCUSSION: A.R.S. § 32-2127(A): *When a broker maintains more than one place of business within the state he shall be required to procure an additional license for each branch office maintained.*

In this instance, the licensee is leasing space and meeting with potential tenants there on a regular basis. Therefore, the office space must be licensed as a branch office.

Fix and Flip Investors Must Disclose Licensed Contractors

FACTS: Investor, not a licensed contractor, purchased a property to “fix and flip.” Investor then executed a contract to sell the property to Buyer. Buyer’s agent states Investor must disclose in the purchase contract the names and license numbers of contractors who performed work at the property.

ISSUE: Does Investor have to disclose licensed contractors when performing fix and flips?

ANSWER: Yes.

DISCUSSION: Investor, because he is not a licensed contractor, must disclose in the purchase contract the names and license numbers of all contractors performing services at the property. A.R.S. § 32-1121(A)(6).

Note: Investor must also remember that A.R.S. § 32 -1121(A)(14) states all work performed at the property, for the purpose of selling the property, must be performed by licensed contractors if the cost of materials and labor, in an aggregate, totals $1,000.00 or more.

Agent Should Not Ask for Letter of Introduction

FACTS: Seller received multiple offers on a property. Several of those offers had letters attached introducing the buyer and telling the seller a little about the buyer. The listing agent contacted the agents who had not presented a letter of introduction asking if they wanted to submit a letter of introduction to the seller.

ISSUE: Did the agent violate fair housing by asking for letters of introduction?

ANSWER: See discussion.

DISCUSSION: The federal Fair Housing Act makes it illegal to discriminate in the sale of real estate on the basis of a person’s:

- Race
- Color
- Religion
- Sex
- Handicap (disability)
- Familial status (includes children under the age of 18 living with parents and legal guardians and pregnant women)
- National origin

A letter of introduction could provide the seller with information that might lead the seller to reject an offer on the basis of a protected class. Therefore, the best business practice would be to refrain from asking for letters of introduction if they were not offered voluntarily by a buyer.

Arizona REALTORS® Contract is Copyrighted

FACTS: A non-REALTOR® buyer has a program that allows him to manipulate the Arizona REALTORS® Residential Resale Real Estate Purchase Contract (Contract). The buyer changes sections of the Contract and then presents the offer to the seller’s agent.

ISSUE: Can a buyer change the language of the Contract?

ANSWER: No.

DISCUSSION: The Arizona REALTORS® Contract is copyrighted; the state association registers and holds the valid copyright for each of its forms. Thus, Arizona REALTORS® has the exclusive right to modify and reproduce, and to authorize others to modify and reproduce the forms. The unauthorized use of these forms constitutes copyright infringement. The importance of protecting the Arizona REALTORS® copyright is also reflected in its Policy: “Those who alter [Arizona REALTORS®] forms or sell or attempt to sell unauthorized copies of [Arizona REALTORS®] forms will be vigorously pursued for violation of copyright law.” (Policy D.4) →

As such, the Contract may not be manipulated and the buyer cannot change the portions of the Contract before presenting his offer.

Note: *By manipulating the Contract, the buyer has not only violated copyright law, the buyer and seller may not have a meeting-of-the-minds, if the licensee and seller fail to discover all of the changes the buyer made in the copyrighted Contract.*

Seller May Not Cancel Contract Based on Change of Financing Terms If No Effect

FACTS: Buyer made an offer to seller. On page one of the Residential Resale Real Estate Contract (Contract), buyer indicated he was putting 20 percent down. Buyer did not include a Pre-Qualification form, but stated one would be provided shortly.

Seller accepted buyer's offer.
When the buyer delivered his pre-qualification, it stated the buyer was only putting 5 percent down.

ISSUE: Can the seller cancel the Contract now that the buyer is only putting 5 percent down?

ANSWER: No.

DISCUSSION: After discussion with his lender, the buyer decided to put down only 5 percent.

Section 2k of the Contract states, "Buyer shall immediately notify Seller of any changes...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."

In other words, a buyer must provide notice to the seller of any change to buyer's financing terms, but the buyer does not need seller's permission if the change does not affect the buyer's ability to obtain loan approval, change the closing date, or increase costs to the seller.

In this case, the buyer's change in down payment will not affect the seller in any of those ways. As such, the buyer has met the requirement of Section 2k, and the seller may not cancel based on the change in financing terms.

No Loan Contingency When Buyer Claims Transaction Is an All Cash Sale

FACTS: A buyer submitted an offer to the seller to purchase the property for $90,000. On page 1 of the AAR Purchase Contract, the buyer indicated, "$90,000 cash at closing." There were no terms disclosed on page 2 of the Contract under Financing. The buyer did not submit a Pre-Qualification Form as a part of the Contract.

Although never disclosed to the seller, buyer was obtaining a loan from a hard-money lender. One week prior to closing, the hard-money lender denied the loan. The buyer then issued an Unfulfilled Loan Contingency Notice and requested a return of the earnest money.

ISSUE: Is there a loan contingency when a buyer indicates that the transaction is an all cash sale?

ANSWER: See discussion.

DISCUSSION: In this instance, the buyer could not use the Unfulfilled Loan Contingency Notice because there was no loan contingency agreed to in the contract. Line 53 of the contract states, "IF THIS IS AN ALL CASH SALE, GO TO SECTION 3." Further, the buyer did not submit a Pre-Qualification Form to the seller, and the Financing section was blank.

Note: If the buyer had written on page 1, "$90,000 – cash funds provided by hard-money lender," and had submitted a loan pre-qualification, and had filled out section 2 of the Contract, then the buyer would have been able to submit the Unfulfilled Loan Contingency Notice and receive a return of her earnest money deposit.

Nonrefundable Earnest Money is Seller's Sole Right to Damages

FACTS: A buyer and seller entered into a contract wherein the buyer agreed to release the $1,000 earnest money, after the inspection period, to the seller. Thereafter, the buyer decided to cancel.

ISSUE: Can the seller still pursue legal remedies against the buyer if the Seller already has the buyer's earnest money?

ANSWER: No.

DISCUSSION: Pursuant to section 7b of the Residential Resale Real Estate Purchase Contract, in the event of Buyer's breach, the Seller may, at Seller's option, accept the earnest money as Seller's sole right to damages.

Because the seller has already claimed the buyer's earnest money, the seller will not be able to pursue other legal remedies for the buyer's breach.

ABOUT THE AUTHOR

Richard V. Mack

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.