

BROKER & MANAGER

QUARTERLY

YOUR ONE STOP SHOP FOR COVID-19 INFORMATION AND RESOURCES

MODEL COVID-19 CERTIFICATION FOR PROPERTY ACCESS
SUPPLEMENTED TO ENCOURAGE VIRTUAL SHOWINGS

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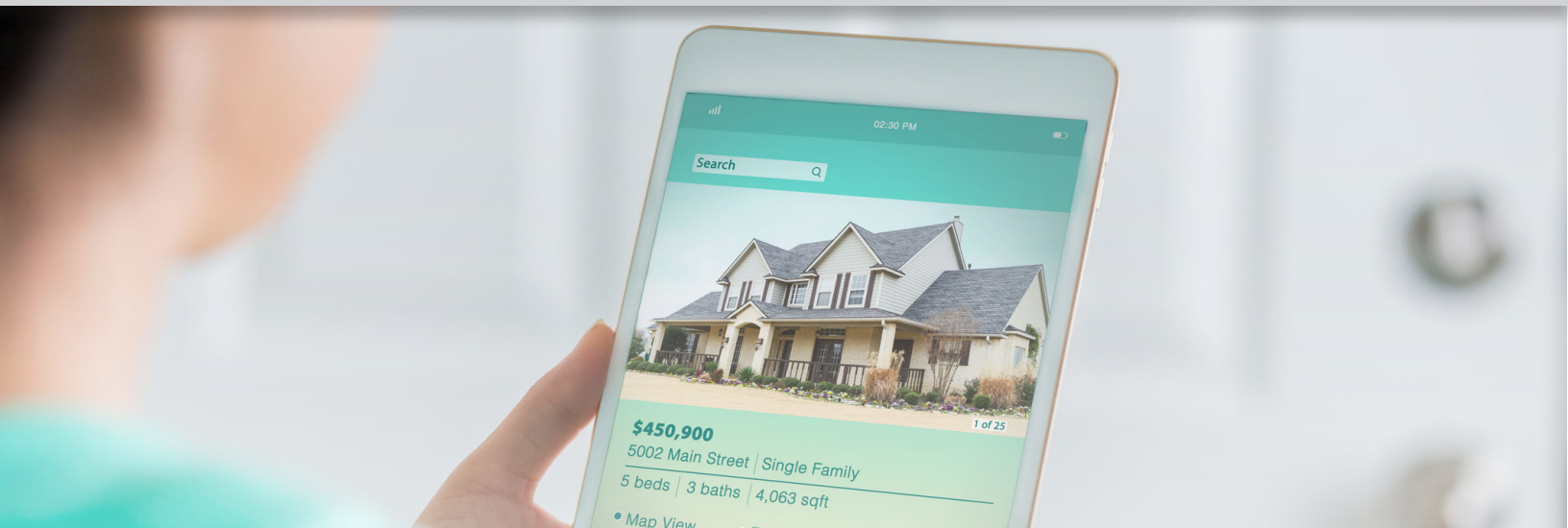


BROKER & MANAGER

SECOND QUARTER 2020 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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Model COVID-19 Certification for Property Access Supplemented to Encourage Virtual Showings

The Arizona REALTORS® continues to recommend that agents and property owners carefully consider the advisability of holding open houses at this time, especially based on recommendations from the Centers for Disease Control that gatherings of ten or more persons be avoided. In fact, the preferred course of action is to virtually grant third-parties access to the property.

Many companies and apps offer on demand open houses, video tours, and virtual staging to showcase a property. These options offer REALTORS® a way to continue representing their clients, but in a socially responsible manner.

To encourage the use of virtual showings and remind potential buyers and tenants of alternative ways to view the property,

the Arizona REALTORS® has supplemented its [Model COVID-19 Certification for Property Access](#). Specially, the following sentence now appears on the Model Certification: "If access is prohibited based upon the above, reasonable accommodations can be made to provide virtual access."

Please keep in mind that the [Model Certification form](#) is not a standardized Arizona REALTORS® form, meaning that it is not subject to copyright. Users of the form can revise and edit it as they see fit, or as recommended by their independent legal counsel.

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.



Model COVID-19 Certification for Property Access

Premises Address: _____ Date of visit: _____ 2020

Agent(s) for Seller/Landlord Present: _____

Potential Buyer(s)/Tenant(s) Present: _____

Agent(s) for Buyer/Tenant Present: _____

Other Individual(s) Present: _____ Role*: _____

Other Individual(s) Present: _____ Role*: _____

Other Individual(s) Present: _____ Role*: _____

*i.e. - inspectors, appraisers, contractors or other transaction service providers

Seller/Landlord authorizes access to the Premises to the individual(s) who have signed below.

Each person listed above certifies that to the best of his or her knowledge neither they, nor a member of their household, nor a person with whom they are in close contact:

1. Has experienced any cold or flu-like symptoms in the previous 14 days (fever, cough, sore throat, respiratory illness, difficulty breathing).
2. Is currently diagnosed with COVID-19.
3. Has a test pending for COVID-19.
4. Is currently under quarantine due to COVID-19 concerns.
5. Has had contact in the previous 14 days with someone diagnosed with COVID-19.
6. Has traveled in the previous 14 days to any location designated by the Centers for Disease Control as "having widespread ongoing transmission with restrictions on entry to the United States" and/or subject to a Level 3 travel health global pandemic notice.

If access is prohibited based on the above, reasonable accommodations can be made to provide virtual access.

This certification does not constitute a legally binding contract.

ALL INDIVIDUAL(S) INTENDING TO ACCESS THE PROPERTY MUST SIGN AND PRINT YOUR NAME TO INDICATE YOUR CERTIFICATION OF ALL OF THE ABOVE:

Signature

Printed Name



Updates

COVID-19 (Novel Coronavirus)

Your One Stop Shop For COVID-19 Information and Resources

Arizona REALTORS® is monitoring the latest news and information related to coronavirus (COVID-19) and its impact on our health and the real estate industry. Check <https://www.aaronline.com/2020/04/03/your-one-stop-shop-for-covid-19-information-and-resources/> regularly for updates to the evolving situation.

Are you aware of all the resources and information made available via the Arizona REALTORS® dedicated COVID-19 webpage found at <https://www.aaronline.com/covid-19/>? If you have not yet taken the time to peruse the page and share the information with your colleagues, there's no time like the present.

The page is primarily broken up into three sections. The first section contains information our Association has produced for the benefit of its members. For example, it contains an article explaining what Governor Ducey's Stay-At-Home Executive Order means for Arizona REALTORS®, as well as a flyer agents can share with their clients to show them the steps Arizona REALTORS® are taking to keep them safe. It also contains educational videos such as the webinar attorney Denise Holiday recently conducted titled "Taking Care of Your Property Management Business During COVID-19."

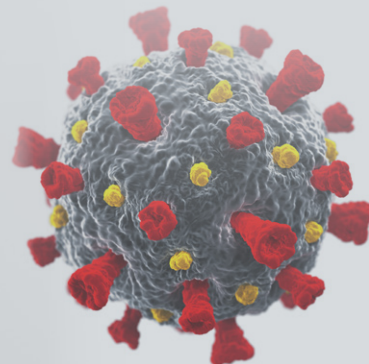
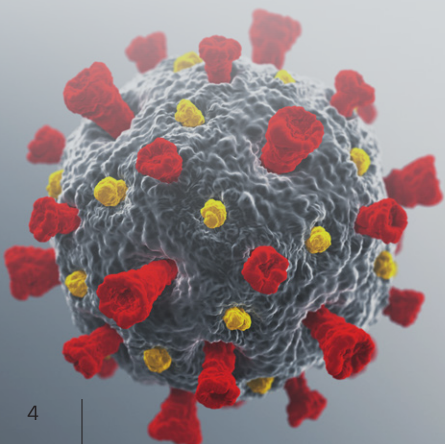
The second section contains resources and guidance from NAR. Did you know that NAR has developed a free Covid-19 hotline that all REALTORS® can use to help them navigate the financial and business challenges presented by the pandemic?

The number is 1-800-874-6500. The Arizona REALTORS® COVID-19 webpage also explains that NAR is providing two months of free TeleHealth access to all REALTORS®.

The third section directs REALTORS® to a number of helpful state and federal resources. This encompasses the most up-to-date information on the Coronavirus Aid, Relief, and Economic Security (CARES) Act which allocated almost \$350 billion to help small businesses keep workers employed. Included in this is information on the Paycheck Protection Program (PPP) for loans to small businesses struggling to meet payroll and other capital needs. Governor Ducey's Executive Orders can be found on this page, along with information published by Arizona Department of Real Estate.

The Arizona REALTORS® COVID-19 webpage is being updated on a daily basis so stay in touch and continue to check the site for new and updated information. 🏠

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REALTORS® Value Flyer

Arizona REALTORS® are constantly working to help provide the tools you need to grow your business.

The Professional & Business Development and Business Services & Technology Committees collaborated to create an online tool that can be used by members to articulate the REALTOR® value to the consumer.

The new value proposition flyer, “A REALTORS® Value To You”

Members can use the Arizona REALTORS® branded version or follow the directions on the page to upload their brokerage logo, [click here](#) for directions:

ARIZONA REALTORS®

A REALTORS® VALUE TO YOU

EXPERTISE
Our expertise can help consumers understand the current market, avoid delays and financial losses.

EFFICIENCY
From efficiently managing the process to fighting for your best interests, professional REALTORS® ensure people get the most out of their real estate transaction.

ETHICS
Our professional training and obligations require us to ethically serve the public during one of their most important financial decisions.

EXPERIENCE
With a REALTOR® on your side, you can count on a knowledgeable, experienced real estate professional who is bound to prioritize your needs above all others.

Member of Arizona REALTORS®

PUA & YOU: The Pandemic Unemployment Assistance Guide for REALTORS®

Applying for Pandemic Unemployment Assistance (PUA) can prove to be a challenging puzzle. In this video, two labor and employment attorneys and two REALTORS® share their expertise and offer advice on the unemployment application process.

Watch the video here: [PUA & YOU: THE PANDEMIC UNEMPLOYMENT ASSISTANCE GUIDE FOR REALTORS®](#)



PUA & YOU: THE PANDEMIC UNEMPLOYMENT ASSISTANCE GUIDE FOR REALTORS®



Also see:

- [NAR's Coronavirus Topic](#)
- [Pandemic Unemployment Assistance FAQs](#)
- [Pandemic Unemployment Assistance \(PUA\) by State](#)
- [Your Guide to PUA Benefits \(REALTOR® Magazine\)](#)
- [Center for REALTOR® Financial Wellness](#)

[Coronavirus: Pandemic Unemployment Assistance FAQ](#)

A summary of the Pandemic Unemployment Assistance program with guidance anticipated from the U.S. Department of Labor (DOL).



WHERE DO I START



Unemployment for Independent Contractors

In March, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Included with the CARES Act was an expansion of unemployment benefits which allows independent contractors to apply for and receive unemployment benefits under the temporary federal program called the Pandemic Unemployment Assistance (PUA).

Currently, the process to receive unemployment benefits has proven to be challenging. While the process is frustrating, we must understand that the Arizona Department of Economic Security (DES) was not prepared to deal with the volume of calls and claims for unemployment. Additionally, independent contractors were not previously allowed to collect unemployment benefits, so this is new territory for everyone. Finally, like the rest of us, DES is trying its best to figure out how to handle the current situation and service everyone.

According to DES's [website](#), a new system to process PUA is set to launch May 12. Applications will be processed beginning the week of May 12 and payments will begin for eligible claimants that same week. The \$600 federal pandemic compensation benefits will be retroactive to March 29, 2020. For more information, see [DES's flyer](#) announcing the new system.

With regard to applying for unemployment benefits, our understanding is as follows:

Step One: Go to DES Unemployment Insurance (UI) [website](#) and apply for traditional benefits. Note: You should identify yourself or your PC, if applicable, as your employer; not the broker.

Step Two: You may be denied for traditional benefits but Step One is a necessary step so that you can qualify for PUA. If you are denied traditional unemployment benefits, you may receive this [Notice](#).

Step Three: Check the DES website daily for updates. See FAQs [here](#).

The above is general guidance and will be updated as the Arizona REALTORS® learns more about the application process for unemployment benefits. We urge you to be patient and kind during this time as implementing new programs is not an easy undertaking.

If you need more information or have additional questions regarding financial assistance, please contact the COVID-19 Arizona REALTORS® Relief Hotline at (833) 431-INFO. This hotline is a FREE member benefit available to all Arizona REALTORS®. 🙏

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COVID-19

COVID-19 Causes Suspension of Some Evictions

COVID-19 has everyone concerned about their health and safety. Every day brings new questions, laws, regulations and uneasiness as we collectively face the uncertainty of how quickly the virus will spread or if we have done our part to contain it.

The federal government and state of Arizona have each enacted new laws which affect a landlord's ability to evict tenants. The federal government enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the state of Arizona issued an Executive Order (Order). The CARES Act is more broad than the Order and trumps state law.

Below, you will find more information about the Order and CARES Act.

On March 24, 2020, Governor Ducey issued [Executive Order 2020-14 \(Order\)](#) delaying residential evictions for those affected by COVID-19. The Order is in effect for 120 days and applies to renters who are quarantined or faced with economic hardship as a result of COVID-19.

While the Order does not cover every scenario, below are some questions and answer for tenants, landlords and property manager based on what we know to date. Update to this article will occur as we receive further guidance.

TENANTS AND PROPERTY MANAGERS/LANDLORDS (click here for FAQ's)

Shortly after the Order was implemented, the federal government passed the CARES Act. Included in the CARES Act were several provisions that prevent the eviction of residential tenants of certain real property secured by Federally backed mortgage loans under several federal programs for a 120-day period (Moratorium). The Moratorium began March 27, 2020 and will end July 25, 2020.

Key provisions are:

- The landlord of a "covered dwelling" cannot: (A) make, or cause to be made, any filing to initiate a legal action

to recover possession of the covered dwelling from the tenant for nonpayment of rent; and (B) impose any fees, penalties or other charges on a tenant for late payment of rent.

- During the Moratorium, the landlord of a covered dwelling cannot: (A) require a tenant to vacate a dwelling unit located in the applicable property before the date that is 30 days after the date the tenant is provided a notice to vacate; and (B) issue a notice to vacate until after the expiration of the Moratorium.

QUESTIONS & ANSWERS

Q. Does Federal law trump State law?

A. Yes. Because Federal law trumps State law, that means if the property is covered under the CARES Act, the landlord may not initiate legal action to evict the tenant for nonpayment of rent. The landlord may also not charge the tenant for late fees, penalties, etc.

Q. How do I know if the property has a federally backed mortgage?

A. You can call your mortgage servicer and ask. You can also find a list of federal agencies and entities at <https://www.consumerfinance.gov/about-us/blog/guide-coronavirus-mortgage-relief-options/>. 📄

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Advantages of Remote Online Notarization Today and Beyond

BY LESLIE BARNES

The COVID-19 pandemic has brought about a great number of changes in how we work and live our lives. In real estate, it has forced all of us to find new ways to maintain a balance between doing business and protecting the health and safety of our associates and clients.

Remote online notarization (RON) is a great example of a tool that does both. Stewart was the first to use RON in digital closings, and we're excited about the possibilities now that it's become legal in Arizona.

Here, I'd like to answer some of the questions we've received about RON over the past few years. Hopefully, this will answer some of yours.

COMMONLY ASKED QUESTIONS

QUESTION: What is RON?

ANSWER: RON stands for remote online notarization. It's a form of electronic notarization where the signer appears before the notary at the time of the notarization using audio-visual technology over the internet instead of being physically present in the room. Stewart was the first title company to close a fully digital closing, in July of 2017. RON is an integral part of our digital closings.

QUESTION: Is there special technology required to perform a RON?

ANSWER: Yes, the statutes and rules are very particular about the technology, primarily for security purposes.

The notary must be able to ensure that the signer is who they say they are, and the signer needs to be certain that their data is protected and secure. Notaries are required by the Arizona Secretary of State to contract with a vendor that provides the technology, or platform, that they intend to use.

QUESTION: Is RON legal in Arizona?

ANSWER: Yes, on April 8, 2020, Governor Ducey signed an executive order moving up the effective date from July 1 to April 10, 2020.

QUESTION: If this didn't become effective in Arizona until April 10, how has Stewart been able to use RON prior to that?

ANSWER: RON is already legal in several states. Stewart Title has been using notaries from those states for transactions here in Arizona. Stewart has thoroughly vetted the remote online notary process and includes transactions as a covered risk in our title insurance policies.

QUESTION: Can RON be used for loan documents?

ANSWER: Theoretically, yes. However, many of the lenders are not ready for this yet either due to technology they use, regulatory issues, secondary market issues or their own underwriting guidelines. It's important to remember that the lenders are highly regulated. It may be prudent of them to be cautious on this. With the COVID-19 situation, I expect to see more lenders using RON and similar technologies sooner rather than later. The lenders must be able to do a fully

digital closing, which means allowing RON for their Notarized documents, including the Deed of Trust, and being able to accept an eNote, both of which are part of completing a fully digital transaction.

QUESTION: How much does it cost to use RON?

ANSWER: The cost varies from platform to platform; however, the cost is usually less than using a traditional outside notary. It also saves on delivery fees.

QUESTION: Does this change document delivery?

ANSWER: Yes, the documents are delivered electronically right back into our software, then we electronically deliver the document directly into the county recorder systems, all within a matter of minutes.

QUESTION: How does my client know when to sign?

ANSWER: The RON signing process is a hybrid, or two-step, process. We use the remote online notary system only to execute the documents that require notarization. Documents that don't require a notary, like settlement statements and our escrow forms, are executed using DocuSign®. We are very thorough in explaining the process to the client and we can email them a PDF of all closing documents to review in advance of the signing, if needed. We can review figures, explain documents and answer any questions at this point, too. We like to do both the RON and the DocuSign well in advance of the closing date.

So, if a RON signing is needed, there are two ways to set up the appointment. We can coordinate with the notary service and the signing will take place at a specific time on a designated date. Documents are sent in advance of the appointment for the client to review, then they click through the email to start the process at the appointed time. Within a few minutes, the notary will join the meeting to complete the signing and notarization.

The second option sets up the signing to take place within a window of time, allowing the client to start the process when it's convenient for them. With this option, the notary service readies the documents and emails them to the client for review. The client then can click through the notary service email and request a notary when it's convenient for them. Documents are typically set up to be ready for this process within 24 to 48 hours. Again, once the client starts the process, it just takes a few minutes for the notary to join and complete the signing.

We've had great success with both processes. In either case, the client receives an email that lets them know about the process and gives them specific instructions and the documents to review.

If a traditional mobile notary signing appointment is needed and closing documents are ready – including lender loan

documents, if applicable—an escrow officer will communicate with the client and determine a time that works best for signing. The mobile notary will confirm the time with the client and the escrow officer. Most importantly, Stewart stays in close communication with the client and the real estate agents through all these processes to keep everyone informed and to make the process as stress-free as possible for the client.

QUESTION: How does the notary know that the signer is who they say they are?

ANSWER: Notaries use credential analysis, identity proofing and multi-factor authentication to verify identities.

Credential analysis is a process that uses technology to validate the principal's government-issued ID, confirm the security features on the ID, confirm the ID is not fraudulent and verify through the issuing source to confirm the ID is valid.

Identity proofing uses knowledge-based authentication (KBA), a method that generates vetting questions based on detailed information that only applies to one person.

Multi-factor authentication is a system that requires more than one method of authentication. It ensures that a user is who they claim to be by combining something only the user would know (a password, for example) with something they have (a cell phone, for example) and something unique to the user (a fingerprint, for example).

QUESTION: What ID do I need?

ANSWER: You need to show two forms of ID to the notary during the signing. These include passport, driver's license or state ID, Social Security card and birth certificate. We have a detailed list of acceptable identification that we email to the client as part of our e-signing setup, especially if there are questions about ID.

QUESTION: What vetting questions can I expect?

ANSWER: This is extremely important and can present a challenge to clients. Typically, the signer has two minutes to answer four out of five questions. These questions are sourced from credit bureaus or other databases and the answers should only be known to the consumer. The question content can be from many years ago, too. For example: What year did you live at 123 Main Street, Phoenix, AZ 85001? Was it 1996, 2000 or 2002? What year VW Beetle did you own in 2005? Was it a 1968, 1972 or 1976?

The platforms are designed to allow two minutes to get the answers right in order to protect the consumer. If the consumer doesn't correctly complete them within two minutes, the system replaces some of the questions and allows two more minutes for the consumer to answer correctly. This added level ensures that the consumer is identified correctly. If for some reason the consumer is unable to answer, they must wait

24 hours to try again with a fresh set of questions. If they're unable to pass after three tries, they can't use RON and will need to sign with a mobile notary. On average, 98 percent of customers pass on the first time, so typically the opt-out is only needed in very limited circumstances.

QUESTION: Does the client need to be a United States citizen?

ANSWER: In most cases, yes. The source of information for the KBA or vetting questions is not always available for foreign citizens and we do not have the means to verify the identity documents for every country. We consider those situations on a case-by-case basis and must have senior underwriting approval.

QUESTION: Can the client sign outside of normal business hours?

ANSWER: Yes. That's one of the biggest advantages of using RON. Right now, because of the COVID-19 situation, the platforms are very backed up and don't have as much flexibility as they did in the past. Both the notary platforms we use are available 24/7 and, as more notaries are certified to perform these signings, the back-ups should be mitigated.

QUESTION: Is this really safe?

ANSWER: Yes, it is extremely safe and even more secure than a face-to-face notarization. The key is making sure you're using the proper platforms and service providers, which we do.

QUESTION: Can you use RON if clients are in another country?

ANSWER: Yes. RON is very helpful in those situations. We just closed for sellers who were in Australia and Colombia. RON made things seamless for them. It also saved them a lot of trouble. Their alternative was to physically go to the US Embassy/Consulate in Australia and Colombia to meet with an American notary. That would have involved making an appointment (not easy in normal times and, because of the virus, impossible in most countries now). That would have also cost money and required them to travel. My seller in Australia was 18 hours away from the nearest embassy. You can see how convenient and valuable the online notary process can be.

In the US, we had a seller, a truck driver, who used the service while he was on the road. It worked well for him because of how easy it was to schedule the service to meet his time constraints. We also had sellers on an island in Alaska with no access to traditional notary services take advantage of this service. In their case, they would have had to fly 500 miles to meet with a notary in person.

QUESTION: How do you order a RON signing?

ANSWER: Simply let your escrow officer know and they will make all the arrangements. Given our current circumstances, we have a conversation with most clients once escrow is opened so we can have the documents completed prior to closing.

QUESTION: What computer / internet / technical things do I need?

ANSWER: You need a good connection to the internet, an internal camera or external webcam, and a microphone. We have an overview of what the clients need that we send to the clients. The platform companies will assist the client with their technical questions as well.

QUESTION: Can I be a part of the signing, too, in case my customer has questions on the documents?

ANSWER: That depends on the platform. Since it is only the documents that need to be notarized that are being executed and since the customers can review them ahead of time, your presence typically isn't needed. That said, both notary companies are working on making it easier for the agent to be present during signings. We also include the agent in the DocuSign package that we send and, of course, send the figures to the agents for review prior to any signing appointment.

QUESTION: How and when will I be notified by the notary?

ANSWER: It depends on the process the client selects. If the client chooses a signing appointment at a specific time and date, the notary sends the client an email once they have the documents prepared. That email lets the client know the time of the appointment. I tell the clients to expect an email 24 to 48 hours prior to the signing time.

If the client chooses a signing window, I let them know they'll receive an email within 24 to 48 hours of the order being placed and then they can sign on when it's convenient for them within the window of time. In either case, we call the client when we see the "ready" email to make sure they have it.

QUESTION: How long does the actual signing take?

ANSWER: From the time the client clicks on the email to start the process to the end of the signing typically takes 20 to 30 minutes. Many of mine have taken less than 15 minutes. Remember, we're only talking about a few documents that need to be notarized.

QUESTION: What are some of the other advantages?

ANSWER: Right now, social distancing might be the most important advantage. This will also apply after the pandemic for people who'd rather stay home or need to because of kids, for example.

RON provides convenience. Clients can close anytime, anywhere. This is especially helpful for clients who are pressed for time or are traveling.

This is a less stressful experience. Clients can be at home or wherever they're more relaxed.

Clients may be able to review documents ahead of time. Again, this takes away some of the stress.

These closings provide increased data security.

They allow for online collaboration, something we've all gotten more used to.

Clients can even impress their kids by doing something online that their kids haven't.

QUESTION: How has COVID-19 changed the process?

ANSWER: The biggest change we've noticed is our clients' openness to this process. I partly credit this to the fear of being face-to-face or having to meet with a stranger in their home; however, we are coming to realize that customer convenience is equally important. Technology in general is moving in this direction, and Stewart Title was the first in Arizona to embrace this cutting-edge technology, months ago. Even without a pandemic, this is the future of signings.

QUESTION: What would you say the best part of this service is?

ANSWER: I don't think it can be emphasized enough in these times the need to avoid face-to-face interaction.

RON provides the perfect solution for this. It's a convenient and secure alternative to traditional notary services. Additionally, we believe that the tool will provide a level of consumer convenience going forward that will allow us to continue to leverage this long after the pandemic concerns have lifted. Everyone who's used it with us has been extremely happy with it. It's easy, secure, convenient and, in these difficult times, it may even save lives. 🙌

More resources

To get a better feel for the process, we've put together a brief demonstration for you. You can see it here: https://drive.google.com/file/d/1Z5gly_QbKPBDHpZ6mA9o9n2aMqQ85R_P/view

[Disclaimer] eClosing may not be available under your state's laws and regulations. Contact your local Stewart underwriter before you proceed to issue a policy of title insurance for specific state underwriting guidelines and requirements for eClose real estate transactions. Stewart makes no express or implied warranties with regard to, and shall have no liability for, any errors or omissions or for the results of the use of such material. Do not assume this information is error-free. It is not intended to direct your closing practices or change the provisions of Stewart's underwriting agreements. This is for informational/instructional purposes only and does not constitute the giving of legal advice or establish an attorney-client relationship

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A 37-year plus veteran in the escrow industry, Leslie is a Certified Senior Escrow Officer, Certified Escrow Instructor and Senior American Settlement Industry Professional who currently serves as Escrow Operations Manager.

Scott's Legal Scoops – Video Series

Should an agent ever buy the house of a seller they are representing? Arizona REALTORS® Assistant CEO and General Counsel Scott Drucker serves up some tasty advice in the inaugural edition of our new feature, Scott's Legal Scoops.

Watch the video here: [Scott's Legal Scoops - Video Series](#)





Arizona REALTORS® Legal Hotline



A RESOURCE FOR **BROKERS** NEEDING **LEGAL INFORMATION**

The Arizona REALTOR® 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

For More Information

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

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.



Get Answers Today!
www.aaronline.com/legal-hotline

REAL SOLUTIONS. REALTOR® SUCCESS.



LEGAL HOTLINE

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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.

Broker Must Produce Subpoenaed Documents

FACTS: The broker received a subpoena from the Superior Court to produce its file in a civil litigation. The broker is not a party to the litigation but did represent a party during the transaction at issue.

ISSUE: Does the broker's duty of confidentiality prohibit him from producing the documents requested in the subpoena?

ANSWER: See discussion.

DISCUSSION: Generally speaking, a brokerage owes its client a duty of confidentiality. This means that the broker may not divulge transaction documents or information to a third party without its client's consent. However, a subpoena is in essence a court order commanding the delivery of the documents. The court order trumps the duty of confidentiality. In other words, the broker should comply with the subpoena and produce the requested documents.

Note: Any personal information, such as social security number, date of birth, etc. should be redacted from any documents before they are produced.

Licensees Should Not Represent Parties Who Refuse to Obtain Title Insurance

FACTS: After the Purchase Contract (Contract) was entered into by the buyer and seller, intending to save some money, the parties decided they would not use a title company nor a traditional lender. The agents have been asked to draft an Addendum to the Contract providing for seller financing and eliminating the provisions addressing title insurance and the handling of escrow.

ISSUE: Can the agents represent the parties in the transaction consistent with the standard of care?

ANSWER: See discussion.

DISCUSSION: Both the buyer's agent and the seller's agent owe their respective clients a fiduciary duty to promote and protect their interests. A.A.C. R4-28-1101(A). Seller finance transactions are complex even under normal circumstances because of the Dodd-Frank legislation and should at least be reviewed by counsel. Closing a transaction without a title commitment and without title insurance is a very high-risk proposition for the parties and the brokerage firms involved.

The agents should notify their respective clients to obtain independent legal counsel. If the parties refuse to hire counsel, it is recommended that the agents resign their agency roles in the transaction.

An Agent Sitting an Open House for the Listing Agent Cannot be Compensated Directly by the Listing Agent

FACTS: A listing agent has hired an agent licensed with another brokerage firm to sit open houses. The listing agent pays the other agent hourly and pays by way of check issued directly to the other agent.

ISSUE: May the other agent accept direct payment from the listing for sitting the open houses?

ANSWER: No.

DISCUSSION: Sitting an open house is activity that requires a license. See ADRE Substantive Policy Statement No. 2017.01. As such, the other agent may accept compensation only from the broker with whom they are licensed. A.R.S. §32-2155(A). The agent therefore may not accept compensation directly from the listing agent.

A Listing Agent Must Disclose Known Material Facts Even if Instructed by the Seller Otherwise

FACTS: The seller is verbally abusive to the listing agent. The seller has also instructed the listing agent not to disclose to potential buyers that an oleander hedge encroaches onto the neighbor's property.



ISSUE: Must the listing agent follow these instructions?

ANSWER: No

DISCUSSION: The listing agent must disclose all known material facts regardless of instructions from the seller. See A.A.C. R4-28-1101. Additionally, the listing agent may want to consider terminating the relationship based on the seller's issuance of instructions contrary to law and the seller's abusive behavior.

Providing Guidance to a For Sale By Owner (FSBO) Could Create an Agency Relationship

FACTS: The buyer's agent presented an offer on a property that was for sale by owner ("FSBO"). In connection with the Purchase Contract, the seller executed the Arizona REALTOR® Unrepresented Seller Consent. During the course of the escrow, the seller has asked the agent multiple questions regarding price, a response to the Buyer's Inspection Notice and Seller Response, repairs to be made and title issues. The buyer's agent has answered some but not all of the questions posed by the seller.

ISSUE: Has the buyer's agent created an implied dual agency by assisting the unrepresented seller even though the parties signed the Unrepresented Seller Compensation Consent Agreement addressing the various duties owed?

ANSWER: See discussion.

DISCUSSION: Agency can be either expressed or implied. *Warren v. Mangels Realty*, 23 Ariz. App. 318, 533 P.2d 78 (App 1978). Providing advice to and otherwise assisting an unrepresented seller could give rise to an implied agency relationship with that seller. *Haldiman vs. Gosnell*, 155 Ariz. 585, 748 P.2d 1209 (1988.). The buyer's agent should therefore provide no further assistance to the seller and should also remind the seller, in writing, that the buyer's agent is not representing the seller in the transaction.

A Licensed Contractor is Required to Make BINSR Repairs Where a Permit is Required or the Repair is in Excess of \$1000

FACTS: In the BINSR, the buyer asked for certain plumbing and electrical repairs. The seller intends to hire an unlicensed handyman to make the repairs

ISSUE: Must a licensed contractor be utilized to make all repairs if requested by the Buyer in the BINSR?

ANSWER: See discussion.

DISCUSSION: Generally, a contractor's license is required by statute for work which the aggregate contract price, including labor and materials, exceeds \$1,000 in value or requires a permit. Thus, to the extent that the repairs exceed \$1,000,

the seller is required to hire a licensed contractor to make those repairs. See A.R.S. §32-1121(A)(14) for details on the statutory exemptions from contractor licensure for work that does not exceed \$1,000.

Buyer Must Provide Seller a Copy of a Termite Report Obtained During the Inspection Period

FACTS: The buyer and seller entered into an Arizona REALTOR® Residential Resale Real Estate Purchase Contract (Contract). During the inspection period, the buyer elected to cancel the Contract based on the results of a termite inspection obtained by the buyer. The seller did not contest the cancellation and further agreed to refund the buyer his earnest money. However, the seller did ask for a copy of the termite report. The buyer refuses to provide a copy.

ISSUE: Is the buyer required to provide a copy of the termite report?

ANSWER: Yes.

DISCUSSION: The Contract provides at lines 222-223: "Buyer shall provide Seller and Broker(s) upon receipt, at no cost, copies of all inspection reports concerning the Premises obtained by Buyer." The buyer is therefore contractually obligated to provide the termite report to the seller.

An Affidavit of Disclosure is Mandated by Statute and May Not be Waived by the Parties

FACTS: The buyer submitted an offer on a home in an unincorporated and unsubdivided area. As part of the offer, the buyer requested an affidavit of disclosure. In the counter offer, the seller refused to provide an affidavit of disclosure.

ISSUE: May the parties waive an affidavit of disclosure when otherwise required?

ANSWER: No.

DISCUSSION: When property being sold is in an unincorporated and unsubdivided area, an affidavit of disclosure must be provided by the seller at least seven days before the close of escrow. A.R.S. § 33-422. Accordingly, the affidavit of disclosure may not be waived by the parties.

Listing Agent is Required to Submit All Offers Received

FACTS: The seller told the listing agent that he did not want to accept any offers from investors.

ISSUE: Must the listing agent present offers from investors in spite of the seller's instructions?

ANSWER: See discussion.

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DISCUSSION: The seller indicated that he would not accept any offers from investors. However, he did not instruct the listing agent not to present offers from investors. Thus, the listing agent is required to present all offers. See ACC R4-28-802 (B).

The Buyer Is Entitled To Possession At Closing

FACTS: The buyer and seller entered into the standard AAR Residential Resale Real Estate Purchase Contract (the "Contract"). The seller has stated that he will vacate the property on noon the day after escrow closes. He wants to make sure the buyer can really get the financing before he packs his belongings and actually moves out.

ISSUE: May the seller remain in the property until noon the day after closing?

ANSWER: No.

DISCUSSION: Section 1(e) of the Contract provides that the buyer is entitled to possession at the time of closing, which is defined as the recording of the deed. Therefore, the buyer is entitled to possession of the premises at the time of the recordation. The seller needs to be out of the premises prior to that time. He may not move out by noon the next day. 📌

ABOUT THE AUTHOR



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Richard V. Mack is a partner at [Manning and Kass](#), which provides the Arizona REALTORS® 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.

Industry Update: Taking Care of Your Property Management Business During the COVID-19 Pandemic.



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