

BROKER & MANAGER

QUARTERLY

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(JUNE 2022)

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LEGAL HOTLINE Q&A



ARIZONA
REALTORS®



BROKER & MANAGER

SECOND QUARTER 2022 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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ARIZONA ASSOCIATION OF REALTORS®

Buyer Advisory

ARIZONA association of REALTORS®

REAL SOLUTIONS. REALTOR® SUCCESS.

EQUAL HOUSING OPPORTUNITY

REALTOR®

**DOCUMENT UPDATED:
February 2022**



BUYER ADVISORY REVISIONS FEBRUARY 2022

New content was inserted on page 6 – 1 "Repairs, Remodeling and New Construction to include the **USE OF LICENSED CONTRACTORS**. The new information details when a licensed contractor is required versus a non licensed individual and Owners who improve the structure or appurtenances to their property."

Note: To receive email updates when the Buyer Advisory is revised, [click here](#) to add a subscription.

NEWS FLASH

ARIZONA REALTORS® NEWS FLASH BROKER/MANAGER QUARTERLY



Former General Counsel and Assistant CEO Scott Drucker, Esq. appointed Chief Executive Officer!

The Arizona REALTORS® is proud to announce that former General Counsel and Assistant CEO Scott Drucker Esq. has been appointed as its Chief Executive Officer. At the recommendation of the Search Committee and the Association's Executive Committee, its Board of Directors approved Scott's promotion earlier this month.

Scott has served the association for nearly a decade in various capacities and plans to build on the successful efforts of former CEO Michelle Lind to provide the highest level of service to the state's largest trade association.

The Arizona Association of REALTORS®, the largest trade association in Arizona representing more than 57,000 Arizona REALTORS®, has promoted Scott M. Drucker Esq. to its chief executive officer.

Previously serving as General Counsel and Assistant CEO since 2013, Drucker succeeds K. Michelle Lind, Esq. who is remaining with the Association as Of Counsel.

As Chief Executive Officer, Drucker will oversee Association operations and play an active role in advancing the growth and mission of the Arizona REALTORS® by implementing the Association's strategic plans and initiatives across Arizona.

After studying at the London School of Economics and obtaining a bachelor's degree in political science from the University of Rochester, Drucker received his Juris

Doctor degree from George Washington University Law School in Washington, D.C. Drucker was in private practice prior to joining the Arizona REALTORS®.

Drucker has served on multiple Arizona real estate committees, such as the Arizona Regional Multiple Listing Service (ARMLS) Strategic Steering Committee and is a frequent speaker on real estate issues. 🏠






FORMS REVISION RELEASE

JUNE 2022

ADDITIONAL CLAUSE ADDENDUM

The Additional Clause Addendum was revised to clarify that, in the event there is a conflict between the terms and conditions of the purchase contract and the Additional Clause Addendum, the terms included in the Additional Clause Addendum will prevail. This clarification helps ensure that the terms of the Additional Clause Addendum are never found to be in conflict with the terms of the Residential Resale Real Estate Purchase Contract.

The additional verbiage is added to lines 8-10 and states “In the event of a conflict between the terms and conditions of the Contract and this Additional Clause Addendum, the terms and conditions of this Additional Clause Addendum shall prevail.” 


ADDITIONAL CLAUSE ADDENDUM		Document updated: June 2022
	<small>The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. Any change in the pre-printed language of this form must be made in a prominent manner. No representations are made as to the legal validity, adequacy and/or effects of any provision, including tax consequences thereof. If you desire legal, tax or other professional advice, please consult your attorney, tax advisor or professional consultant.</small>	
1. Buyer: _____		
2. Seller: _____		
3. Premises Address: _____		
4. Date: _____		
5. The following additional terms and conditions are hereby included as a part of the Contract between Seller and Buyer for the above referenced Premises if marked by an "X" and initialed by Buyer and Seller. All terms and conditions of the Contract are hereby included herein and delivery of all notices and documentation shall be deemed delivered and received when sent as required by Section 8m of the Contract. In the event of a conflict between the terms and conditions of the Contract and this Additional Clause Addendum, the terms and conditions of this Additional Clause Addendum shall prevail.		
11. <input type="checkbox"/> BACK-UP CONTRACT — CONTINGENT UPON CANCELLATION OF PRIOR CONTRACT: Buyer acknowledges that Seller is currently obligated by a prior contract to sell the Premises to another buyer. This is a backup Contract contingent upon cancellation of the prior contract. Seller retains the right to amend, extend, or modify the prior contract. Upon cancellation of the prior contract, Seller shall promptly deliver written notice to Buyer. Upon Buyer's receipt of written notice of cancellation of the prior contract, Buyer shall open escrow and Buyer shall deposit any required earnest money. The date of Seller's written notice to Buyer shall be deemed the date of Contract acceptance for purposes of all applicable Contract time periods. Buyer may cancel this backup Contract any time prior to receipt of Seller's notice of cancellation of prior contract.		
19. (BUYER'S AND SELLER'S INITIALS REQUIRED) _____	BUYER / BUYER / SELLER / SELLER	
20. <input type="checkbox"/> SIGNATURE OF ABSENT BUYER SPOUSE OR CO-BUYER: Signing Buyer shall within five (5) days or _____ days of acceptance of this Contract obtain the signature of the absent buyer spouse or co-buyer on this Contract or deliver a disclaimer deed to Escrow Company that eliminates the need for the absent signature.		
23. (BUYER'S AND SELLER'S INITIALS REQUIRED) _____	BUYER / BUYER / SELLER / SELLER	
24. <input type="checkbox"/> CORPORATE RELOCATION APPROVAL: Seller is in the process of a corporate relocation and this Contract is contingent upon corporate approval. Buyer agrees to cooperate with Seller in providing additional disclosures or executing additional addenda required by corporation, provided that Buyer incurs no additional costs or liability.		
27. (BUYER'S AND SELLER'S INITIALS REQUIRED) _____	BUYER / BUYER / SELLER / SELLER	
28. <input type="checkbox"/> NON-REFUNDABLE EARNEST MONEY: Buyer's earnest money shall be non-refundable unless Buyer elects to cancel pursuant to the Due Diligence section of the Contract, the Contract is cancelled pursuant to the Risk of Loss provision or escrow fails to close due to Seller's breach of contract. Buyer acknowledges that Buyer's earnest money shall be non-refundable even if the Premises fail to appraise for the sales price or the loan contingency is unfulfilled, unless prohibited by Federal Law.		
33. (BUYER'S AND SELLER'S INITIALS REQUIRED) _____	BUYER / BUYER / SELLER / SELLER	>>
Additional Clause Addendum • Updated: June 2022 • Copyright © 2022 Arizona Association of REALTORS®. All rights reserved. Page 1 of 3		



NEW ARIZONA REALTORS® MEMBER BENEFIT!

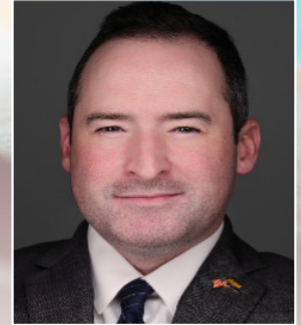
Arizona REALTORS® and the NATIONAL ASSOCIATION OF REALTORS® has partnered with Photofy to create a NAR-branded version of their content creation app that comes pre-loaded with “That’s Who We R” social media videos and graphics. The app allows you to easily personalize the campaign’s social media graphics with your photo or logo and contact information; then share them on your social media accounts. The app also comes pre-loaded with ready-to-share videos and graphics with suggested copy to accompany them. The app is available for iOS and Android devices.

Go to <https://photofy.com/nar> and enter your contact information and NRDS ID. Only NAR members can sign up to receive the NAR version of the app. You can then download the app from the Apple App Store (for iOS devices) or Google Play (for Android devices).

And coming soon, Arizona REALTORS® will provide a custom-branded gallery for Arizona members that you can share on your social media channels. 



K. Michelle Lind, Esq.
Of Counsel
Arizona REALTORS®



Louis Dettorre
Commissioner
Arizona Department of Real Estate

REAL ESTATE ADVERTISING RULES & GUIDANCE

The Arizona Department of Real Estate (ADRE) and the Arizona REALTORS® frequently receive questions and complaints about real estate advertising. The ADRE also often finds advertising violations during an audit.

Frequent Advertising Violations: The most frequent real estate advertising violations have a common thread and include:

- Failure to identify the employing broker in a clear and prominent manner.
- Social media posts that constitute advertising and fail to identify the employing broker in a clear and prominent manner.
- Branch Office signage that fails to identify the employing broker using the legal name as licensed with the Department or the doing business as name in a clear and prominent manner.
- Team advertising that fails to identify the employing broker in a clear and prominent manner.

Addressing an advertising violation can be costly and time-consuming – and easily avoided. This article and the [accompanying advertising checklist](#) are intended to assist real estate licensees comply with Arizona law and the ADRE Commissioner’s Rules on advertising, as well as answer questions about what is required in real estate advertising.

Arizona Real Estate Law Defines “Advertising” as:

- the attempt by publication, dissemination, exhibition, solicitation or circulation, oral or written, or for broadcast on radio or television
- to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in [real property] including the land sales contract to be used, and
- any photographs, drawings or artist’s presentations of physical conditions or facilities existing or to exist on the property.

Generally, advertising does not include (a) press releases or other communications delivered to news media for general information or public relations purposes for no charge; or (b) communications to stockholders as specified in the statute. A.R.S. § 32-2101(2). The Arizona Department of Real Estate Commissioner’s Rules, A.A.C. R4-28-502, set forth the rules for real estate advertising.

Consider the following rules and guidelines when advertising real property, either as an entity, an individual or as a member of a real estate team.

Social Media, Internet Activity, Emails and Texts about Property or Real Estate Services Are Advertising: The ADRE Commissioner’s Rules specify that the use of an electronic medium, such as the Internet or web site technology that targets Arizona residents with the offering of a property

interest or real estate brokerage services pertaining to property located in Arizona also constitutes advertising. A.A.C. R4-28-502(L) (See also, A.R.S. § 32-2163(D)). Thus, online advertising and marketing via text and short message services (SMS) are subject to the same rules as print advertising.

The Employing Broker Must be Identified in a Clear and Prominent Manner: A licensee must ensure that all advertising identifies, in a clear and prominent manner, the employing broker's legal name or the dba name contained on the employing broker's license certificate. A.A.C. R4-28-502(E). The employing broker is the corporation, limited liability company, partnership or sole proprietorship licensed as the broker. The employing broker designates a natural person to act as the designated broker. The rule requiring clear and prominent identification of the employing broker ensures that the public is made aware of the person or entity responsible for supervision.

The employing broker's name must be included in all print, TV, and online advertisements, including email marketing, search engine marketing, classified ads, real estate advertising guides, and other magazine ads.

- The employing broker's name must be spelled out in its entirety. For example, if an employing broker's legal or dba name on a license includes "Southeast Valley," that is what must appear in the ad; simply saying "SE" is not sufficient.
- If the brokerage is an office of a franchise, the office must be identified; simply displaying the franchise name alone is not sufficient.

Follow These "Clear and Prominent" Employing Broker Guidelines: Although "clear and prominent" is a somewhat subjective term, it means "readily noticeable," which may relate to font size or position in relation to the size or placement of the other text in the ad, TV commercial, social media post, email, website, etc.

Consider the following rules and guidelines:

- **Teams:** Teams must comply with all the same advertising rules as individuals. With team advertising it must be clear that the team is a part of the employing brokerage. For example, placing "The (Team Name) Team" at the top of the page in large letters with a much smaller brokerage symbol somewhere below is not sufficient. Team signage and advertising that includes unlicensed persons must identify them as being unlicensed.
- **Social Media:** When advertising real property on social media, such as Facebook, Instagram, LinkedIn, and YouTube, the name of the employing broker must be stated. When advertising real property in "thumbnails", text messages, "tweets", etc., where stating the name of the employing broker firm is not practical, the advertising

information being linked to must include the name of the employing broker.

- **Websites:** The employing broker's name must be visible on the front page of the website and each subsequent page of the website, without the necessity of scrolling down, regardless of the screen size of the computer.
- **Flyers:** In advertising flyers, the employing broker's name may be located on either the top or the bottom of the flyer however the employing broker's name must be clearly legible.
- **Other Promotional Material:** On any other promotional material, the employing broker's name must be on the front page or front of the object.

"Blind Ads" Are Prohibited: A licensee must not advertise property in a manner that implies that no salesperson or broker is taking part in the offer for sale, lease, or exchange. A.A.C. R4-28-502(A). In other words, "blind ads", including advertising a property for sale without the broker and agent's names, in newspapers, mailers, roadside signs, on Craigslist, or otherwise is prohibited.

"Owner/Agent" Disclosure Is Required: Any licensee advertising their own property for sale, lease, or exchange must disclose the licensee's status as a salesperson or broker and as the property owner by placing the words "owner/agent" in the advertisement. A.A.C. R4-28-502(B). When advertising your own property, include "owner/agent" in all advertising, including any "for sale" sign.

Claims Must be Accurate: A licensee must ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker must not misrepresent the facts or create misleading impressions. A.A.C. R4-28-502(C).

Advertising another Licensee's Listing Must Include the Listing Broker: A licensee advertising property that is the subject of another licensee's real estate employment agreement must display the name of the listing broker in a clear and prominent manner. A.A.C. R4-28-502(F).

"For Sale" Signs Require the Seller's Consent and Must be Promptly Removed: Before placing or erecting a sign giving notice that specific property is being offered for sale, lease, rent, or exchange, a salesperson or broker must secure the written authority of the property owner, and the sign must be promptly removed when authority expires, or upon request of the property owner. A.R.S. § 32-2153(12); A.A.C. R4-28-502(I).

An "Acre" Must Refer to 43,560 Square Feet: A licensee must not use the term "acre," either alone or modified, unless referring to an area of land representing 43,560 square feet. A.A.C. R4-28-502(H).



Requirements for Trade Names Must Be Followed: Any broker using a trade name owned by another person on signs displayed at the place of business must place the broker's name, as licensed by the Department on the signs; and the broker must include the following legend, "Each (TRADE NAME or FRANCHISE) office is independently owned and operated," or a similar legend approved by the Commissioner, in a manner to attract the attention of the public. A.R.S. § 32-2126; A.A.C. R4-28-502(K).

Broker Supervision Is Required: The designated broker must supervise all advertising, for real estate, cemetery, or membership camping brokerage services. A.A.C. R4-28-502(G). An employing broker and a designated broker shall exercise reasonable supervision and control over the activities of brokers, salespersons, and others in the employ of the broker through the establishment and enforcement of written policies, procedures, and systems. R4-28-1103(A)(5).

Real Estate Schools Must Also Comply with Advertising Requirements: A school must include its name, address and telephone number in all advertising of Department-approved courses. The school owner, director, or administrator must supervise all advertising and the school owner must ensure that the school's advertising is accurate. A.A.C. R4-28-502(D).

The ADRE Can Provide Guidance or Issue Sanctions: The ADRE receives numerous advertising complaints each month, primarily from other licensees, and will sanction those licensees in violation of the advertising rules. Therefore, if you have a question about your advertising practices, please contact your broker or the Department at <https://azre.gov/message-center> for guidance.

Finally, if you notice a possible advertising violation by another licensee, consider contacting the person or the broker about the issue before filing a complaint. 📌

Nikki's Nuggets – Legally Speaking



CLICK ARROW ABOVE TO WATCH THE VIDEO

Watch the first episode of Nikki's Nuggets – Legally Speaking Video Series, where she discusses the recently revised Solar Addendum.





“Celebrating Fair Housing Month”

Fair Housing Month is celebrated annually in the month of April to recognize the 1968 Fair Housing Act which prohibits discrimination in housing.

Tools: Visit nar.realtor/FHM to access tools (including social media graphics) that will help you . . .

“Check yourself. Educate yourself. Hold yourself accountable. Because That’s Who We R®”



**“Focus On Fair Housing”
With Nate Johnson**

CLICK ARROW ABOVE TO WATCH THE PRESENTATION

CALENDAR

EQUITY, DIVERSITY & INCLUSION

COMMITTEE MEETING DATES:

Thursday, May 12, 2022 (Zoom)

Thursday, July 21 (Hybrid)

SAVE THE DATE: Statewide Diversity Event –
Thursday, September 22

BOOKS

[Fair Housing Book Recommendations](https://www.nar.realtor/fair-housing/fair-housing-month/fair-housing-book-recommendations)

<https://www.nar.realtor/fair-housing/fair-housing-month/fair-housing-book-recommendations>

WHAT DOES IT MEAN?

STEERING:

“The practice of influencing a buyer’s choice of communities based upon one of the protected characteristics under the Fair Housing Act, which are race, color, religion, gender, disability, familial status, or national origin.” [Steer Clear of "Steering"](#)





NAR's interactive fair housing training platform, Fairhaven, takes real estate professionals through a fictional town as they try to close four transactions while being confronted with various discriminatory situations.

As you advance through Fairhaven you will receive feedback on how you reacted to the various scenarios. This feedback is intended to assist you in your real-life encounters.

Completion of the simulation will take 60 and 100 minutes, and you can pause and return at your convenience. **Visit Fairhaven Today:**

<https://fairhaven.realtor>

“Protected Classes”

The Fair Housing Act prohibits discrimination in housing for the following protected classes: **Race, Color, National Origin, Religion, Sex (including gender identity and sexual orientation), Familial Status, Disability.**

NAR opposes discrimination in housing based on the protected classes. “This policy is embodied in NAR's Code of Ethics. NAR also authorizes sanctions in response to a finding that a member has violated any fair housing law, including local and state laws that prohibit discrimination based on sexual orientation or gender identity. NAR policy is to support equal opportunity on the basis of sexual orientation and gender identity and the NAR Code of Ethics was amended in 2010 and 2013, to include this updated policy in the Code of Ethics.”

“Fair Housing Mistakes Agents Make”

- Refuse to rent or sell housing or refuse to negotiate for housing based on protected classes (not in my neighborhood)
- Set different terms, conditions or privileges for sale or rental of a dwelling based on protected classes (extra for the kids)
- Falsely deny that housing is available for inspection, sale or rental based on protected classes (sorry, not available for showings)
- Assign a person to a particular building or neighborhood or section of a building or neighborhood (it's better if you're on the ground floor with that wheelchair)
- Suggest or recommend against certain neighborhoods based on protected class (you don't want to live there).

“Examples of Housing Discrimination”

- A real estate agent tries to persuade someone not to buy or rent a house in a certain neighborhood. This is called **steering**.
 - A bank refuses to lend money to a buyer because the house is in a minority neighborhood. This is called **redlining**.
- More [Housing Discrimination](#) examples.

“Examples of Microaggressions as Potential Fair Housing Violations”

- Complimenting a Person of Color on their ability to speak English when English is their first language.
 - Saying something like “Oh, that's so gay!”
- More examples of [Microaggressions](#).

Arizona REALTORS® - Equity, Diversity & Inclusion Committee

<https://www.aaronline.com/arizona-realtors-inclusiondiversity-committee/>

[Watch](#) – “Voices of Fair Housing” – Fair Housing Center for Rights & Research.

[Learn](#) – NAR REALTOR® L.E.A.D – Diversity, Equity, and Inclusion (DEI) Course.

[Use](#) – NAR Fair Housing Toolkit



Questions for the Commissioner

President Gary Nelson & ADRE Commissioner Louis Dettorre



Arizona REALTORS® President Gary Nelson recently sat down with the Arizona Department of Real Estate (ADRE) Commissioner Louis Dettorre for a conversation about the latest issues emerging within the real estate industry.

[CLICK ARROW ABOVE TO WATCH THE VIDEO](#)



ARIZONA REALTORS® LEGISLATIVE TRACKING

The 2022 legislative session is past the 100-day marker and continues to limp towards budget negotiations after the first round of budget bills died in committee. A clear sign that negotiation strategies need to be overhauled as water, tax cuts, education funding and election policy remain high priority issues for many legislators. In the meantime, the Arizona REALTORS® are still meeting with legislators on SB1116 to discuss our strong support for the legislation that would deliver savings to rental property owners and tenants. The Arizona REALTORS® will continue to work hard to advance and defend REALTOR® Party issues!

While things may be slow, Arizona REALTORS® haven't stopped getting bills across the finish line!

SIGNED!

Arizona REALTORS® bill HB2172, codifying statutes to support real estate teams' ability to hire licensees as W-2 employees, pending Broker approval and other conditions.

SIGNED!

HB2747, relating to wholesale real estate buyers and sellers, will better protecting home buyers and sellers by requiring wholesalers to disclose their status.

SIGNED!

HB2674, establishing the Housing Supply Study Committee consisting of stakeholders and experts from across the state, including the Arizona REALTORS®. The bill was passed with an emergency clause, meaning it is effective immediately; allowing the committee to get to work and evaluate solutions to address the housing crisis before introducing legislation next session.

SIGNED!

HB2101, which protects Arizona from a deregulated utility market, ensures that Arizona will have a reliable and affordable grid, especially as we continue to experience historic growth.

BILLS TO KEEP AN EYE ON!

SUPPORT: **SB1116**, which would repeal Residential Rental TPT, is expected to head to the Rules Committee soon before reaching the House floor for further debates and votes.

Legislators from both sides of the aisle have voiced strong support for the legislation, but this bill has a long road ahead and will likely become part of the budget negotiations.

NEUTRAL: **SB1168** relating to the regulation of Short-Term Rentals. The Arizona REALTORS® testified as neutral on the bill to voice concerns over any amendments that would impose caps or limits to how many short-term rentals could be allowed in a city or town, which the REALTORS® would oppose.

NEUTRAL: **HB2554**, which prohibits counties from requiring surveys as a condition for approving land divisions. This has been a passion project of Rep. Gail Griffin's for the past two years. The striker is the best, although still imperfect, bill Rep. Griffin has introduced. The REALTORS® are continuing to meet with Rep. Griffin to discuss nuances of the bill as it remains held up in the slow pace of the legislature.

NOTE: Bills signed into law will take effect 90 days after the adjournment of the legislative session, also known as "Sine Die." 📅

SESSION SUMMARY	
<i>(As of May, 23 2022)</i>	
Day of Session:	134
Bills Posted:	1780
Bills Passed:	255
Bills Vetoed:	0
Bills Signed:	248
Mem, Res Posted:	148
Mem, Res Passed:	11

ABOUT THE AUTHOR



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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 Zelms, Erlich & Mack

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.

GAMES OF CHANCE OR RISK, SUCH AS LOTTERIES AND CONTESTS, ARE NOT APPROPRIATE INCENTIVES FOR MARKETING

FACTS: To generate business, Team Real Estate is seeking a new and innovative way to promote themselves and their listings. To do so, they are considering a drawing in which the winner will receive a \$250 gift card. Specifically, Team Real Estate will enter into a drawing the name of individuals that “Like” their Facebook page or attend one of their open houses.

ISSUE: Is Team Real Estate’s promotional activity allowed?

ANSWER: No. See Discussion.

DISCUSSION: A.R.S. § 32-2153(13) provides that the commissioner may reprimand a licensee who “solicited, either directly or indirectly, prospects for the sale, lease or use of real property...through a promotion of a speculative nature involving a game of chance or risk or through conducting lotteries or contests.” Because the contemplated drawing could be considered a game of chance, it may be deemed a violation of the Commissioner’s rules.

A.R.S. § 13-3301(4) defines gambling in part as the “act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill.” Performing an act such as attending an open house or “L[i]k[ing]” a Facebook page in exchange for entry into a drawing could be considered “giving something of value for the opportunity to obtain a benefit.” Because the contemplated promotional activity could be deemed gambling, the team should refrain from offering open house attendees and people that “Like” their Facebook page entry into a drawing.

DOCUMENTATION MAY BE REQUESTED FOR AN EMOTIONAL SUPPORT ANIMAL

FACTS: An applicant has informed the property management company that he has an emotional support animal.

ISSUE: Can the property manager ask for documentation from the tenant indicating the tenant would benefit from an emotional support animal?

ANSWER: See discussion.

DISCUSSION: The U.S. Department of Housing and Urban Development office issued a letter on the topic of service animals, which provides that housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal. Acceptable forms the housing provider may ask for include documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability. Such documentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance or emotional support.

For more information on this topic, please visit: [SLS Service or Support Animal – YouTube](#).

AN AGENT SHOULD NOT REPRESENT A FAMILY MEMBER IN A DUAL AGENT TRANSACTION

FACTS: The agent, while not a party to the transaction, is representing his wife and son in the purchase of a property and has disclosed this relationship to the seller.

ISSUE: Is it advisable for the agent to also represent the seller of the property as a dual agent?

ANSWER: No.

DISCUSSION: Dual agency imposes restrictions on the conduct of a licensee. Among others, a dual agent may not favor one party over another nor disclose confidential

information, such as the price the buyer is willing to pay, without the informed consent of that party. See *Haymes v. Rogers*, 70 Ariz. 408, 222 P.2d 789 (1950). Ordinarily, this may not be a problem, and dual agency is in fact specifically authorized by Arizona law with the written consent of both parties. See A.A.C. R4-28-1101(F). In some situations, however, an agent's relationship presents an unwaivable conflict.

In this instance, and assuming the property is being purchased with sole and separate funds of the spouse and son (as opposed to community property of the husband and wife), the agent is not a direct party to the transaction. However, the agent's relationship with the buyers presents, at a minimum, the appearance of partiality. Additionally, while dual agency is permitted by Arizona law, judicial skepticism of this arrangement exists. See *Marmis v. Solot Co.*, 117 Ariz. 499, 503, 573 P.2d 899, 903 (App. 1977). For these reasons, the agent should avoid representing the seller as a dual agent.

SELLER NOT REQUIRED TO APPROVE BUYER'S CHANGE IN FINANCING UNDER CERTAIN CONDITIONS

FACTS: Buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (Purchase Contract) which disclosed that the buyer would be obtaining a conventional loan.

Within five days of contract acceptance, buyer decided to proceed with an FHA loan. Pursuant to section 2k of the Purchase Contract, buyer's agent notified seller, in writing, of the financing change and that there would be no additional cost to seller, nor a delay in closing.

In response, seller sent buyer a Cure Notice stating that buyer was in breach of the Purchase Contract and that seller did not approve of buyer's change to FHA financing.

ISSUE: Is buyer in breach of contract as a result of the change in financing?

ANSWER: No.

DISCUSSION: Pursuant to section 2k of the Purchase Contract, buyer may switch financing if he immediately notifies seller and if the change in loan terms do not adversely affect buyer's ability to obtain loan approval without prior-to-documents conditions, increase seller's closing costs, or delay close of escrow.

Assuming that buyer's claims are accurate, and the change will not trigger any of the possibilities set forth in Section 2k of the Purchase Contract, buyer is not in breach and does not need seller's approval to proceed with the FHA loan.

SELLER IS CONTRACTUALLY OBLIGATED TO ALLOW AN INSPECTION, UNLESS THE INSPECTION PROVISIONS ARE MODIFIED

FACTS: The buyer and seller entered into the Arizona REALTORS® Residential Resale Real Estate Purchase Contract. Section 8 of the contract provides "Buyer is accepting the property as is, where is." However, no other terms of the standard form contract were changed. Three days after the contract was signed, the buyer asked for access for an inspection. The seller refused, claiming the buyer was not entitled to an inspection because the buyer was purchasing "as is, where is."

ISSUE: Is the seller contractually obligated to allow the buyer access for an inspection?

ANSWER: Yes.

DISCUSSION: Even though the buyer agreed to purchase the property "as is, where is" no other terms of the contract were changed. Accordingly, the inspection provision, and specifically Section 6, remain as part of the agreed upon terms. The seller therefore agreed to "make the Premises available for all inspections and walkthrough(s) upon reasonable notice by Buyer." The seller is therefore contractually obligated to allow the inspection.

Note: The handwritten "as is" verbiage in Section 8 was unnecessary as the Arizona REALTORS® Residential Resale Real Estate Purchase Contract states that "the premises are being sold in its present physical condition as of the date of contract acceptance," which essentially means the property is being sold "as is."

BUYER UNABLE TO OBTAIN FINANCING, NO NOTICE PROVIDED WITHIN THREE DAYS PRIOR TO THE CLOSE OF ESCROW

FACTS: The buyer and seller executed the AAR Residential Resale Real Estate Purchase Contract. The financing provisions were not modified in any way by the parties. In spite of his good faith efforts, the buyer was unable to obtain financing. However, the buyer did not provide notice of this inability to provide financing within three days prior to the close of escrow as required by section 2b of the contract. On the date escrow was scheduled to close, the seller demanded the earnest money deposit based on the buyer's failure to comply with section 2b. The seller did not issue a cure notice. In response, the next day, the buyer provided notice of his inability to obtain financing.

ISSUE: Is the seller entitled to the earnest money under the circumstances?

ANSWER: No.



DISCUSSION: The buyer is obligated to provide notice three days prior to the close of escrow of his inability to obtain loan approval. However, the failure to provide the notice does not amount to a “breach” of the contract unless and until the seller has given the appropriate three-day cure notice and the three days have passed. Here, because the buyer provided notice of his inability to obtain financing before a cure notice was given, the buyer is not in “breach.” Accordingly, the financing contingency is still in place and the buyer is entitled to a return of the earnest money based on his inability to obtain financing.

Note: Had the seller given a cure notice based on the buyer’s failure to comply with section 2b, and the three days expired without the buyer curing the non-compliance, then the seller would be entitled to the earnest money.

THE PURCHASE CONTRACT IS NOT AUTOMATICALLY CANCELLED IF THE PARTIES GO PAST THE CLOSE OF ESCROW DATE

FACTS: For various reasons, the buyer and seller are unable to close escrow on the date identified in the Arizona REALTORS® Residential Resale Real Estate Purchase Contract (Purchase Contract). There is no addendum extending the close of escrow date.

ISSUE: Does the Purchase Contract automatically cancel because the parties were not able to close escrow on the agreed upon date?

ANSWER: See discussion.

DISCUSSION: In the event buyer and seller are unable to close on the agreed upon date, the Purchase Contract is not automatically cancelled. Some action by one of the parties is required. First, a party must issue a three-day cure notice pursuant to Section 7a. Once the cure period expires, the party may cancel per section 8l, which provides: “Cancellation: A party who wishes to exercise the right of cancellation as allowed herein may cancel this Contract by delivering notice stating the reason for cancellation to the other party or to the escrow Company.” (Emphasis added.).

DEPARTMENT OF REAL ESTATE CAN REVOKE A LICENSE FOR ACCEPTING CASH PAYMENTS FOR REFERRALS OF BUSINESS IN VIOLATION OF RESPA

FACTS: The licensee regularly receives payments from a mortgage broker for referring business. The mortgage broker typically gives the licensee cash for each referral ranging from \$200 to \$1,000, depending on the purchase price of the transaction referred. The mortgage broker pays the licensee in one hundred dollar bills so there is “no record” of the payment. When the designated broker became aware of this activity, he demanded that the agent cease and desist, and further advised the agent that the payments were a violation of RESPA and could possibly lead to his license being revoked. The agent refused, claiming he was advised by counsel that

RESPA “was never enforced” against agents and that the Department of Real Estate could not revoke his license for violating a federal statute.

ISSUE: Does the Department of Real Estate have jurisdiction to take disciplinary action for violation of a federal statute?

ANSWER: Yes.

DISCUSSION: Arizona statutes specifically give the Department of Real Estate the ability to “suspend or revoke a license” for multiple misdeeds, including the violation of “any federal or state law, regulation or rule that relates to real estate...” A.R.S. § 32-2153(B)(10). The kickbacks referenced above are fairly clear RESPA violations. The Department could therefore revoke the license based on the receipt of the funds.

UNLESS MODIFIED, THE FINANCING CONTINGENCY IN THE COMMERCIAL CONTRACT EXPIRES 30 DAYS FROM CONTRACT ACCEPTANCE

FACTS: The buyer and seller entered into an Arizona REALTORS® Commercial Real Estate Purchase Contract (Commercial Contract), with close of escrow scheduled in 45 days. Section 5a provided the Commercial Contract was contingent on the buyer obtaining financing for the purchase. Five days prior to the scheduled closing the buyer provided notice that he could not get the financing required for the purchase and demanded the return of the \$50,000 earnest money deposit. The seller refused to release the earnest money to the buyer claiming the financing contingency was no longer a basis for cancellation and a return of the earnest money.

ISSUE: Is the buyer entitled to a return of the \$50,000 earnest money deposit because of the failed financing?

ANSWER: No.

DISCUSSION: Unlike, the Residential Resale Real Estate Purchase Contract, the financing contingency in the Commercial Contract does not extend to the close of escrow date. Rather, the financing contingency has a definite end date. Specifically, Section 5b provides that the buyer’s financing contingency – and the attendant contractual right to cancel and receive the earnest money – ends 30 days from the date of the contract. Here, because more than 30 days have passed, the buyer is not contractually entitled to cancel the contract and receive the return of the earnest money deposit.

AN ASSIGNOR IS LIABLE FOR ASSIGNEE’S FAILURE TO PERFORM

FACTS: Pending escrow, the buyer assigned the purchase contract to a third-party (“Assignee”). The Assignee failed to close escrow as required by the contract. The earnest money was dishonored for insufficient funds and the seller wants to pursue a damage claim against the buyer. The buyer claims he has no liability because he assigned the contract to the Assignee.

ISSUES: Is the buyer liable for breach of contract damages after the assignment of the contract?

ANSWER: See discussion.

DISCUSSION: Parties are contractually obligated to perform consistent with the terms and conditions of a purchase contract. Generally, an assignment of contractual rights to an Assignee does not eliminate the buyer's contractual obligations. See *Golder vs. Crain*, 7 Ariz. App. 207, 437 P.2d 959 (1968). Thus, the buyer is liable for the non-performance of the Assignee. 🏠

ABOUT THE AUTHOR



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Richard V. Mack is a partner at Zelms, Erlich & Mack, 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

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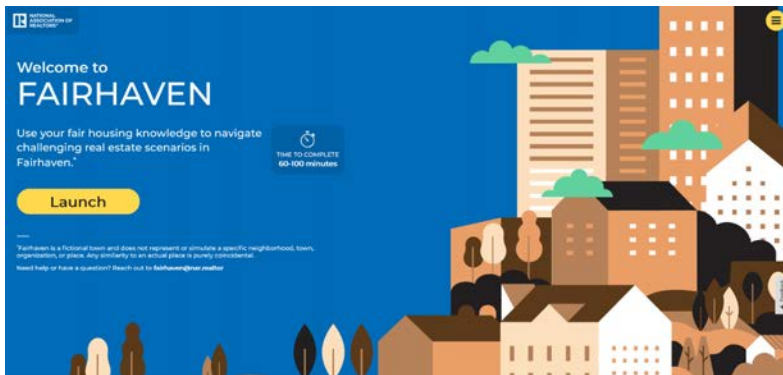


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