

# BROKER & MANAGER

QUARTERLY

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# BROKER & MANAGER

FIRST QUARTER 2023 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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ASSOCIATION *of*  
REALTORS®

## CODE OF ETHICS TRAINING

NAR's Board of Directors **approved a change to the Code of Ethics training requirement**, extending it from every two years to every three years. This extends the current cycle deadline from March 1, 2022, to Dec. 31, 2024.

REALTORS® are required to complete **ethics training** of not less than 2 hours, 30 minutes of instructional time. The training must meet specific learning objectives and criteria established by the National Association of REALTORS®.

Training may be completed through NAR's online courses or through another method, such as online or classroom courses via local/state associations. **Read the consequences** for failing to complete Code of Ethics training.

[CHECK CODE of ETHICS STATUS](#)

# FORM RELEASE - FEBRUARY 2023

## RESIDENTIAL SELLER'S PROPERTY DISCLOSURE STATEMENT (SPDS)

### RESIDENTIAL SELLER DISCLOSURE ADVISORY

Document updated:  
February 2023



**WHEN IN DOUBT – DISCLOSE!**



Arizona law requires the seller to disclose material (important) facts about the property, even if you are not asked by the buyer or a real estate agent. These disclosure obligations remain even if you and the buyer agree that no Seller's Property Disclosure Statement ("SPDS") will be provided.

The **Residential Seller's Property Disclosure Statement** was last reviewed and revised in its entirety in 2014. The workgroup<sup>[1]</sup> was well represented by members from all across the state and was chaired by Wendy Shaw.

To view the Residential Seller's Property Disclosure Statement (SPDS), click [HERE](#).

To view the Redline DRAFT version of the Residential Seller's Property Disclosure Statement (SPDS), click [HERE](#).

Below is an outline summary of the revisions made to the Residential Seller's Property Disclosure Statement ("SPDS"), followed by a list of frequently asked questions

## Residential Seller Disclosure Advisory

The Advisory page now identifies receipts and permits for the seller to attach copies of, if available. Additionally, a note was added advising the parties that the disclosures are warranties that survive closing. In other words, the note reminds the seller that even after closing, they are responsible for their disclosures.

## Property and Ownership

This section has a significant number of changes beginning with identifying the Legal Owner(s) of the Property instead of identifying the property address first. After identifying the owner, the Date Purchased has been changed to Date Acquired.

A new Notice to Seller box has been inserted on lines 8-10 advising the seller that Arizona law imposes certain requirements on the sale or lease or subdivided and unsubdivided lands or lots and when a subdivision Public Report is required.

The leased box on line 13 includes rental so that it reads "Rental/Leased" as the Property can be rented but not include a lease (e.g., month-to-month or vacation rental). A new question regarding whether the seller is aware of any regulations surrounding length of time for rentals is included on line 18.

Instead of identifying fair housing laws for older persons, this verbiage has been changed to ask whether the property is located in an age restricted community.

On line 25, a new question regarding whether the Property is designated as a historic home or located in a historic district has been added.

On line 31, the word "govern" was changed to "regulate," and it now includes boxes for the seller to identify whether the association is "Mandatory" or "Voluntary," and it contains a note to skip the association related questions if an association does not regulate the Property. Line 36 asks if the seller is aware if the Property has any association notices of potential violation(s) or unresolved violations(s) and line 41 now includes a box for "Notice of Default."

Line 47 includes a box to check if any variances affect the Property.

The seller is directed to skip multiple questions if the Property is not located within a Community Facilities District (CFD). Line 52 asks the seller if there are fees associated with the CFD and, if so, how much and how often? Additionally, line 53 asks if the CFD fees are included in the Property taxes or paid separately.

Line 59 now includes a box to mark if the road/street access to the Property is not maintained. Additionally, line 60 requests the seller to attach the road maintenance agreement if available.

On line 62, new verbiage was added to request information regarding notices of any potential violations or unresolved violations and on line 63 another category for Municipal Ordinances was added.



## Building and Safety Information

Line 73 now requests the seller to provide the approximate age of the roof.

Line 84 asks the seller if they are aware of any “past or present” cracks or settling.

On line 100, if the Property has not been treated for termites or wood-destroying organisms, the seller is prompted to skip the questions asking for more information. If a treatment warranty is transferable, a question has been added on line 104 requesting information regarding the cost of the transfer.

PEX has been included in the types of water pipes on line 113. Tankless has been added to line 118 as a type of water heater that can be chosen.

A couple of new questions have been added to the swimming pool section. Lines 135-136 ask if the seller is aware if a swimming pool was removed, capped/decked over, or filled and a blank line is included for the seller to provide an explanation, if necessary. Line 137 asks the seller whether they lease any pool equipment, and the seller can thereafter list any leased pool equipment on the blank lines.

Under electrical, two new questions have been added. Line 140 asks the seller whether they are aware of the type of wiring and thereafter provides boxes for copper, aluminum, and other. Line 143 asks whether there is a charging station for an electric vehicle and if the charging station is owned or leased.

The Miscellaneous section has significant changes. The first revision is on line 155 and asks whether any of the rodents, bugs, etc listed on line 156 have been observed “anywhere” on the Property. A new Notice box to the Seller and Buyer advises the parties when a contractor’s license is required for work performed on the Property. Rather than ask if permits were obtained, the question on line 171 now asks if the seller “is aware if” permits were obtained. Lines 176 through 185 asks the seller to disclose the names and license numbers of all contractors that have performed work on the Property in the past year and blank lines to explain. The last revision to this section asks if there are security bars, whether quick releases are installed on the bedrooms and provides a blank line to explain.

## Utilities/Services

The title was changed to include “Services” as clarification for utilities.

When the seller listed the services to the property, a line was given so that the seller could name the “Provider.” To add clarity and to assist sellers with giving the name of the Provider, this has been revised to read “Name of Provider.”

Lines 194 and 198 were added for the seller to identify whether fire service and garbage collection is public or private.

Under the type of fuel, on line 196, verbiage was added for the seller to disclose if there is a propane tank, whether the tank is owned or leased and to attach a copy of the lease if available.

If mail is delivered to a cluster mailbox, blank lines have been included on line 212 for the seller to provide the Box Number and Location.

## Sewer/Wastewater Treatment

This section has been moved and is now located under Utilities/Services. The workgroup believed disclosure of information contained in this portion of the SPDS was more appropriate after Utilities/Services as opposed to Environmental.

Previously, the SPDS asked whether a professional verified the sewer connection. Now the question on line 227 asks whether the seller is “aware if” a professional verified the sewer connection. On line 234, the word “septic” was added before “On-Site Wastewater Treatment Facility” to add clarity to sellers confused by “on-site wastewater.”

Three new disclosures are asked: (1) line 229 asks if there is a lift pump; (2) line 236 asks the seller to list the Number of Facility(ies); and (3) line 246 asks whether the seller is aware if a Facility was Abandoned, Capped, or Removed. Explanation lines have been added for new questions.

## Environmental Information

This section has been moved and is now located after the Sewer/Wastewater Treatment section.

Finally, a box has been added to the end of the SPDS advising the Seller and Buyer that “[i]n the event Seller needs to update any disclosures contained herein, the Notice / Disclosure form is available for this purpose.”

## FREQUENTLY ASKED QUESTIONS

**Q1.** Why was Date Purchased changed to Date Acquired?

**A1.** There are many instances in which a person acquires a property but did not purchase the property themselves. For example, if the person inherited the property, the person would not have purchased the property and therefore may not want to insert a date in “Date Purchased.” However, under “Date Acquired,” the person could insert the date the person inherited the property. Date Acquired can also apply to the owner of the property who purchased the property. Additionally, changing the verbiage allows for the owner of the property to give information based on their length of knowledge of the property.

**Q2.** Why is there a new Notice to Seller box included on lines 8-10?

**A2.** The new notice box cites Arizona law and lets the seller know that a Subdivision Public Report may be required if the sale involves six or more parcels, lots, or fractional interests.

**Q3.** Why was Rental inserted with Leased on line 13?

**A3.** The property could be offered as a rental but not have a lease. This would most likely apply to a vacation rentals.

- Q4.** Why does the SPDS ask whether there are any regulations surrounding length of time for rentals?
- A4.** CC&Rs recorded against the property may regulate whether rentals are allowed. Therefore, if the seller knows there is a regulation for whether a property can be rented or a limitation on the length of time a property can be rented, the seller should disclose that information.
- Q5.** Why would anyone care if the property is designated as a historic home or located in a historic district?
- A5.** When a property is designated as a historic home or located in a historic district, there may be certain restrictions with regard to renovations. As such, this information is material and should be disclosed.
- Q6.** Why was a box added for “Mandatory” and “Voluntary” membership in an association?
- A6.** Not all associations are mandatory. Because some associations are voluntary, the workgroup thought it pertinent to disclose whether the association is voluntary or mandatory.
- Q7.** Why was the question regarding whether the property has any notices of potential violation(s) or unresolved violation(s) added?
- A7.** Sometimes the owner of the property is aware of a notice regarding a potential violation or has an unresolved violation but the owner did not disclose that information because a fine has not yet been assessed for the potential or unresolved violation.
- Q8.** Why are there more questions regarding Communities Facilities Districts (CFD) added to the SPDS?
- A8.** Information pertaining to CFD fees and how the CFD fees are paid is important information for the seller to disclose so that the buyer can make an informed decision on whether the CFD fees affect the buyer’s ability to purchase the property.
- Q9.** How should the seller fill out the approximate age of the roof? Does it mean the whole roof? What if part of the roof is new?
- A9.** The seller should be as thorough as possible when providing the age of the roof. If the seller replaced a portion of the roof, the seller should identify the area of the roof that was re-shingled or re-tiled and the approximate date that occurred and then include the approximate age of the remainder of the roof.
- Q10.** Why is there a question regarding whether a swimming pool was removed, capped/decked over, or filled?
- A10.** Assuming a pool was capped/decked over or filled and the buyer wishes to build a pool or structure on the property, this information would allow a buyer to investigate whether it could impact their use and enjoyment of the property.
- Q11.** What if the owner is not aware of the type of wiring?
- A11.** The owner can mark the box “no” if they do not know the type of wiring.
- Q12.** On lines 160-168 why was the new Notice box to seller and buyer included?
- A12.** The seller and buyer should be aware of Arizona law regarding when a contractor’s license is required for work performed on a property. With this understanding, the seller should be able to make better disclosures regarding any work performed on the property.
- Q13.** Why does the seller only have to list the names and license numbers of all contractors and the scope of work that has been performed on the property in the past year?
- A13.** The main reason for the addition of this information is for when a property is a fix and flip. If the timeframe was for the duration of a person’s ownership, items may be accidentally missed; especially if the owner has owned the property for any significant amount of time.
- Q14.** Why is it important to know whether quick releases were installed in the bedrooms?
- A14.** If security bars are installed on bedroom windows, the law requires a quick release on bedroom windows in the event of an emergency.
- Q15.** What is a lift pump?
- A15.** A pump that moves wastewater from a lower elevation to a higher elevation.
- Q16.** Why was a question added to include whether a Facility was abandoned, capped, or removed?
- A16.** Assuming a Facility was abandoned or capped and the buyer wishes to build a pool or structure on the property, this information would allow a buyer to investigate whether it could impact their use and enjoyment of the property.
- Q17.** Why was the notice to seller and buyer box added to the end of the SPDS?
- A17.** This box was added to notify the parties that the seller can easily update items on the SPDS by using the Notice/Disclosure form.

*[1] Members participating on the workgroup were Bryan Anderson, John Barile, Lori Burrell, Matt Deutch, Wednesday Enriquez, Cathy Erchull, Lee Giblin, Craig Hieber, Ben Little, Laurie McDonnell, Dianne Patterson, Lisa Sullivan, Cathy Swann and Mindy Terlesky. The workgroup was assisted by Arizona REALTORS® staff Nikki Salgat, Jan Steward, and Jamilla Brandt.*

# THE NEW FAIR HOUSING ADVISORY – - DISCRIMINATION IS ILLEGAL



**T**oday, fifty-five years after the passing of the Federal Fair Housing Act, people still deal with housing discrimination. One of the goals the 2022 Arizona REALTORS® Equity, Diversity, and Inclusion (EDI) Committee set last year was to look at how to bring more awareness to the consumer about fair housing issues.

**S**everal EDI committee members met with the Risk Management Committee (RMC) to request that fair housing verbiage be added to certain forms. After much discussion, the Risk Management Committee decided the issue is of such significance that it formed a workgroup<sup>[1]</sup> to create a new Fair Housing Advisory.

**T**he intention of the form is to remind consumers that it's against the law to discriminate in any form when renting or selling property. The form also provides links for additional information and resources for people who believe they may have been a victim of housing discrimination. The new Advisory will be available in your forms libraries on February 1, 2023.

**T**he EDI committee and RMC are asking brokers across the state to encourage their agents to use this Advisory in every transaction – like

the Wire Fraud Advisory or the Buyer Advisory. And whether the Advisory is required or not, to be a Fair Housing advocate and use this Advisory to educate your clients – both buyers and sellers.

**A** great time to introduce the Fair Housing Advisory might be when you are reviewing agency with your client, presenting the Buyer Advisory, or make the Advisory a regular part of your listing paperwork.

**I**f you have questions about the form, please speak with your broker. Arizona REALTORS® continue to stand for accessible and available housing for everyone – regardless of race, religion, color, national origin, gender, familial status, sexual orientation, gender identity and ability status.

**Butch Leiber, REALTOR®**

2023 Vice Chair, Arizona REALTORS® EDI Committee  
2023 President, Phoenix REALTORS®

<sup>[1]</sup> The workgroup was chaired by D. Patrick Lewis and the workgroup members were Butch Leiber, Torey Gannon, Rick Mack, Lisa Paffrath, Holly Eslinger, Sharon Ellsworth, Jon Kichen, and Jan Leighton.

# BROKER *to* BROKER

## FORUM

### Mark Your Calendar for our 2023 Broker to Broker Forums

January 18

February 16

March 15

April 19

May 17

June 21

July 19

August 16

September 20

October 11

November 15

December 20

**These virtual forums offer brokers/managers the opportunity to stay abreast of the hot topics and issues that are most important and relevant to you, as the leaders in your brokerages. This forum allows you to pick the collective brains of fellow Arizona brokers.**

**Check out the Broker Forum recording archives here:** <https://www.aaronline.com/increase-knowledge/new-broker-programs/broker-university/>



## Tech Marketplace

[CLICK HERE TO LEARN MORE](#)

**Tech Marketplace is an Arizona REALTORS® member resource where you will find a variety of applications, software, products, and services.**



# VACANT LAND FRAUD?

**Attempts to commit deed fraud are becoming more pervasive in Arizona.** More specifically, there has been a recent surge in fraudsters impersonating owners of vacant land and contacting real estate licensees to put the land on the market to sell. Typically, in this scenario, fraudsters are well versed in their knowledge of the property as the internet and public records provide a fair amount of detail. And, because online transactions are not abnormal these days, an agent may not think twice about being contacted by a purported seller who does not live in the local area. However, because real estate licensees are the first line of defense to this type of fraud, it's helpful for agents to be aware of this scheme so that they may adopt preventative practices.

## Red Flags:

- Unencumbered, vacant land;
- Vacant parcels owned by the same owner for several years;
- Non-local owners;
- Low sales price;
- The seller claims to be out of the country for an urgent but believable reason (usually something dealing with family);
- The seller needs to sell fast – story may pull at the heart strings;
- The seller cannot meet the agent in person or connect with the agent via video conferencing;
- The seller will only communicate via email and will not provide a mailing address; and
- The seller uses a power of attorney, or has documents purportedly acknowledged in the state or country they live in.

## Preventative practices:

1. Be extremely careful with emails from out-of-country sellers rushing to close the transaction;
2. Ask the seller who referred them or how they found you;
3. Ask to speak with the seller via Zoom, Skype or another video conferencing platform;
4. Ask the seller questions about the property such as when and how they came to acquire it, and what their plans were for the vacant parcel to see if the seller knows the property's history;
5. Request a copy of the seller's identification;
6. Check the county assessor's website for the current owner's address, and consider performing an internet search to compare information provided to you by the purported owner against what you discover online;
7. Check the treasurer's website, and review the history of tax payments to see if you can determine who the payor has been, and their mailing address;
8. Perform a notary search and contact the Embassy or Consulate, if applicable, to confirm whether the notary works there; and
9. Listen to your gut.

If you see suspicious activity, contact your local authorities and the [Arizona Attorney General's office](#).

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

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# Arizona Department of Real Estate Bulletin Volume 2022 - Issue 3



ARIZONA DEPARTMENT OF REAL ESTATE

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# TEAMS

## - WHOSE NAME IS LISTED ON THE CONTRACT?



The Department has received inquiries from buyers or sellers regarding the name of the licensee listed on a real estate contract as representing the buyer's or seller's interests. In these inquiries, the licensee listed as the buyer's or seller's representative is someone they have never met or spoken with.



While the Department does not regulate real estate contracts, it is recommended that the name of the licensee who has been in direct contact with the buyer or seller and has been considered by the buyer or seller as their agent be listed on the contract as such.



In the case of a real estate team representing the client, when presenting a contract to a buyer or seller for review and signature, it is recommended that the buyer or seller be advised of the role of the licensed team members listed on the contract as representing the client's interests.



[SPS 2022.02. Requirements for Teams](#)

[SPS 2022.03. Unlicensed Assistants](#)

# HEY!

# THAT WAS "MY BUYER" AND "MY COMMISSION!"

Imagine that you have been working with some friendly buyers and have shown them multiple properties. Then, you don't hear from them for a while. When you follow up, you find out that they have purchased a home using another agent . . . it may have even been a home that you had shown them previously. You think: Hey! That was "my buyer" and "my commission!" Was it?

## The MLS Offer of Compensation

After a listing broker enters into a listing agreement with the seller, the broker generally enters the listing information in the multiple listing service ("MLS") in which the broker is a participant. The MLS is a means by which broker participants make blanket unilateral offers of compensation to other broker participants. A cooperating broker is entitled to a commission from the listing broker pursuant to the MLS offer of compensation when the cooperating broker is the "procuring cause of the sale." In the event of a procuring cause dispute, if the brokers cannot resolve the issue informally or through mediation, REALTOR® brokers are obligated to arbitrate.

## Procuring Cause

Unfortunately, determining which broker is the procuring cause of the sale can be difficult. Some of the factors an arbitration hearing panel will consider when determining which broker is the procuring cause of a sale include:

- **Who first introduced the buyer to the property?** The broker who introduced the buyer to the property is not automatically the procuring cause of an ensuing sale, but who initially introduced the property to the buyer is generally an important factor in determining procuring cause.
- **Was the introduction of the property to the buyer instrumental in creating the desire to purchase?** Merely alerting a buyer to the fact that a property is available does not usually constitute procuring cause.
- **Did the introduction of the buyer to the property start an uninterrupted series of events leading to the sale or was the series of events interrupted in some way?** If there was an interruption or break in the original series of events, a hearing panel will look at how the interruption was caused and by whom. For example, if a broker becomes aware that another's efforts have broken down, steps in, and finalizes a sale by removing an impediment, a hearing panel will consider whether the transaction would have occurred without the assistance of the second broker. If not, the second broker is the procuring cause. However, if a broker

is aware of another's continuing efforts and in bad faith interferes with the transaction, the second broker will not be the procuring cause.

- **Did the broker who made the first introduction to the property engage in conduct or fail to take some action that caused the buyer to utilize the services of another broker (estrangement or abandonment)?** If the first broker said or did something the broker shouldn't have, which caused the buyer to decide not to use the broker, that constitutes estrangement, which would break the uninterrupted chain of events. A broker not maintaining contact, not following up, or not providing requested information to the buyer in a timely manner would be considered abandonment, which would also break the series of events. The second broker who steps in to assist a buyer to achieve a successful transaction after the estrangement or abandonment of the buyer by the first broker would be considered the procuring cause of the sale.
- **Did the seller, buyer, or other broker act in bad faith to deprive the first broker of the commission?** For example, if the first broker introduced the property to the buyer and brought the negotiations to a point where the buyer had made the decision to purchase, the first broker is the procuring cause. The first broker would prevail in a hearing even if the buyer and seller, with or without a second broker, conspired to take the property off the market and consummate the sale without the first broker or otherwise "froze" the first broker out of the transaction.

Further, in determining which broker is the procuring cause, a hearing panel will consider only facts directly related to the sale of the property at issue. The hearing panel will not consider a broker's prior relationship with the buyer, the fact that the broker showed the buyer numerous other properties or anything that happened after the buyer decided to make an offer.

Due to all the factors discussed above, procuring cause disputes are best resolved informally or through mediation, which is often successful with the assistance of the association's volunteer mediators. For more information about procuring cause and the



REALTOR® arbitration and mediation processes, go to: <https://www.aaronline.com/resolve-disputes/arbitration/>

As with any potential dispute, communication is key. A salesperson with a procuring cause issue in a transaction should talk to their broker or manager as soon as possible.

### Avoiding Procuring Cause Disputes

Not all procuring cause disputes can be avoided, but most can. One way to avoid a procuring cause dispute is by using the **AAR Buyer-Broker Exclusive Employment Agreement**. The agreement benefits the buyer by setting forth the terms of the buyer-broker relationship. The agreement benefits the broker by assuring that the broker will be compensated the agreed-upon amount if the buyer purchases a property during the term of the agreement.

In the buyer-broker agreement, the buyer agrees to compensate the broker the specified amount or the compensation the broker receives from the seller or the seller's broker, whichever is greater. In either event, the buyer authorizes the broker to accept compensation from the seller or the seller's broker, which shall be credited against any compensation owed by the buyer pursuant to the agreement. If completion of any transaction is prevented by the buyer's breach or with the consent of the buyer other than as provided in the purchase contract, the total compensation is due and payable by the buyer.

In the agreement, the buyer also agrees to work exclusively with the broker and be accompanied by the broker on the first

visit to any property. If the broker does not accompany the buyer on the first visit to any property, including a model home, new home/lot, or "open house," the buyer acknowledges that the builder, seller, or seller's broker may refuse to compensate the broker, which will eliminate any credit against the compensation owed by the buyer to the broker.

Even if you choose not to use the **AAR Buyer-Broker Exclusive Employment Agreement**, which is your best protection as a buyer's agent, educate the buyers about the real estate purchasing process, communicate with them often to avoid an abandonment or estrangement argument, and understand the basics of procuring cause. You deserve to be compensated for your hard work. You don't want to find yourself in the situation of thinking: Hey! That was "my buyer" and "my commission!"

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

#### ABOUT THE AUTHOR



#### Michelle Lind, Esq.

*Michelle Lind is Of Counsel to the Arizona REALTORS® and the author of Arizona Real Estate: A Professional's Guide to Law and Practice. This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.*

## If you don't ask...

Where would I find a brief description of form revision updates and related FAQs?

- I'm glad you asked. Find form revision updates and FAQs [here](#).

📌 Arizona REALTORS® provides members with form-by-form revision updates in February, July and November. Find form revisions [here](#).





## NAR PREVAILS IN RENEWED DOJ ANTITRUST PROBE

Multiple Listing Services (MLS) are independent, local marketplaces that promote innovation and make it possible for residential real estate businesses of all types and sizes to compete. The National Association of REALTORS® (NAR) provides guidelines to ensure that these local marketplaces remain pro-consumer and pro-competitive and routinely reviews these guidelines to maintain practices that increase transparency and improve the consumer experience.

Despite the fact that consumers benefit from the increased broker-cooperation that MLSs make possible, in 2019, the United States Department of Justice (DOJ) opened an investigation into NAR's Participation Rule and [Clear Cooperation Policy](#). Specifically, the DOJ's Antitrust Division alleged that this rule and policy were anticompetitive and a restraint of trade.

In 2020, NAR and the DOJ began negotiating a potential settlement. Terms were ultimately agreed upon, but the draft consent judgment prepared by the DOJ contained a reservation of rights clause, declaring that nothing in the judgment would limit the DOJ's ability to again investigate these policies in the future. NAR would not accept this term, explaining that it would not agree to a settlement without written assurances that the DOJ would close its investigation.

Ultimately, the DOJ agreed and wrote to NAR that "once the consent decree is filed, the Division will notify NAR in its closing letter that it has closed its investigation into the Participation Rule and the Clear Cooperation [Policy]." On November 19, 2020, both the DOJ and NAR announced that a settlement had been reached that required NAR to repeal or change several MLS rules and policies that the DOJ deemed anticompetitive. At that time, NAR issued a statement reading in part:

*Most of the changes seek to more explicitly state what is already the spirit and intent of NAR's Code of Ethics and MLS Policies regarding providing information about commissions and MLS participation.*

As required by the settlement agreement, the DOJ thereafter sent a letter to NAR confirming that it had closed its investigation.

While the DOJ and NAR were finalizing the verbiage of the revised rules, on July 1, 2021, in what NAR called "an unprecedented breach of contract," the DOJ filed a notice

of withdrawal from the parties' settlement and began the process of pursuing a broader investigation. In response, NAR filed a petition with the United States District Court for the District of Columbia seeking an end to the DOJ's investigation, thereby compelling the DOJ to honor the terms of the settlement.<sup>[1]</sup>

By way of its claims asserted against the DOJ, NAR argued that the government, like any party, must be held to the terms of its settlement agreements and, on January 25, 2023, Judge Timothy J. Kelly issued a ruling in favor of NAR holding that the terms of the parties' settlement agreement are valid and enforceable. In the court's decision, Judge Kelly wrote:

*Because the agreement included the Antitrust Division's commitment to close its investigation into NAR's current Participation Rule and Clear Cooperation Policy, the government breached the agreement by reopening the investigation into these same rules.*

Even though the DOJ has the option to appeal the court's decision, NAR General Counsel Katie Johnson expressed that "this is a clear victory" and "NAR is delighted the DOJ is now bound to honor its agreement."

Johnson concluded her remarks by reiterating NAR's commitment to "act in the best interests of home buyers and sellers across the country."

<sup>[1]</sup> While the court was considering the petition, NAR still moved forward with the terms of the settlement and amended the subject policies as had been agreed upon.

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#### Scott M. Drucker, Esq.

Scott M. Drucker, Esq., a licensed Arizona attorney, is the Chief Executive Officer for 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.

# Nikki's Nuggets



**Nikki J. Salgat, Esq.**  
AAR General Counsel

CLICK ARROW ABOVE TO WATCH THE VIDEO



## GEOGRAPHIC AREA VS AREA OF EXPERTISE

In this edition of Nikki's Nuggets, Arizona REALTORS® General Counsel Nikki Salgat discusses Geographical Area vs Area of Expertise.

[Click here](#) for more short videos which are a great resource for your office meetings.



# RiSE

REALTORS® Inspiring Service Excellence

## Honor Roll

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**The R.I.S.E. Honor Roll** program was created to spotlight professionalism as it occurs, while creating a culture of gratitude between members.

**Every month, the Arizona REALTORS®** will publicly announce the Honor Roll list, which will feature your remarkable agents who were nominated by their broker for being exceptional.

**Professionals...That's Who We R.** 🇺🇸





# Arizona REALTORS® Legal Hotline



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

The Arizona REALTORS® 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](mailto:jamillabrandt@aaronline.com)  
or 602-248-7787

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# 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.*

## **UNLESS THE INDEPENDENT CONTRACTOR AGREEMENT REQUIRES IT, A BROKERAGE IS NOT OBLIGATED TO TRANSFER LISTINGS TO A DIFFERENT BROKERAGE WHEN AN AGENT DEPARTS**

**FACTS:** The agent has five active listings. All of the listings were documented with the Arizona REALTORS® Residential Listing Contract Exclusive Right to Sell/Rent (“Listing Agreement”). The agent has decided to transfer her license to a different brokerage firm and insists that the listings “belong” to her. She has demanded that the broker transfer the listings to the new brokerage firm. The independent contractor agreement between the agent and brokerage does not specify what happens to listings if an agent departs.

**ISSUE:** Is the brokerage obligated to transfer the listings to the agent’s new brokerage firm?

**ANSWER:** See discussion.

**DISCUSSION:** Generally listing agreements belong to the brokerage firm. In fact, the Listing Agreement contains references throughout that the “Broker” will perform services and receive compensation under specified circumstances. The agent is merely acting on behalf of broker. As such, because the Independent Contractor Agreement does not address any obligation to transfer listings, the broker is not obligated to transfer the listings to the agent’s new brokerage firm.

## **A TEAM LEADER DOES NOT HAVE AUTHORITY TO REVIEW TRANSACTION DOCUMENTS FOR ADRE PURPOSES**

**FACTS:** The team leader, who is not an associate broker, has a team of 15 agents. The team leader insists that he has the authority to perform the broker review of transaction documents pursuant to Arizona statute.

**ISSUE:** Does the team leader have authority to review transaction documents on behalf of the designated broker?

**ANSWER:** No.

**DISCUSSION:** Review of transaction documents for Arizona Department of Real Estate (“ADRE”) purposes must be performed by the designated broker or an associate broker authorized in writing to do so by the designated broker. A.R.S. § 32-2151.01(G). A team leader is not given that same authority. Thus, the team leader may not review his team’s transaction documents for ADRE purposes. An authorized broker is required to perform that function. The team leader is also prohibited from acting as an authorized branch office manager because he does not have an associate broker’s license. See A.A.C. R4-28-304(B).

Note: The team leader may review the transaction documents for quality control purposes, compliance with team criteria, etc. However, they will also need to be reviewed by an authorized broker for ADRE regulatory purposes.

## **DIVORCE DOES NOT ALLOW A HUSBAND AND WIFE TO CANCEL A CONTRACT**

**FACTS:** A husband and wife signed a contract to sell their home. While escrow was pending, the wife initiated divorce proceedings. The wife no longer wants to sell the house, because she wants to reside in the house after the divorce. The wife claims that the now pending divorce renders the purchase contract void such that the parties no longer have to honor the contract terms.

**ISSUE:** Can the husband and wife cancel the Contract because of the pending divorce?

**ANSWER:** No.

**DISCUSSION:** A seller or buyer can only cancel a contract for a reason recognized by the law. A divorce is not a permissible reason to cancel. Therefore, the husband and wife are required to close escrow on the sale of the home, regardless of the pending divorce. The disposition of the sales proceeds will be addressed in the divorce proceedings.

## AUTHORIZED REPRESENTATIVES MAY SIGN ON BEHALF OF AN LLC

**FACTS:** Two friends have created an LLC and they intend to have the LLC purchase real estate. The LLC is “member-managed” and there is no operating agreement in place. A brokerage submits a buyer/broker agreement to the LLC with the LLC identified as the client.

**ISSUE:** Who may sign the buyer/broker agreement on behalf of the LLC?

**ANSWER:** See discussion.

**DISCUSSION:** In a “member-managed” LLC, each member has the authority to sign documents on behalf of the LLC unless that authority is removed pursuant to a written operating agreement. In a “manager-managed” LLC, the manager has the authority to sign documents on behalf of the LLC while the members are generally not. In a member-managed or manager-managed LLC, the LLC may delegate signing authority to any person by written agreement. When the LLC’s signatory executes a document, they should sign their own name and the document should reflect the signatory’s role within the LLC. A signature block might appear as follows:

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House Buyers, LLC

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By: John Doe Its: Manager

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Its:

## SELLER MAY BE BOUND TO AGREEMENT TO REPAIR PROPERTY NOT OWNED BY SELLER

**FACTS:** Buyer and seller are under contract for the purchase and sale of a condominium unit. The exterior walls of the unit are owned and maintained by the condominium association, not the seller. Buyer submits a BINSR requesting repairs to deteriorating stucco on the exterior walls of the unit. The seller agrees to make the repairs, signs, and returns the BINSR to buyer. The seller speaks to the condominium association board and is told that the association will be repairing the stucco next year but that it will not be done during escrow. The condominium association also refuses to allow the seller to repair the walls of seller’s unit immediately at seller’s own cost.

**ISSUE:** What is the buyer’s recourse?

**ANSWER:** See discussion.

**DISCUSSION:** The buyer’s request for repairs that are not located on the “premises,” i.e., not part of the property being purchased by the buyer, was arguably improper. However, because the seller agreed to make the repairs, the seller became bound by that agreement. The fact that the seller has no legal authority to make the repairs or force the association to make the repairs within the escrow period

does not relieve the seller of this responsibility. If the repairs remain incomplete within three days of close of escrow, the buyer may issue a cure notice and, if the repairs remain incomplete once the cure notice expires, the buyer may cancel the contract and potentially seek damages for breach of contract.

## ONCE A SELLER IS INCOMPETENT, SHE CANNOT CREATE A VALID POWER OF ATTORNEY

**FACTS:** A competent seller accepts a purchase offer and signs the purchase contract. During escrow, seller is involved in an accident that results in a brain injury that renders her unable to understand that executing the closing documents will result in the transfer of her property to the buyer. Seller’s daughter obtains a durable power of attorney form purporting to allow the daughter to complete the sale of the property. The power of attorney form is signed by the seller, notarized, and witnessed, all after the accident.

**ISSUE:** Is the power of attorney valid?

**ANSWER:** No.

**DISCUSSION:** By statute, to have the requisite competence to execute a valid power of attorney, “at the time the power of attorney was executed the principal was capable of understanding in a reasonable manner the nature and effect of the act of executing and granting the power of attorney.” A.R.S. § 14-5506(D)(1). For the same reason that the seller’s signature on the closing documents would be invalid, her signature on the power of attorney is invalid, i.e., she is not capable of understanding the effect of her signature on the document. In this instance, the seller’s family or others may petition a court for the appointment of a guardian ad litem who can represent the interests of the seller and sign the closing documents on the seller’s behalf once a judge confers that power to the guardian. This, of course, is likely to require a significant extension of the close of escrow date on the transaction.

## LANDLORD IS NOT REQUIRED TO PROVIDE A KEY TO PERSON NAMED IN AN INJUNCTION AGAINST HARASSMENT FOR DOMESTIC VIOLENCE

**FACTS:** A husband and wife are both tenants under the lease. Several months into the tenancy, the wife obtained an injunction against harassment, against the husband for domestic violence. The wife does not want to terminate the lease, but has asked the property manager to change the locks for her safety.

**ISSUE:** Can the landlord change the locks, even though the husband is identified as one of the tenants on the lease?

**ANSWER:** Yes

**ISSUE:** Pursuant to the Residential Landlord Tenant Act, at the tenant’s request, if a tenant is a victim of domestic violence



a landlord is required to “install a new lock to the tenant’s dwelling if the tenant pays for the cost of installing the new lock.” A.R.S. § 33-1318(E). Additionally, the landlord is not required to provide a new key to the person who committed the domestic violence, even though that person is identified as a tenant on the lease. A.R.S. § 33-1318(F).

## RESIDENTIAL LANDLORD MAY PROHIBIT SMOKING INSIDE A RESIDENCE

**FACTS:** After the tenant took occupancy of the apartment, the landlord discovered that the tenant smokes cigarettes inside. The landlord is fine with the tenant smoking as long as it is in a designated area of the complex.

**ISSUE:** Is the landlord violating the fair housing act if they require the tenant to only smoke in designated areas?

**ANSWER:** See discussion.

**DISCUSSION:** There is no “right to smoke” under any U.S. law. Smoke-free apartment policies are legal and permitted under Arizona law. In fact, Smoke-Free Arizona Act (A.R.S. § 36-601.01) requires the enclosed common areas of apartment properties to be smoke-free. Smoking is prohibited inside and within 20 feet of entrances, open windows, and ventilation systems of enclosed common areas of multi-family housing such as the main office, laundry room, fitness center, activity center, or clubhouse. Because smokers are not a protected class, the landlord is not discriminating against the tenant under the Fair Housing Act.

## HOLIDAYS DO NOT EXTEND THE INSPECTION PERIOD

**FACTS:** The buyer and seller executed an Arizona REALTORS® Resale Purchase Contract (Contract) on December 15th, with a 10-day inspection period. The buyer provided a BINSR on December 27th asking for certain repairs. The seller claims

the BINSR is ineffective because it is late. The buyer claims the BINSR was timely because Christmas Day and the day after the observed holiday this year- “don’t count” in the inspection period.

**ISSUE:** Is the BINSR timely?

**ANSWER:** No.

**DISCUSSION:** Section 8h of the Contract defines days as “calendar days.” The document does not create a “carve out” for Christmas or other holidays. Thus, Christmas Day and Christmas Day Observed are both included in the 10-day inspection period. The BINSR was therefore delivered after the inspection period and not effective.

Note: If close of escrow is scheduled to occur on a holiday and the escrow company is closed, the close of escrow shall occur on the next business day pursuant to section 1d of the Contract.

## CONTRACT TIME FRAMES BEGIN AFTER BUYER’S CONTINGENCY IS FULFILLED

**FACTS:** The Arizona REALTORS® Residential Resale Purchase Contract includes the Buyer Contingency Addendum, stating that the Contract is contingent on the buyer accepting an offer on their own property. The seller and listing agent claim that the inspection period is currently underway. The buyer disagrees because she has not yet received an offer on her property.

**ISSUE:** Has the Buyer’s inspection period begun?

**ANSWER:** No.

**DISCUSSION:** The Buyer Contingency Addendum in the subject transaction has the box on line 46 checked. Thus, the time frames for the Purchase Contract, including the inspection period, begin three days after an accepted offer on the buyer’s property is delivered to the seller. 📄

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### ABOUT THE AUTHOR



#### Richard V. Mack

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 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.



# Window to the Law: Legal Issues for Teams



Learn what common legal issues should be addressed by real estate teams, and the brokers who supervise them, including state license laws, employment law, and business operations.

### Window to the Law

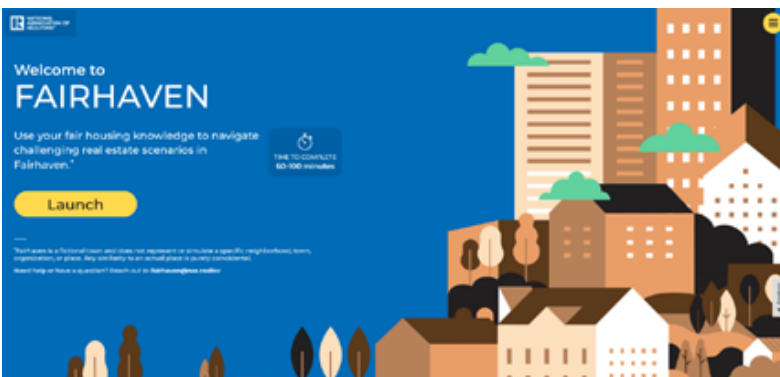
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