Q1 2024

ARIZONA REALTORS®

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FORM REVISION

FEBRUARY 2024

Revised Real Estate Disclosure and Election Form

TRENDING TOPICS

How REALTORS® Should Navigate the Evolving Commission Landscape

Masiello v. Arizona Association of REALTORS®

U.S. Department of Labor Issues Final Independent Contractor Rule

Builders Overreach Shot Down in Punderful Fashion

Establish Your Value with the Agent's Value Proposition

LEGAL HOTLINE PG 14

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Have any of your agents gone above and beyond by taking their peer-to-peer interactions from ordinary to extraordinary?

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Professionals, that's Who We R.

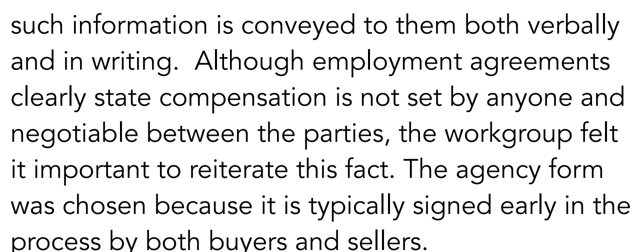
SCAN THE CODE
To recognize an agent!

REVISED FORM RELEASE

FEBRUARY 2024

The revised Real Estate Agency Disclosure and Election form was reviewed by a workgroup[1] of volunteer members and the revised form was released in February 2024.

The main revision to the Real Estate Agency Disclosure and Election (READE) form is the addition of a new section that emphasizes information regarding broker compensation that is already contained in other Arizona REALTORS® forms. Specifically, it states that broker compensation paid by a client is always negotiable and the amount chosen is documented in an employment agreement after discussion. The new language also states that if a seller enters into a listing agreement, the amount of buyer broker compensation to be offered is also negotiable and agreed upon after a discussion with their broker. The new section basically restates the same information contained in the Arizona REALTORS® employment agreements that broker compensation is not set by anyone and is negotiated solely between the broker and their client(s).



The READE form remains an agency election form. The sentence "This document is not an employment agreement" was moved to the top of the form, just under its title. The new section regarding broker compensation is also introduced by the sentence that "Agency Election Does Not Establish Broker Compensation." Finally, a broker representing both the seller and buyer was formally named as a Limited Representation Broker for consistency.

A redlined version of the revised READE form can be found HERE

FAQs

Q1. Why is broker compensation being discussed in an agency form?

A1. A portion of the public may still fail to recognize that broker compensation is negotiable even though such information is conveyed to them both verbally and in writing. Although employment agreements clearly state compensation is not set by anyone and negotiable between the parties, the workgroup felt it important to reiterate this fact. The agency form was chosen because it is typically signed early in the process by both buyers and sellers.

Q2. What information should agents share with their clients when discussing the revised READE form, their employment contract and compensation?

A2. Agents should make it clear to clients that the amount of compensation is negotiable. The amount of compensation set forth in an employment agreement should be documented only after a discussion with their client has taken place and an agreement on compensation has been reached. Seller agents should

[1]Jim Sexton chaired the workgroup. Other members participating on the workgroup were Teresa Acuna, Martha Appel, Laurie Beischel, Paul Bruce, Wednesday Enriquez, Cathy Erchull, Duane Fouts, Kyle Fouts, Wendy Shaw, and Mary Ann Shryack.

also discuss the seller's various options for offering compensation to the buyer's agent and why it may be advantageous to do so. Again, seller agents should make it clear that there is no set or established amount of compensation to be offered to the buyer's agent and it is therefore up to the seller to determine this amount.

Q3. Because broker compensation is negotiable, does this mean an agent has to lower the amount of compensation they are seeking?

A3. No. The Thirteenth Amendment to the U.S. Constitution protects people's right to refuse to work unless the terms of employment are acceptable to them.

Q4. Does this mean the seller's agent is obligated to offer the amount of buyer's agent compensation determined by the seller?

A4. Yes, if the agent accepts the employment of the seller. Compensation is always negotiable and this decision belongs to the seller.

Other resources available to discuss broker compensation:

Video: How to Explain Real Estate Compensation to Clients

How REALTORS® Should Navigate the "New" Commission Landscape: Part Two of Three: Offers of Compensation Are Still Acceptable

PRIOR FORM REVISIONS

The Arizona REALTORS® strives to keep all its forms up to date as laws change or industry practice evolves. Once released, the forms library contained on all of the Arizona REALTORS® forms licensing platforms are updated.

Form updates are made to minimize your risks and ensure legal compliance. Don't take a chance with outdated forms.

Prior Arizona REALTORS® form revisions (2014 – 2024) can be found at: HERE

ABOUT THE AUTHOR

Aaron Green, Esq.

Aaron M. Green, Esq., a licensed Arizona attorney, is the General Counsel 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.

PARTY CORPORATE ALLY PROGRAM

The **Corporate Ally Program (CAP)** is a powerful partnership between the Arizona REALTORS® and corporate allies aimed at protecting, promoting and strengthening the real estate industry.

HOW REALTORS® SHOULD NAVIGATE THE "NEW" COMMISSION LANDSCAPE

PART 1 OF 3: COMPENSATION IS SEPARATE FROM REPRESENTATION

Aaron Green, Esq. **GENERAL COUNSEL AT ARIZONA REALTORS®**

Despite what some plaintiffs' lawyers may claim, REALTORS® are not analogous to travel agents being unjustly paid when a traveler books a flight directly with an airline.[1] And despite what these same lawyers claim in court, real estate commissions are, and have always been, negotiable. It is the market, not REALTOR® associations, which has set compensation amounts for 100 years. Unfortunately, there is a perception that buyer's agents are compensated via a secret, hidden process because they allegedly provide little value and no one would pay them voluntarily. The lawsuits, and the media attention they attract, are encouraging sellers to test this theory by offering little, if any, compensation to a cooperating buyer's agent in an MLS.

This article and frequently asked questions (FAQs) is the first of a three part series that will help guide REALTORS® through the evolving commission landscape. This article will discuss a buyer agent's legal obligations and options when little or no compensation is offered to cooperating agents in an MLS.

Compensation is separate from representation. In Arizona, a buyer's agent can typically only enforce their right to compensation in one of two ways: 1) Be the procuring cause of a sale where cooperating compensation is offered in an MLS of which the buyer's agent is a participant; or 2) Have a valid employment agreement with their client. Ariz. Revised Statutes 32-2151.02.

The amount of compensation offered to cooperating buyers' agents in an MLS has always been negotiable and decided upon by the seller in consultation with their agent. A seller's agent can offer cooperating buyers' agents compensation based as a percentage of the final sales price or a flat amount.[2] Thus, there is nothing illegal, unethical, or improper for a seller's agent to offer only minimal compensation to cooperating buyers' agents in an MLS for any particular property, with the seller's informed consent.

An agent representing a buyer owes a fiduciary duty to the buyer to act in their client's best interest. Ariz. Admin. Rule R4-28-1101(A) and Article 1, Code of Ethics. Therefore, if any particular property would be of interest to the buyer, their agent is obligated to provide the listing information to the buyer regardless of the amount of the broker compensation offered in an MLS, even if it is just $1.00. Furthermore, as long as the agent continues their representation of the buyer, the agent is obligated to promote their client's best interest by: 1) showing the buyer the property; 2) drafting an offer; 3) negotiating

[1]See opinion article of attorney Michael Ketchmark published in the USA Today on December 4, 2023. What percentage do realtors charge? Your agent may be getting too much (usatoday.com)

[2]Note some MLSs allow offered compensation of $0.00, $0.01 or $1.00.

a purchase contract; 4) assisting the buyer through the inspection period and BINSR process; 5) assisting the buyer through closing and 6) advocating for their client in any other manner to help the buyer purchase a home. In such a circumstance, if the buyer's agent failed to have a valid employment agreement with the buyer, the buyer's agent would only be paid the amount of compensation offered via the MLS, even if that offer is only $1.00.

The best way for a buyer's agent to ensure that they are compensated for the professional services rendered is to have the buyer sign the Arizona REALTORS® Buyer Broker Exclusive Employment Agreement ("Buyer Broker Agreement"). The Buyer Broker Agreement sets forth how the buyer's agent is to be compensated for their services and assures the agreed upon amount will be paid if the buyer purchases a property during the term of the Buyer Broker Agreement. It also allows the buyer and their agent to document all other terms specifically agreed upon by them. Some buyers may be reluctant at first when asked to sign a Buyer Broker Agreement. View this reluctance as an opportunity to educate the buyer about the value of your services and build trust.

For additional information on Buyer Broker Agreements:

NAR Window to the Law: Benefits of Using a Buyer Representation Agreement

How Buyer Agreements Boost Your Value, Fend Off Claims (NAR Realtor)

Top Ten Reasons to use the Buyer Broker Employment Agreement

FAQs

Q1. What laws or rules have changed?

A1. None. Arizona law has required a valid contract to enforce an employment agreement with a client since 1995. The National Association of REALTORS® rule requiring an offer of compensation to cooperating buyers' agents based as a percentage of the final sales price or a flat amount was adopted in 1996. The "new" landscape is solely based on the recent NAR lawsuit and resulting media coverage, which may result in the emergence of more sellers offering minimal compensation to cooperating buyers' agents.

Q2. Is a buyer's agent obligated to work for free?

A2. No. The Thirteenth Amendment to the U.S. Constitution protects people's right to refuse to work unless the terms of employment are acceptable to them.

Q3. Why can't the buyer's agent refuse to show the buyer a property listing if there is minimal compensation offered in an MLS?

A3. The fiduciary duty of the agent to the buyer obligates them to act in the buyer's best interest. It is in the buyer's interest to see homes they might be willing to purchase.

Q4. Can the buyer instruct their agent to only send them listings of properties that offer a set amount of compensation offered in an MLS?

A4. Yes. Best practice would be for the buyer and the buyer's agent to enter into a Buyer Broker Agreement that clearly specifies the buyer's instructions. This is especially true for instructions that appear contradictory to the client's interests.

Q5. Can the buyer's agent set filters of listed properties based on the amount of compensation offered in an MLS?

A5. Only if instructed to do so by the buyer. The buyer's agent's fiduciary duty obligates the agent to provide the buyer all attractive listings regardless of the amount of compensation offered in the MLS. Only the buyer can instruct their agent otherwise.

Q6. Can a buyer's agent contact the seller's agent to request higher compensation than the amount offered in the MLS?

A6. Yes. Amounts of compensation offered by the seller's agent in the MLS can be negotiated between the agents (but an offer cannot be submitted if it is contingent upon an increased commission payable to the buyer's agent). Code Comprehension: Article 16. Best practice would be for both agents to confirm the amount in writing.

Q7. Can a buyer request a seller concession as part of their offer and then use it to pay their agent?

A7. Yes. However, if the buyer is financing the purchase, they must confirm with their lender that the loan program allows the seller concession. Furthermore, the buyer's agent must have an employment agreement with the buyer to enforce their right to compensation. Without an employment agreement, the buyer is not obligated to pay their agent and the buyer could later choose to use the seller concession for other purposes.

Q8. Can a buyer's agent request additional compensation from the seller?

A8. This would be very problematic for a number of reasons: 1) A buyer's agent cannot contact the seller directly if they are represented by a listing agent; 2) The buyer's agent would need a valid employment contract signed by the seller; and 3) A buyer's agent must have the consent of their buyer or they would be breaching their fiduciary duty. In light of the above, this practice should be avoided.

Q9. How can a buyer's agent best protect themselves?

A9. By entering into a Buyer Broker Agreement specifying the terms of the engagement is the best way for a buyer's broker to protect themselves and ensure that each party understands what services the buyer's agent will provide in that transaction. Provided that the buyer's agent fulfilled their obligations and acted in the buyer's best interests, entering in a Buyer Broker Agreement will help shield the buyer's agent from inaccurate claims they breached their fiduciary duty. A Buyer Broker Agreement also sets forth how the buyer's agent is to be compensated for their services, ensuring that both parties are in agreement on this topic.

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NATIONAL ASSOCIATION OF REALTORS® | ARIZONA REALTORS®

HOUSING REPORT
Arizona - Dec. 2023

LISTINGS
Down from previous month
State 28,463
12/22 32,539 | 12/21 24,001 | 12/20 24,302
YOY change -12.5%

SALES
Down from previous month
State
12/22 7,065 | 12/21 12,492

MEDIAN SALES PRICE
Up from previous month
State $352,536
12/22 $324K | 12/21 $361K | 12/20 $283K
YOY change 8.7%

INVENTORY
Seller's market
State 3.44
6 months = Balanced market
YOY change 6.7%

PRICE RANGE STATISTICS

Listings Trends
More than 5% increase (YOY)
More than 5% decrease (YOY)

Listing Price Range	Listings (Dec.)	Sales in Previous 12 Months	Months of Inventory
Below $125,000	747	1,692	5.3
$125,000 - $249,999	2,189	8,457	3.1
$250,000 - $374,999	6,093	26,482	2.8
$375,000 - $499,999	7,403	28,832	3.1
$500,000 - $624,999	3,782	12,650	3.6
$625,000 - $749,999	2,440	7,758	3.8
$750,000 - $874,999	1,369	4,170	3.9
$875,000 - $999,999	1,089	2,750	4.8
$1M - $1.99M	2,093	4,878	5.2
$2M and up	1,258	1,644	9.2

This report is made by RPR® with MLS data.
RPR® is a wholly owned subsidiary of the NATIONAL ASSOCIATION OF REALTORS®

PRESENTED BY:
Contact: ARIZONA REALTORS® Business Technology and Communications
Phone: (602) 248-7787
Email: support@aaronline.com

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MASIELLO V. ARIZONA ASSOCIATION OF REALTORS® ET AL

In October 2023, the National Association of REALTORS® received an adverse verdict in a class action anti-trust lawsuit in Missouri. Following that verdict, Plaintiffs' attorneys began filing copycat lawsuits all across the country. The copycat lawsuits often include state REALTOR® associations, local REALTOR® associations, MLSs, and brokerages.

Unfortunately, the Arizona Association of REALTORS® (AAR) has now been named in a copycat lawsuit of this nature, along with four of our local associations, and several corporate defendants. The claims asserted are similar to those advanced in other cases, which is that NAR and others conspired to artificially inflate buyer broker compensation. This argument is utterly false and not supported by the evidence.

Regarding the lawsuit recently filed in Arizona, the below questions and answers shed light on the Plaintiff, the claims asserted, the damages sought, and the NAR rules at the center of the case.

Q1. Who is the Plaintiff?

A1. The Plaintiff's name is Joseph Masiello. According to the Complaint, in or about October 2021, Mr. Masiello listed and sold a home on an Arizona multiple listing service (MLS) while allegedly represented by one of the corporate defendants. As part of the sale transaction, the Complaint states that Mr. Masiello paid a 2% commission to the seller broker and a 2.5% commission to the buyer broker.

Q2. Who are the Defendants?

A2. The named Defendants are the Arizona Association of REALTORS®, the Phoenix Association of REALTORS®, the Scottsdale Area Association of REALTORS®, the West and Southeast REALTORS® of the Valley, the Tucson Association of REALTORS®, and 15 corporate defendants which are brokerages operating in Arizona. The National Association of REALTORS® was not named as a defendant, nor were any multiple listing services.

Q3. Is this a class action lawsuit?

A3. No class of Plaintiffs has been certified by the Court. However, the Plaintiff is seeking to make this a class action lawsuit with a desired class of plaintiffs consisting of "All persons who, from January 5, 2020, through the present, used any Brokerage Defendant to list a home on an Arizona MLS, and who paid a commission to the buyer's broker in connection with the sale of the home."

Q4. In what court is the lawsuit filed?

A4. The United States District Court, District of Arizona.

Q5. What are Plaintiff's allegations?

A5. Plaintiff alleges that Defendants "participated in the establishment, implementation, and enforcement of the Buyer Broker Commission Rule and other anticompetitive NAR rules in Arizona." Specifically, Plaintiff alleges that a

conspiracy exists among all Defendants that "(a) requires sellers to pay inflated commissions for services provided by buyer-brokers; (b) raises, fixes, and maintains buyer-broker compensation at levels that would not exist in a competitive marketplace; and (c) encourages and facilitates steering and other actions that impede entry and market success by lower-cost real estate brokerage services."

Q6. What relief is Plaintiff seeking?

A6. In addition to class certification, Plaintiff is seeking an award of damages to be determined at trial, an award of statutory interest and penalties, an award of costs and attorneys' fees, and an order for injunctive relief enjoining Defendants from engaging in the anticompetitive acts Plaintiff alleges.

Q7. What is AAR's position?

A7. No conspiracy exists and Plaintiff's claims exhibit a fundamental misunderstanding/misrepresentation of how real estate sales are conducted in Arizona. Consumers have the choice whether to work with a real estate professional, a REALTOR® member, or represent themselves. The practice of listing brokers offering compensation to brokers who produce a buyer emerged in the free market decades ago, and NAR's rule followed, bringing transparency to preexisting marketplaces. Compensation can be a percentage, fixed rate, hourly rate, or any other arrangement and compensation is always negotiable between agents and their clients. In fact, pursuant to NAR's policies, compensation for the sale or rental of real property is not set by any Association/ Board of REALTORS® or MLS. The compensation rule does not tell listing brokers and their clients how much to offer a buyer broker. Furthermore, the diverse business models that exist in Arizona result in a wide spectrum of options for consumers.

Q8. Does AAR own or operate a Multiple Listing Service?

A8. No.

Q9. How does the current compensation model benefit both buyers and sellers?

A9. This model of compensation is advantageous for all parties for numerous reasons:

- It means that sellers can have their home seen by more buyers, allowing the free market to produce the best sales price.
- Buyers benefit from professional representation in what for many will be the most significant, complex purchase of their lives.
- Critically, this compensation model promotes access to homeownership that benefits both buyers and sellers. Adding broker compensation on top of closing costs would push the dream of homeownership further out of reach for many.
- The same would be true for veteran home buyers because VA loans prohibit them from paying buyer broker fees.

Q10. When will the trial take place?

A10. No trial date has been set and it is unknown whether Plaintiff's claims will survive either a Motion to Dismiss or a Motion for Summary Judgment. If a trial were to occur, it would take place many years from now.

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U.S. DEPARTMENT OF LABOR ISSUES NEW GUIDANCE ON INDEPENDENT CONTRACTOR STATUS

Aaron Green, Esq. **GENERAL COUNSEL AT ARIZONA REALTORS®**

On January 10, 2024, the U.S. Department of Labor (DOL) issued a revised rule on how to analyze who is an employee versus an independent contractor under the Fair Labor Standards Act (FLSA). The revised DOL rule announcement and guidance can be found HERE. The FLSA is the law that sets standards for minimum wage, overtime pay, recordkeeping, and other rules related to employees. The FLSA requirements do not apply to independent contractors. On the surface, the revised rule appears substantially similar to the previous rule announced in 2021 in that both use the same factors to be considered in the analysis:

1. Opportunity for profit or loss depending on managerial skill;
2. Investments by the worker and the potential employer;[1]
3. The degree of permanence of the work relationship;
4. The nature and degree of control;
5. The extent to which the work performed is an integral part of the potential employer's business; and
6. Skill and initiative.

The real difference in the revised rule is that the six factors are now to be given equal weight. Previously, the 2021 rule guidance considered two factors (1- Opportunity for profit or loss depending on managerial skill or investment and 4- The nature and degree of control) as "core" and the most probative of whether workers are economically dependent on someone else's business or are in business for themselves. The DOL 2021 rule and guidance can be found HERE. The new revised rule abolishes "core factors" and provides that each is an equal tool to conduct a totality-of-the-circumstances analysis to determine economic dependence (indicative of an employee). The subtle shift provides less clarity to interested persons and appears aimed at expanding the number of workers to be considered employees.

The new revised rule goes into effect on March 11, 2024. Please note the revised DOL rule does not affect any other employee/independent contractor analysis statutes or laws including IRS (for tax purposes), state law (worker's compensation) or common law (tort liability).

More information on the revised rule or employee/independent contractor analysis can be found at:

DOL FAQs

Real Estate Salespersons- Independent Contractors or Employees?

[1] The 2021 rule had only 5 factors. Factor 2 analysis was combined with Factor 1 (whether there was an opportunity for profit or loss depending on managerial skill or investment).

BUILDER'S OVERREACH SHOT DOWN IN PUNDERFUL FASHION

Aaron Green, Esq.
GENERAL COUNSEL AT ARIZONA REALTORS®

Given the historic lack of inventory in the real estate market, many buyers are flocking to purchase newly built homes. The advantages of buying new home construction can include more affordable prices, structural warranties, and the ability to pick out custom fixtures. On the downside, home builders often insist on using their purchase contracts that lack many buyer safeguards like consumer-friendly contingencies or a reasonable liquidated damage clause if the buyer fails to purchase the home. In Oklahoma, a home builder took it one step further by suing a buyer for almost $160,000.00 even after the home builder resold the home for more money and retained the buyer's $20,000.00 earnest money deposit.

The facts are as follows: In 2022, the buyers entered into a purchase contract with the home builder to buy the property for $517,400.00 and put down a $20,000.00 earnest money deposit. When the home was completed several months later, the potential buyer failed to close and soon thereafter filed for bankruptcy. The home builder retained the buyer's earnest money deposit and sold the home eight (8) months later for $524,900.00.

Despite selling the home for more money and retaining the $20,000.00 deposit, the home builder still claimed it was owed an additional $159,741.00 from the buyer for lost profits. According to the home builder, it was a "volume builder" meaning it had the unlimited ability to construct homes and an equally unlimited supply of buyers for each home it built. Therefore, it was entitled to its net profit from the failed transaction even though it sold the home for a profit.

Judge Terrence L. Michael disagreed. Judge Michael felt the novel legal theory of the home builder was the "wrong tool for the job", not "strong enough to bear the weight of its foundationally shaky arguments", "does not pass inspection", and had "been constructed out of whole cloth, with no more substance than the proverbial house made of straw (or sticks if you prefer)." Instead, the court followed Oklahoma law that measured damages for a breach of purchase contract to be the contract price less the market value of the property. Since the market value exceeded the contract price the home builder suffered no damage, let alone almost $160,000. Arizona measures damages similarly but also allows for the possibility of consequential damages if applicable (expenses related to the 2nd sale). Revised Arizona Jury Instructions, Contract Instruction #20.

While the Oklahoma home builder's attempt to double dip was thwarted, it illustrates the lengths some home builders will go to pursue contract buyers if they fail to close. The danger is real. Best practice for agents representing buyers of new construction homes is to recommend to their buyers that they consult legal counsel to review the builder's purchase contract and advise them of their legal obligations and potential liabilities. Agents should not try and interpret contracts with which they are not familiar and should not under any circumstances put themselves in a position where they can be accused of offering legal advice.

In re Potts
2023 WL 4882437

ARIZONA REALTORS®

NEW AGENT NAVIGATION FORUM

Introducing the Arizona REALTORS® New Agent Navigation Virtual forums!

The New Agent Navigation forums are virtual informative sessions that will provide your newer agents with valuable perspectives from the buyer and seller sides of the transaction.

Each session is structured to delve deeper into topics that are crucial for understanding and navigating the dynamics of a real estate transaction.

Every forum will conclude with an open forum, providing an opportunity to share experiences, exchange insight, and ask questions. This collaborative environment fosters growth and learning, allowing newer agents the opportunity to learn from seasoned professional and peers.

Please encourage your new agents to take advantage of this free member benefit as they embark on their real state journey.

For information or to register: SCAN THE CODE

FREE FOR REALTOR® MEMBERS

602-248-7787 www.AARonline.com

2024 Schedule

Time: 12:00 p.m. to 1:30 p.m.

FEBRUARY 28, 2024
Buyer & Seller Counseling Sessions

- What are they and why
- Components
- Forms
- Best practices

May 29, 2024
Putting the Offer Together

- Putting the offer together
- Pre-Qualification
- Timing
- Best practices

August 21, 2024
What's Next After the Offer is Accepted

- Net sheets
- Concessions
- Appraisals
- Repairs

November 20, 2024
Preparing to Close the Deal

- Title commitment
- Final walkthrough
- Termination of agency
- Stay in touch

ARIZONA REALTORS®

2024 Spring CONFERENCE

LET'S DO GREAT THINGS TOGETHER

Keeping up with changes in the dynamic real estate industry while serving your clients to the highest degree requires knowledge, poise, and confidence. During this year's Conference, you will gain knowledge, tools, and connections that will propel your success.

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MARCH 26-28 2024

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Thank You MICHELLE

"It has been my honor and privilege to serve the Arizona REALTORS®. There are so many people to thank - past and current leadership, committee/workgroup members, and of course the Arizona REALTORS® staff.

You all make the Arizona REALTORS® the best state association in the nation!"

-MICHELLE LIND

Michelle Lind ended her tenure with the Arizona Association of REALTORS® (AAR) effective January 1, 2024. For more than 30 years she represented AAR in various capacities as: legal hotline and outside legal counsel for eight years; General Counsel from 1999 to 2012; and CEO from December 2012 to April 2022 when she stepped down to serve 'Of Counsel' to the association until December 2023.

As CEO, she ensured the successful performance of the programs in the association's Strategic Plan while developing resourcess to assist leadership including Executive Committee and Board of Directors orientations and position descriptions. Additionally, Michelle increased the association's public relations presence, promoted the Arizona Housing Fund, and developed the ASU/AAR Mentorship Partnership.

Michelle will continue to work in the legal profession on a limited basis, providing legal research, writing, drafting transactional documents, and teaching courses in the rCRMS program.

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

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

For More Information

Please contact Jamilla Brandt, Arizona REALTORS® Risk Management Coordinator, at 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.

RECORDING A LEASE OPTION IS NOT ADVISABLE FOR THE PROPERTY OWNER

FACTS: During negotiations for a lease with option to purchase, the buyer has indicated a desire to record the option to purchase the property.

ISSUE: Are there any risks to the seller if the buyer records the option? Also, what happens if the buyer breaches the lease and is evicted?

ANSWER: See Discussion.

DISCUSSION: If recorded by the buyer, the option to purchase becomes an encumbrance against the seller's title. The seller's risk is that the buyer does not exercise the option—because the buyer elects against purchasing the property, is unable to qualify, is evicted, or some other reason—and then the buyer fails to release the option from the public records. In this situation, the seller may be forced to commence a quiet title lawsuit against the buyer in order to remove the encumbrance. The seller may, however, be entitled to recover the attorneys' fees incurred and costs of suit, plus damages. See A.R.S. § 33-420.

Please note also that unless the lease and option to purchase contain cross-default provisions, a breach of the lease by the buyer and subsequent eviction by the seller may not prevent the buyer from exercising the option to purchase.

A BUYER MUST HONOR AN EXISTING LEASE AFTER CLOSE OF ESCROW

FACTS: A listing just went under contract. The tenant's lease doesn't expire until August. The buyer wants to occupy the property and wants the tenant out by close of escrow.

ISSUE: Should the property manager give notice to the tenant that he/she will need to vacate the property in 30 days?

ANSWER: See Discussion.

DISCUSSION: The general rule is that the purchaser of a home (or any other real property) has to honor the existing lease. The buyer is further deemed to have notice of the lease by way of constructive notice. Accordingly, the buyer must honor the remaining term of the lease.

The tenant should be provided with a Notice of Nonrenewal of Lease Agreement, at the end of the original term, which should be given on or prior to the periodic rental due date.

NOTE: A lessee has the right to possession and use of the premises so long as he is not in default of any of the terms of the lease. Camelback Land & Inv. Co. v. Phoenix Entm't Corp., 2 Ariz. App. 250, 407 P.2d 791 (Ariz. App. 1965).

BUYER'S AGENT SHOULD ADVISE BUYER THAT SELLER MAY NOT MOVE OUT TIMELY

FACTS: Escrow is set to close in three days. The seller has significant amounts of personal property in the residence and is apparently making no effort to pack or otherwise get ready to move. The buyer's agent is afraid that the seller may not leave at closing as required.

ISSUE: Should the buyer's agent advise the buyer of this issue?

ANSWER: Yes.

DISCUSSION: The licensee is obligated to disclose to the client all material facts, including those suggesting that the seller may

be unable or willing to perform. See A.A.C. R4-28-1101. Here, because it looks like the seller may not vacate the premises timely, the buyer's agent should advise the buyer of this fact.

A BINSR MUST IDENTIFY ITEMS DISAPPROVED

FACTS: The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the "Contract."). On the Buyer's Inspection Notice and Seller's Response ("BINSR"), the buyer requested a credit of $5,000 rather than requesting that the seller make any repairs. However, the buyer did not identify any items disapproved in the BINSR. The listing agent contends that the BINSR is not valid. The buyer's agent claims that with the October 2022 revision to the BINSR allowing a buyer to request a credit, identifying items disapproved is no longer required.

ISSUE: Must a BINSR identify items disapproved to be valid?

ANSWER: Yes.

DISCUSSION: Both the Contract and BINSR forms were revised in October 2022 to allow a buyer to request a credit rather than only repairs. However, the revisions did not alter the requirement that the buyer provide notice of items disapproved, even if asking for a credit. Thus, a BINSR must identify items disapproved to be valid regardless of the request made by the buyer.

A CO-OWNER OF REAL PROPERTY MAY FORCE A SALE VIA A PARTITION ACTION

FACTS: Two years ago, an engaged couple bought a house together. They hold title as joint tenants with rights of survivorship. Both parties are borrowers on the mortgage. The couple recently broke up and one of the owners moved out of the house and refuses to contribute any money towards the mortgage.

ISSUE: Can the remaining owner force the sale of the house because the mortgage is too expensive?

ANSWER: Yes.

DISCUSSION: Any owner may force the sale of the property by filing a partition action. A.R.S. § 12-1211(A) provides: "The owner or claimant of real property or any interest therein may compel a partition of the property between him and other owners or claimants by filing a complaint in the superior court of the county in which the property, or a portion thereof, is situated." Typically, the Court will order that the property be sold. See A.R.S. §12-1218. Upon the sale, all common property expenses (including the mortgage) will be paid, and the remaining sales proceeds will be split based on the parties' respective ownership interests, after a hearing.

DEATH IN THE HOME NEED NOT BE DISCLOSED

FACTS: The father died in the home. The son, as the personal representative, is selling the home.

ISSUE: Does the son or the agent have a legal obligation to disclose that the father died in the home?

ANSWER: No.

DISCUSSION: Pursuant to A.R.S. § 32-2156, sellers and their agents are not obligated to disclose that the property was the site of a natural death. However, the seller and the agent cannot make a misrepresentation if asked whether there has been a death on the property. They must answer truthfully or respond that they are not legally required to answer the question.

THE HOA CANNOT CHARGE FEE FOR DISCLOSURE DOCUMENTS UNTIL CLOSE OF ESCROW

FACTS: The HOA is demanding payment from the seller for the work it performed in gathering and providing resale disclosure documents to the buyer for the pending sale of the property. The property is not scheduled to close escrow for another two weeks.

ISSUE: Upon delivery of the documents, does the homeowner have to pay the HOA?

ANSWER: No.

DISCUSSION: Pursuant to A.R.S. § 33-1806, an association may charge a homeowner a fee "to compensate the association for the costs incurred in the preparation and delivery of a statement or other documents furnished by the association . . . for the purposes of resale disclosure, lien estoppel and any other services related to the transfer or use of the property." The statute further provides that the fees "shall be collected no earlier than at the close of escrow." Id. Accordingly, an association may charge a homeowner fees for providing the documents prior to close of escrow but the homeowner does not have to pay the fees until escrow successfully closes.

NOTE: In the event the pending sale does not close escrow, the association may not charge its fee to the homeowner.

BUYER'S FAILURE TO ACT DURING THE THREE DAY CURE PERIOD ALLOWS THE SELLER TO CANCEL THE CONTRACT

FACTS: The parties executed an AAR Residential Resale Real Estate Purchase Contract ("Contract"). The Contract was

contingent on the buyer selling their home. Pursuant to the terms of the Contract, the buyer agreed to deposit funds with the title company three days prior to close of escrow. The buyer failed to deposit funds with the title company three days before close of escrow and the seller sent a three day Cure Period Notice to the buyer for failing to do so. During the three day cure period, the buyer still failed to deposit the funds with the title company. After the three day cure period had ended, the buyer attempted to cancel the transaction. Thereafter, the title company cancelled escrow and gave the earnest money deposit to the seller.

ISSUE: Was the buyer entitled to return of her earnest money when she attempted to cancel the Contract after the three day cure period ended?

ANSWER: No.

DISCUSSION: Pursuant to the terms of the Contract, the buyer agreed to deposit funds with the title company three days prior to close of escrow. When the buyer failed to deposit the funds, she was in potential breach of the Contract. Once the seller gave the buyer a three day Cure Period Notice, the buyer could have cured the potential breach by depositing the funds within three days. The buyer also could have cancelled the contract within the three day cure period if the contingency to sell their home had not yet been met. Because the buyer failed to do anything until after the three day cure period was over, the buyer breached the Contract. As the non-breaching party, the seller had a right to cancel the contract and keep the earnest money as the seller's sole right to damages.

A DESIGNATED BROKER IS RESPONSIBLE TO REASONABLY SUPERVISE AGENTS LICENSED WITH THE BROKERAGE FIRM

FACTS: A real estate company has two franchise offices in Arizona, one in Scottsdale and one in Mesa. Each office has its own designated broker and operates separately. The Scottsdale office has a team that wishes to split into two parts, keep the same name, but work out of the Mesa office. The Mesa office will oversee the sales transactions of the new team and have supervision responsibilities over the same.

ISSUE: Will the Arizona Department of Real Estate allow a team to split, keep the same name, and work out of two separate brokerages?

ANSWER: See Discussion.

DISCUSSION: Pursuant to Arizona Administrative Code R4-28-306(A)(2) an agent can only perform real estate services on behalf of the employing broker. Moreover, each brokerage has supervisory responsibility over agents licensed with that broker. AAC R4-28-1103(A). The Scottsdale brokerage cannot delegate its supervision responsibilities to the Mesa brokerage. In a nutshell the proposed split does not comply with licensing laws.

CHANGES DURING ESCROW CAN BE MADE ON THE NOTICE/DISCLOSURE FORM

FACTS: Two (2) weeks before close of escrow, there was a torrential downpour. The seller discovered a leak in the roof over the garage and now needs to disclose this information to the buyer. The seller does not want to go through the exercise of reviewing and updating the Seller's Property Disclosure Statement (SPDS).

ISSUE: Does the seller have to notify buyer of the change in the Premises by updating the SPDS?

ANSWER: See Discussion.

DISCUSSION: Section 4f of the Residential Resale Real Estate Purchase Contract provides that the seller must notify the buyer "of any changes in the Premises or disclosures made herein, in the SPDS, or otherwise." Because the seller just discovered a leak and it was not previously disclosed, the seller must notify the buyer of the change in Premises and may do so by using the Notice / Disclosure Form instead of updating the SPDS.

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 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.

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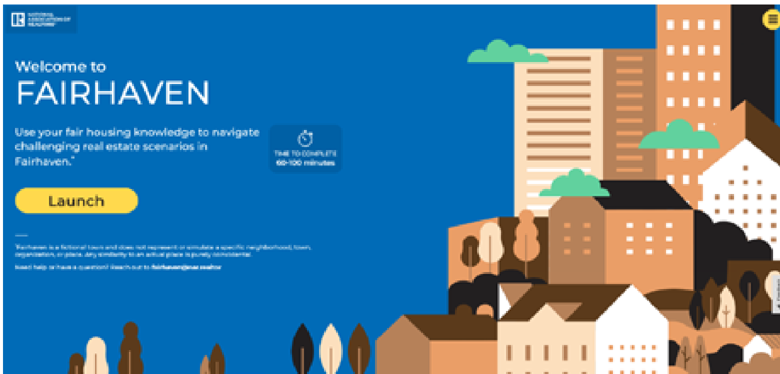

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