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SETTLEMENT & PRACTICE CHANGES AUGUST 2024

TRENDING TOPICS

VIDEO: New Forms Discussion with Wendy Shaw and Phil Sexton

Top Ten FAQs for New Practice Changes and Forms

New Law Impacts Enforceability of Listing Contracts

Revised: Residential Listing Contract

Revised: Buyer-Broker Exclusive Employment Agreement

Buyer-Broker Agreement to Show Property

Legislative Update

Window To The Law: Updated Guidance For Telephone Consumer Protection Act Compliance



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NEW FORMS DISCUSSION

with



Wendy Shaw & **Phil Sexton**



 WATCH NOW

TOP TEN FAQs FOR NEW PRACTICE CHANGES AND FORMS



Q1. Does a Listing Broker need to sign a new ER-Residential Listing Contract with a seller once the new practice changes take effect?

A1. No. However, best practice would be for the listing broker to discuss the practice changes with the seller, the removal of cooperative compensation from the MLS, confirm their consent to offer compensation to a potential buyer broker, and consider how to address the possibility of an unrepresented buyer. If the listing broker and seller mutually agree to alter the terms of their existing ER, they can either sign an addendum to the ER on the Listing Contract Addendum or sign a new ER using the August 2024 edition of the form.

Q2. Does a Buyer Broker with an existing Buyer Broker Exclusive Employment Agreement (BBEEA) need to enter into a new BBEEA?

A2. Yes. The practice changes require an “ascertainable” rate or amount of compensation to be paid to the buyer broker. The previous BBEEA does not include required language and does not include an “ascertainable” rate or amount of compensation. Therefore, best practice is for the buyer broker and buyer to cancel their existing agreement and sign a new BBEEA no later than August 17, 2024.

Q3. A Buyer Broker is concerned that the buyer is unsophisticated and may not understand the legal ramifications of agreeing to exclusive representation. What is best practice in this circumstance?

A3. A buyer broker soliciting a buyer to enter into a buyer broker agreement should first ask the buyer if they have already signed any other buyer broker agreements. Lines 7-8 of the Buyer Broker Exclusive Employment Agreement (BBEEA) provide an opportunity, and plain language, to facilitate a discussion about the consequences to the buyer should they breach an exclusive agreement. Best practice is also for the buyer broker to send a blank buyer broker agreement prior to

discussing the terms and prior to sending the completed agreement for signatures to ensure that the buyer has the necessary time to review the form without feeling pressured to sign. If they do have questions, encourage the buyer to ask you or discuss with independent legal counsel. Finally, should the parties agree to **Compensation After Expiration Date** on line 54 of the BBEEA, best practice would be for the buyer broker to explain the term and remind the buyer of this obligation on the date the term of the agreement ends so that it is fresh in their minds.

Q4. A buyer enters into a Buyer Broker Exclusive Employment Agreement (BBEEA) with agent A. Agent A is on vacation but arranges for another agent of the Broker to show the buyer properties while agent A is unavailable. Does the other agent need the buyer to sign another written agreement prior to touring a home?

A4. No. All buyer broker agreements are between the buyer and the Broker. All agents of the Broker are therefore working for the buyer under the Broker’s BBEEA. It would be confusing and potentially problematic for an agent to enter into another agreement with an agent within that same brokerage that may contradict or nullify the existing BBEEA.

Q5. A builder is offering a bonus to a buyer broker in excess of the compensation amount agreed to by the buyer. Can the buyer and their broker use the Buyer/Tenant Employment Agreement Addendum to increase the compensation amount?

A5. First and foremost, the buyer broker is prohibited from receiving compensation from any source in excess of the amount set forth in the buyer representation agreement. As for this specific scenario, the NAR settlement agreement does not expressly prohibit increased compensation with the buyer's express permission via a signed addendum to the buyer representation agreement, but there are concerns associated with increasing compensation to the buyer broker. The primary reason being that the broker owes a fiduciary duty to the buyer to act in the buyer's best interest. Increasing the buyer broker's compensation may not be in the buyer's best interest. In the event that the buyer proposes and insists that their broker keep the "bonus" offered by the builder, it should be documented to show the buyer had full knowledge, understanding, and willingness to pay their broker more money than was owed.

Q6. A buyer requests a broker assist them in the purchase of either an existing home or a vacant lot. The parties agree that the broker will earn a higher percentage of the full purchase price as compensation if a vacant lot is purchased. Can the buyer and broker agree to variable compensation?

A6. Yes. The parties can agree to different compensation amounts for different services rendered. Best practice would be for the buyer and the broker to enter into two (2) buyer broker agreements. One buyer broker agreement for **Residential** and a separate one for **Land**. Each buyer broker agreement would include the amount of compensation agreed to by the buyer and the broker for the services provided in that agreement. Remember that the compensation set forth in the buyer broker agreement for the residential property must be an identifiable sum certain, not open-ended.

Q7. If an MLS Participant hosts an open house or provides access to a property on behalf of the seller only, will they be required to enter into a written agreement with unrepresented buyers touring the home?

A7. No. In this case, since the MLS Participant is only

working for the seller, and not the buyer, the MLS Participant does not need to enter into a written agreement with the buyer.

Q8. A seller and a Listing Broker are discussing strategy when signing the new ER-Residential Listing Contract. The seller is willing to authorize the Listing Broker to offer compensation to a prospective buyer broker but wants to start with a small amount. How should the seller and Listing Broker fill out lines 50-51?

A8. A seller should only authorize an offer of compensation in an amount they are willing to pay. If the seller wants to start initial advertisements at a lower compensation amount than listed on line 51, this should be noted in the **Additional Terms and Conditions** section. Alternatively, the seller can choose to offer a lower amount of compensation, or no offer of compensation, on lines 50-51, but authorize the Listing Broker to advertise that the seller is open to potentially compensating a buyer broker (or additional compensation) in a purchase contract offer. Again, this strategy should be noted in the **Additional Terms and Conditions** section. Keep in mind that it must be the seller's decision whether to offer cooperative compensation and, if so, how much.

Q9. Why does line 20 of the Seller Compensation Addendum (SCA) reference "either Section 8f or Section 9g of the Contract" when there is no Section 9g of the Residential Purchase Contract?

A9. The SCA was designed to be an addendum available for use with multiple Arizona REALTORS® purchase contracts. Section 8f governs compensation in the Residential Resale Real Estate Purchase Contract and Vacant Land/Lot Purchase Contract. Section 9g governs compensation in the Commercial Real Estate Purchase Contract.

Q10. Why are lines 14-16 of the Seller Compensation Addendum necessary? If the brokers' agreement is separate and independent, why is there a need to reference it?

A10. Disclosing the existence of a broker-to-broker agreement (Compensation Agreement Between Brokers) provides transparency and reminds the seller and seller's broker that compensation is already owed to the buyer broker via a separate agreement.





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NEW LAW IMPACTS ENFORCEABILITY OF LISTING CONTRACTS

Scott Drucker, Esq.
CEO AT ARIZONA REALTORS®

Do you enter into exclusive residential listing agreements that are longer than 12 months? If so, it's critical that you become familiar with Arizona's newest law.

Senate Bill 1218 is set to take effect on September 14, 2024, changing the laws surrounding exclusive listing agreements. Specifically, the legislation will create three new statutes: A.R.S. §§ 44-501, 502, and 503, all of which will fall under the heading **"Exclusive Property Engagement Agreements."**

Pursuant to A.R.S. § 44-501, Exclusive Property Engagement Agreement means "a contract or agreement that provides an exclusive right to a person to list or sell Residential Real Estate," which is defined as real property in Arizona that "is used or will be used primarily for a personal, family or household purpose and that contains fewer than five dwelling units."

A.R.S. § 44-502 then sets forth a litany of unlawful practices pertaining to Exclusive Property Engagement Agreements. While a summary of the restrictions is set forth below, the statute itself should be reviewed for additional details.

Subsection A makes it unlawful for an Exclusive Property Engagement Agreement to:

- Last longer than 12 months after the date that the agreement is signed;
- Be a covenant that runs with the land;
- Bind a future owner unless the future owner acquires an interest in the property after listing services have begun;
- Be recorded in the office of a County Recorder;
- Authorize a person to place a security interest or lien against the property; and
- Allow the Exclusive Property Engagement Agreement to be assigned without notice to and agreement of the owner.



The new law goes on to state that a Court may not enforce any Exclusive Property Engagement Agreement made or recorded in violation of the above. Similarly, any such noncompliant Agreement recorded with a County Recorder's Office is void and unenforceable.

Finally, A.R.S. § 44-503(D) makes it clear that "A Contract or Agreement that violates this chapter and that is recorded before the effective date of this section is void."

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 REALTORS® General Counsel
Aaron Green discusses

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REVISED: RESIDENTIAL LISTING CONTRACT

Aaron Green, Esq.

GENERAL COUNSEL AT ARIZONA REALTORS®

This article will discuss the revisions made to the Residential Listing Contract Exclusive Right to Sell/Rent. Please note that substantively identical revisions for consistency were made to the Residential Listing Contract Exclusive Agency, Vacant Land/Lot Listing Contract Exclusive Right to Sell/Rent and Vacant Land/Lot Listing Contract Exclusive Agency forms.

The redline of the revised [Residential Listing Contract Exclusive Right to Sell/Rent](#) (ER) can be found [HERE](#).

The **PARTIES** Section of the ER now defines the broker that represents the seller as “Listing Broker” instead of “Broker.” The change is made throughout the ER.

The **LISTING PRICE AND TERMS** Section now uses the term “buyer” instead of “purchaser.” Similarly, the ER now uses the term “compensation” instead of “commission” when referring to amounts paid to the Listing Broker. The change is made throughout the ER.

Significant changes were made to the **COMPENSATION** Section. First, the disclosure language was revised to comply with the practice change to conspicuously state that broker compensation is not set by law and is fully negotiable. The disclosure is now in bold to make it more prominent and includes the Seller’s initials to confirm they have read the disclosure.

Next, the **Retainer** paragraph was revised to include: a *click box* if a retainer fee is agreed to; an optional timeframe available for payment; and a second *click box* to indicate whether the retainer fee will be credited against the Listing Broker’s compensation. The workgroup wanted the Retainer Fee paragraph to match the same paragraph of the Buyer-Broker Exclusive Employment Agreement, so it combined the best parts of each.

Finally, the **Commissions** paragraph was renamed **Listing Broker Compensation** and was heavily revised to *unbundle* the Listing Broker’s compensation. Instead of a “TOTAL COMMISSION” being negotiated with the seller as in the existing ER, the Listing Broker will now negotiate their compensation independently of cooperative compensation offered to a potential buyer broker. For a **SALE**, the Listing Broker will input the compensation owed to them for a sale based on a ___% of the full purchase price or a \$_____ amount. The Listing Broker can then negotiate additional compensation should the buyer be unrepresented in a transaction. Finally, the seller, in consultation with the Listing Broker, can decide whether or not they will authorize an offer of compensation to a potential buyer broker (off of an MLS). Both scenarios include a *click box* if agreed upon with the rate or amount to be input.

¹Thank you to the ER/EA workgroup for their efforts to revise the forms. The workgroup was chaired by Jim Sexton. Other workgroup members were John Barile, Laurie Beischel, Jen Bergamini, Eric Davis, David Dynes, Jay Eckhardt, Cathy Erchull, Kim Everett, Serena Jones, Jennifer Kiley, Paul Kriewall, Mimi Lundy, Jim Nuth, Carol Pinciario, and Mike Porter.

Lines 52-55 provide specificity should the seller offer compensation to a potential buyer broker. The language includes the seller's authorization for the Listing Broker to enter into an agreement to compensate the buyer broker and pay the agreed upon amount in such circumstance. Finally, it clarifies that the Listing Broker is entitled to the offered amount if it also represents the buyer.

Lines 56-58 provide the seller's acknowledgement that the buyer broker only represents the interests of the buyer

(unless the Listing Broker represents both seller and buyer under Limited Representation) and that the buyer broker may credit part, or all, of their compensation to the buyer.

For a **RENTAL**, compensation was similarly *unbundled* and substantively mirrors the language of the **SALE** subparagraph described above.

The **REMEDIES** Section requests the seller to waive their right to be a member of a class action lawsuit.

FAQS

Q1. Why does the ER now refer to the seller's broker as the Listing Broker?

A1. The workgroup felt the change helped clarify which broker was being discussed, especially in the **COMPENSATION** Section.

Q2. Why is Listing Broker compensation *unbundled*?

A2. To provide the parties flexibility and choice. Compensation terms were always negotiable, but the new format identifies all possible scenarios for full transparency.

Q3. Why is additional compensation available for an unrepresented buyer?

A3. Some brokers feel it takes significantly more time and energy to close a transaction that is not assisted by a buyer broker. They are further of the opinion that they are at risk for additional legal exposure when a buyer is not represented in a transaction. For these reasons, the workgroup included space for the Listing Broker to negotiate additional compensation for the added time, energy and/or legal risk potentially expended when the buyer is unrepresented. With that said, compensation is negotiable and any such additional compensation must be agreed to by the seller.

Q4. The seller authorizes the Listing Broker to offer 100 apples to compensate a potential buyer broker. The Listing Broker enters into an agreement to compensate the buyer broker 80 apples. Does the Listing Broker get to keep the remaining 20 apples?

A4. No. Pursuant to lines 50-51, the seller is only authorizing a communication to offer compensation to a potential buyer broker. Per lines 52-55, the obligation for the seller to actually make payment only arises when the Listing Broker enters into an agreement to compensate the buyer broker and only for the amount actually paid (up to the offered amount).

Q5. Does this mean the Listing Broker needs an agreement to accept the offered compensation when it also represents the buyer?

A5. No. Per lines 54-55, the seller will pay the Listing Broker the offered amount if any agent of the Listing Broker represents the buyer. Furthermore, it would be unnecessary and superfluous for the Listing Broker to enter into an agreement with itself.

Q6. What if the offered compensation is less than the amount owed by the buyer in the Buyer-Broker Exclusive Employment Agreement?

A6. The buyer broker can accept the offered compensation through an agreement with the Listing Broker (unnecessary in Limited Representation), at which point the buyer would be responsible for ensuring the buyer broker is paid the remaining amount owed. For example, if the buyer, via the Buyer Broker Exclusive Employment Agreement, agrees to pay their buyer broker 100 apples and the cooperative compensation received is only 80 apples, the buyer would then be responsible to make sure 20 additional apples are paid to their buyer broker as agreed. The buyer can then either pay the 20 additional apples themselves or request the seller pay the additional compensation in an addendum

to the purchase contract.

Q7. What if the seller does not authorize the Listing Broker to offer any compensation to a potential buyer broker but the seller wants to advertise his/her willingness to pay compensation based on the terms of an offer?

A7. Best practice would be for the Listing Broker to include the seller's instructions in the **ADDITIONAL TERMS AND CONDITIONS** Section, thereby documenting them. Then, if contacted by a buyer's agent inquiring about cooperative compensation, the Listing Broker should explain, in conformance with the seller's instructions, that payment of cooperative compensation is dependent on the nature of the offer submitted.

Q8. Can the agent of the Listing Broker offer variable compensation if the same agent of the Listing Broker represents both the seller and the buyer?

A8. Yes. Best practice would be for the agent of the Listing Broker to address the variable rate or amount in the **ADDITIONAL TERMS AND CONDITIONS** Section.

Q9. Does a Listing Broker need to sign a new ER with a seller after the practice changes take effect or when the revised ER is released for use?

A9. No. However, best practice would be for the Listing Broker to discuss the practice changes with the seller, the removal of cooperative compensation from the MLS, confirm their consent to offer compensation to a potential buyer broker, and consider how to address the possibility of an unrepresented buyer. If the Listing Broker and seller mutually agree to alter the terms of their existing ER, they can either sign an addendum to the ER on the Listing Contract Addendum or sign a new ER using the August 2024 edition of the form.



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2024 LEGISLATIVE UPDATE

Each year our legislative policies are approved by the Board of Directors and guide our advocacy team on which issues to prioritize to support our members. This process begins each summer at the Arizona REALTORS® Caucus where we hear from all our members, the industry practitioners, on which issues are impacting them most.

The Arizona REALTORS® were hard at work during the 2024 Legislative Session tracking bills that impact our industry. We advocated to protect our member's ability to do business, private property rights, and homeownership. Follow along as Senior Director of External Affairs, Matt Contorelli provides our Legislative Recap of the specific issues impacting the real estate industry this year.



WHAT'S THE LATEST...

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The Arizona REALTORS® are proud to launch a new program to further our advocacy mission down at the state Capitol. The Key Contact program will pair a REALTOR® with every member of the state legislator so our elected officials can hear directly from our industry practitioners on what is happening in the real estate industry.

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REVISED: BUYER-BROKER EXCLUSIVE EMPLOYMENT AGREEMENT

One of the most significant practice changes of the NAR settlement is the requirement that MLS participants working with buyers must enter into a written agreement with the buyer prior to touring a home. ([New MLS Policy Statement 8.13](#), p. 10). Furthermore, the written agreement must include: 1) a specific and conspicuous disclosure of the amount or rate of compensation; 2) the amount of compensation must be objectively ascertainable and not open-ended; 3) a term that prohibits the MLS participant from receiving compensation that exceeds the amount in the written agreement from any source; and 4) a conspicuous statement that broker fees are not set by law and are fully negotiable.

To comply with the practice change described above, the Arizona REALTORS® significantly revised the Buyer-Broker Exclusive Employment Agreement and created two (2) new forms: Buyer-Broker Agreement to Show Property (Show Property) and Buyer/Tenant Employment Agreement Addendum (Addendum).

This article discusses the revised [Buyer-Broker Exclusive Employment Agreement](#) (BBEEA) and a redline of the changes can be found [HERE](#).

Prior to Line 1, a “Notice to Buyer” sentence is included to notify buyers that all REALTORS® are required to have a signed written agreement prior to showing a home to a buyer.

Line 1 removed “Tenant” from the BBEEA. The settlement does not require the practice change described above for brokers working with tenants. As such, the workgroup felt the form would be clearer if it pertained solely to buyers. A separate Tenant-Broker Exclusive Employment Agreement was drafted for brokers working with tenants and will also be available on August 1st.

Lines 2-3 identify the broker and their agent and were revised to match the Residential Listing Contract.

The **Agreement** paragraph was added to disclose the exclusive nature of the BBEEA and warn the buyer that

signing more than one BBEEA or similar agreement could make the buyer liable to compensate multiple brokers. The workgroup felt this language was important and thus placed it at the very beginning of the form and underlined the warning to provide emphasis.

The **Term** paragraph was revised to match the Residential Listing Contract by clarifying the time zone that governs the end of the term and defined it as the “Expiration Date.”

The **Employment** and **Agency Relationship** paragraphs were not revised.

The **Property Viewing** paragraph was slightly reworded to reference the newly defined “Broker Compensation” that appears later in the BBEEA but did not substantively revise the paragraph.

The **Due Diligence** paragraph was combined with other verbiage in the newly titled “Failure to Complete” subsection found later in the BBEEA. The stigmatized property disclosure was removed because the workgroup felt it unnecessary to reiterate a disclosure that is already provided in the Real Estate Agency Disclosure and Election form, Buyer’s Advisory and the Residential Seller’s Property Disclosure Statement.

The disclosure language on lines 25-26 was previously located at the bottom of the Compensation Section of the BBEEA. The revised language complies with the practice change to conspicuously state that broker compensation is not set by law and is fully negotiable. The disclosure is now in bold and placed directly above the compensation sections to make it more prominent and now includes the Buyer’s initials to confirm they have read the disclosure. Similar language will be found in the revised Residential Listing Contract, purchase contracts, and all Arizona REALTOR® forms that discuss broker compensation.

The **Retainer Fee** paragraph was relocated and revised. Specifically, the new paragraph requires a *click box* if a retainer fee is agreed to, includes a timeframe for payment (five days is the default), and states the payment is for consultation, research and, now, “other services.” The workgroup wanted the Retainer Fee paragraph to match the same paragraph of the Residential Listing Contract, so it combined the best parts of each.

The **Broker Compensation** paragraph was heavily revised. First, it now clarifies that compensation is due

if the buyer, or any entity owned or controlled by buyer, closes escrow on a transaction for the purchase, exchange, or option of a property. Second, the rate or amount of broker compensation is chosen via a *click box* with the compensation filled in by the Buyer and Broker. The form educates the Buyer and Broker that only one method of compensation is to be chosen and the actual rate or amount must be filled in. Finally, the paragraph clarifies that compensation must be paid in U.S. currency to match the Residential Listing Contract and includes previous language that the compensation is to be paid at, and as a condition of, closing unless agreed otherwise.

The **Compensation from seller or seller’s broker** subparagraph discusses the possibility that the seller or seller’s broker may offer to compensate the Buyer Broker. In such circumstances, the Buyer authorizes their Broker to accept the offer which will be credited against the “Broker Compensation” with any excess credited to the Buyer. Pursuant to the practice changes, the Broker will not receive any amount greater than the compensation agreed upon in the written agreement from any source. The subsection also notifies the Buyer they are ultimately responsible to pay any amounts not paid for by the seller or the seller’s broker. If an offer of compensation is insufficient, the Buyer can request the seller to pay their Broker’s compensation but any amount unpaid shall be paid by the Buyer. Finally, a *notice box* discloses that VA regulations may require VA transactions to be conditioned upon the “Broker Compensation” being paid by the seller or the seller’s broker. Although the VA recently announced that it is lifting its ban on veteran borrowers paying for real estate representation, the change has been labeled “temporary” and it is unclear what the future holds in this regard.

The **Failure to Complete** subparagraph discusses the Buyer’s obligation to act in good faith to purchase the property. This subsection combined previous sections of the BBEEA to notify the Buyer that once an acceptable property is located, the Buyer agrees to act in good faith to acquire the property and conduct any inspection/investigations they deem material or important. The Buyer is also advised that if they prevent the transaction from closing, they will owe the “Broker Compensation.”

The **Compensation After Expiration Date** subparagraph includes a potential tail clause that would require the Buyer to pay the “Broker Compensation” if within a certain time period after the Expiration Date the Buyer enters into a purchase contract on a property that was shown or

negotiated by the Broker. "Broker Compensation" is also due and payable if the Buyer closes escrow on a property that was under contract or in escrow prior to the end of the term.

The **Listings** paragraph states that the Broker will show all property listings that fit the Buyer's criteria regardless of any compensation that may or may not be offered by a seller or seller's broker. The paragraph includes that, if necessary, Buyer instructs Broker to negotiate the Broker Compensation be paid by the seller or seller's broker and that doing so will not jeopardize the initiation, processing, or finalizing of a transaction. Finally, a *notice box* informs the Buyer that if they instruct the Broker to filter or restrict property listings, they must do so in writing.

The **Release of Broker** paragraph advises the Buyer that the Broker is not qualified or licensed to offer financial, legal or tax advice. Furthermore, if the Buyer requests a recommendation for these services, the Buyer is told to

fully vet such professionals and choose the professional in their sole discretion. Finally, the Buyer is asked to waive any liability of the Broker based on the Buyer's choice of, or failure to hire, such professional.

The **Alternative Dispute Resolution** paragraph was revised to include an option for either the Buyer or Broker to opt out of binding arbitration following an unsuccessful mediation. The paragraph also asks the Buyer to waive their right to be a member of a class action lawsuit.

The **Entire Agreement** paragraph now includes a sentence that if one or more term in the BBEEA is unenforceable, the remainder of the agreement remains valid.

Best Practices and Frequently Asked Questions for the [Buyer-Broker Exclusive Employment Agreement \(BBEEA\)](#) can be found [HERE](#).



BUYER-BROKER AGREEMENT TO SHOW PROPERTY

This article discusses the new [Buyer-Broker Agreement to Show Property](#) and a sample of the form can be found [HERE](#).

Lines 1-3 identify the buyer, the broker and their agent. The form matches the BBEEA.

Line 4 includes the same "Notice to Buyer" on the BBEEA that all REALTORS® are required to have a signed written agreement prior to showing a home to a buyer.

Lines 5-6 states that the Buyer is engaging the Broker to view property and other real estate services at the Buyer's discretion.

The **Term** paragraph provides a commencement date and expiration date.

The **Property** paragraph identifies the general description of the property being sought and shown.

The **Agency Paragraph** states the agency relationship will be documented in the Real Estate Agency Disclosure and Election form.

The disclosure language on lines 12-13 matches the BBEEA to comply with the practice change to conspicuously state that broker compensation is not set by law and is fully negotiable. The disclosure is in bold and placed directly above the compensation paragraph to make it prominent. Similar language will be found in the revised Residential Listing Contract, purchase contracts, and all Arizona REALTOR® forms that discuss broker compensation.

The **Broker Compensation** paragraph provides the terms for the Broker to earn compensation. Specifically, the Broker must represent the Buyer in the purchase of a property as indicated on the purchase contract signed within the term. The rate or amount of broker compensation is chosen via a *click box* with the compensation filled in by the Buyer and Broker. The form educates the Buyer and Broker that only one method of compensation is to be chosen and the actual rate or amount must be filled in. The paragraph states the compensation is to be paid at, and a condition of,

closing. Finally, the Buyer authorizes their Broker to accept compensation from a seller or seller's broker as a credit against the Broker Compensation but the Broker will not receive any amount greater than the compensation agreed upon in the written agreement from any source.

The **Buyer Showing Instructions** paragraph states that the Broker will show all property listings that fit the Buyer's criteria regardless of any compensation that may or may not be offered by a seller or seller's broker unless instructed otherwise in writing. The paragraph also includes that, if necessary, Buyer instructs Broker to negotiate the Broker Compensation to be paid by the seller or seller's broker and that doing so will not jeopardize the initiation, processing, or finalizing of a transaction.

The **Equal Housing Opportunity** paragraph notifies the Buyer that the Broker's policy is to abide by all laws prohibiting discrimination.

Best Practices and Frequently Asked Questions for the [Buyer-Broker Agreement to Show Property](#) can be found [HERE](#).



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- As a free 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.

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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.

TENANT'S FAILURE TO PAY FOR UTILITIES DOES NOT RESULT IN LANDLORD LIABILITY

FACTS: Pursuant to the terms of the lease agreement, the tenant is responsible for paying for the propane used to heat the home. The tenant failed to pay the propane company and has run out of propane. Therefore, the tenant has no heat or hot water. The tenant subsequently paid the propane company, but the company cannot deliver propane to the tenant's home for a week.

ISSUE: Could the tenant hold the landlord liable for the failure to provide heat or hot water?

ANSWER: No.

DISCUSSION: If contrary to the rental agreement the landlord deliberately or negligently fails to supply reasonable amounts of hot water or heat, the landlord can be held liable for the breach. A.R.S. §33-1364(A). In this case, the rental agreement provided that the tenant is responsible for paying for the propane to provide hot water and heat. Therefore, the landlord should have no liability to the tenant.

NON-REFUNDABLE EARNEST MONEY REQUIRES CLARIFICATION

FACTS: Buyer and Seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract ("Contract"). The parties agreed in Section 8 that the Buyer's earnest money is "non-refundable after the Inspection Period." The parties are now in a dispute as to when the Inspection Period ends.

ISSUE: Does the Inspection Period include the Inspection Period Notice and Buyer Disapproval time periods in sections 6i and 6j of the Contract?

ANSWER: See Discussion.

DISCUSSION: Pursuant to section 6a of the Contract, the Inspection Period is ten (10) days after Contract acceptance unless otherwise specified. Therefore, the term "Inspection Period" in the Contract probably does not include the Inspection Period Notice and Buyer Disapproval time periods in sections 6i and 6j of the Contract. To avoid ambiguity and disputes, the Non-refundable Earnest Money clause in the Arizona REALTORS® Additional Clause Addendum should be used, which provides in part that "Buyer's earnest money shall be non-refundable unless Buyer elects to cancel pursuant to Section 6 of the Contract . . .".

MANAGER GENERALLY HAS THE AUTHORITY TO SIGN ON BEHALF OF A LIMITED LIABILITY COMPANY

FACTS: A husband and wife deeded the property to their Arizona limited liability company (LLC). The wife is listed as the manager of the LLC.

ISSUE: Who is the rightful owner of the property entitled to sign the listing agreement?

ANSWER: See Discussion.

DISCUSSION: The listing agreement is a contract between the broker and the seller and must be signed by the actual owner of the property. Here, the LLC is the owner of the property. Generally, the manager of a manager-managed limited liability company is entitled to conduct the company's activities and affairs and is the person with signing authority for an LLC. ARS § 29-3407(C). However, the owners of the LLC can limit the general powers of the manager in an operating agreement. ARS § 29-3105(A). Accordingly, the manager wife should sign the listing agreement unless the LLC's operating agreement says otherwise.

THE SELLER SHOULD DISCLOSE KNOWN PESTS

FACTS: Listing broker provided the seller with the Arizona REALTORS® Residential Seller's Property Disclosure Statement ("SPDS"). The seller did not disclose the presence of scorpions or javelinas on the property when completing the SPDS. The listing agent is aware there have been scorpions and javelinas on the property and discussed the failure to disclose with the seller. The seller insists that a seller is not obligated to disclose scorpions or javelinas to the buyer because the seller does not consider the scorpions or javelinas to be a problem.

ISSUE: What are a seller's disclosure obligations?

ANSWER: See Discussion.

DISCUSSION: The cover page to the SPDS states in part: "Residential Seller Disclosure Advisory. When in Doubt – Disclose!" The SPDS does not ask if the disclosed items are "problems," the SPDS asks: "Are you aware of or have you observed any of the following anywhere on the Property? (Check all that apply:)" and scorpions are the first prompt. Although javelinas are peccaries, which are not prompted for, they can be disclosed in the "other" category. The seller contractually promised to provide a SPDS and the failure to do so honestly and completely could result in liability.

Generally speaking, where a seller of real property knows of facts materially affecting the value of the property that are not readily observable and are not known to the buyer, the seller is under a duty to disclose those facts to the buyer. *Hill v. Jones*, 151 Ariz. 81, 725 P.2d 1115 (App. 1986). Additionally, pursuant to section 5b of the Arizona REALTORS® Residential Resale Real Estate Purchase Contract, the seller is obligated to disclose all known material latent defects that materially and adversely affect the consideration to be paid by the buyer.

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.

HOMEOWNER SHOULD NOT COMPLETE PAGE THREE (3) OF THE HOA ADDENDUM

FACTS: Prior to submitting an offer, buyer's agent received the H.O.A. Condominium / Planned Community Addendum (HOA Addendum). Upon reviewing the HOA Addendum, buyer's agent noticed that the seller had completed page one and lines 75-76 on page three of the HOA Addendum.

ISSUE: Is it appropriate for the seller to complete lines 75-76 on page three of the HOA Addendum?

ANSWER: No.

DISCUSSION: Page three (3) of the HOA Addendum should only be completed by the buyer as page three (3) is part of the buyer's purchase offer to the seller. In the event the seller receives buyer's offer and does not agree to the terms as set forth on page three (3) of the HOA Addendum, the seller may then submit a counter offer to the buyer.

Note: Similarly, a buyer should not complete page one (1) of the HOA Addendum. Rather, the buyer should only complete page three (3).

TENANT CAN VOLUNTARILY PAY ADVANCE RENT

FACTS: After the landlord rejected the tenant's rental application, the tenant offered to pay three months' rent in advance.

ISSUE: May the landlord accept tenant's offer to pay three months' rent in advance?

ANSWER: Yes.

DISCUSSION: Pursuant to A.R.S. §33-1321(A), "[a] landlord shall not demand or receive security, however denominated, including prepaid rent in an amount or value of more than one and one-half month's rent. This subsection does not prohibit a tenant from voluntarily paying more than one and one-half month's rent in advance." Therefore, the landlord may accept three months' advance rent from tenant if voluntarily offered.

BUYER'S FAILURE TO ACT DURING THE THREE (3) 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 (3) days prior to close of escrow. The buyer failed to deposit funds with the title company three (3) 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 (3) day cure period, the buyer still failed to deposit the funds with the title company. After the three (3) 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 (3) 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 (3) 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 (3) day Cure Period Notice, the buyer could have cured the potential breach by depositing the funds within three (3) days. The buyer also could have cancelled the contract within the three (3) 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 (3) 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.

ELECTRONIC SIGNATURES ARE ACCEPTABLE

FACTS: The buyer received a copy of AAR's Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards (Sales) ("Lead Paint Disclosure Form") but is hesitant to electronically sign the form because the buyer does not believe an electronic signature is sufficient for the federal disclosure requirement. The seller electronically signed the disclosure?

ISSUE: If the buyer electronically signs the Lead Paint Disclosure form, is the signature valid?

ANSWER: Yes. See Discussion.

DISCUSSION: The Arizona Electronic Transactions Act (the "ETA") creates statutory authority for creating contracts electronically. A.R.S. §44-7001, et. seq. The ETA provides that "[a] record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form." A.R.S. §44-7007(A). Nonetheless, the ETA applies only to a "transaction between parties each of which has agreed to conduct the transaction by electronic means." A.R.S. §44-7005(B). In this case, the seller already electronically signed the Lead Paint Disclosure Form. Therefore, if the buyer electronically signs the form, the behavior by both parties is evidence that the parties agree to conduct the transaction by electronic means. Accordingly, if the buyer electronically signs the Lead Paint Disclosure Form, their signature is valid.

SPDS WAIVER DOES NOT ELIMINATE DISCLOSURE OBLIGATIONS

FACTS: Contained in the listing is a comment that the seller will not be providing a Residential Seller's Property Disclosure Statement (SPDS) and that such must be waived by the buyer.

ISSUE: If the buyer agrees to waive the SPDS, is the seller still required to disclose to the buyer known facts about the property?

ANSWER: Yes.

DISCUSSION: Arizona law requires the seller to disclose material (important) facts about the property, even if not asked by the buyer or a real estate agent. These disclosure obligations remain even if the parties agree that no SPDS will be provided. As such, an agreement to waive the SPDS does not excuse the seller's disclosure obligations. Rather, it often makes it: (1) harder for sellers to satisfy their disclosure obligations; and (2) more likely that sellers will inadvertently fail to disclose a material fact.

NOTE: Even when a property is sold in as-is condition, sellers are still subject to the same legally imposed disclosure obligations.



ABOUT THE AUTHOR

Richard V. Mack

Richard V. Mack, a partner in the Phoenix office of Zelms Erlich Lenkov & Mack, has been a lawyer since 1990. He is a State Bar of Arizona certified real estate specialist and AV Preeminent® by Martindale Hubbell. He has also been designated as a 2008–2012 and 2014–2021 Super Lawyer and is a member of Arizona's Finest Lawyers. Mr. Mack also serves on the Arizona State Bar Real Estate Advisory Commission, which oversees the Real Estate Specialization Program, serving as vice chair in 2021. Mr. Mack 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 BBA with an emphasis in economics, and received his JD from the University of Arizona.

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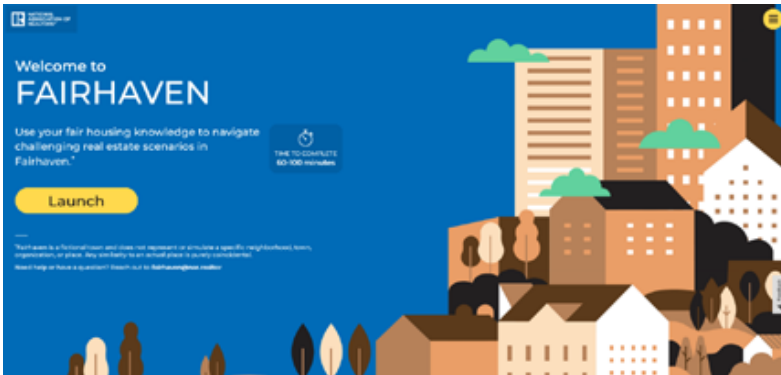
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