

# BMQ

BROKER | MANAGER QUARTERLY

## REVISED FORMS NOVEMBER 2024

### TRENDING TOPICS

Top FAQs For New Practice Changes and Forms: Round 2

Do You Truly Understand The Importance Of Statewide Forms And The Chaos That Would Ensur Without Them?

Buyer Representation Agreement Flyer

NAR Consumer Guides

Hire an AZ REALTOR® Media Campaign

Code of Ethics Videos

Window To The Law: Avoiding the Unauthorized Practice of Law



ARIZONA REALTORS®  
**BIMQ**  
BROKER | MANAGER QUARTERLY

# IN THIS ISSUE

PG  
3-4

Revised Forms: November 2024

PG  
6-7

Top FAQs for New Practice Changes  
and Forms: Round 2

PG  
9-10

Do You Truly Understand The Importance Of  
Statewide Forms And The Chaos That Would  
Ensure Without Them?

PG  
11

Buyer Representation Agreement Flyer

PG  
12

NAR Consumer Guides

PG  
13

Hire an AZ REALTOR® Media Campaign

PG  
5



LEGISLATIVE  
UPDATE

PG  
14



ARIZONA REALTORS®

LEGAL  
HOTLINE

PG  
18



CODE OF ETHICS  
VIDEOS

PG  
19



NATIONAL ASSOCIATION OF REALTORS®

WINDOW  
TO THE LAW



ARIZONA REALTORS®  
**REALTOR® DAY**  
AT THE CAPITOL

**ARIZONA CAPITOL**

WESLEY BOLIN MEMORIAL PLAZA

10:00 A.M. - 2:00 P.M.

# SAVE the DATE

MARCH 26, 2025



# REVISED FORMS

NOVEMBER 2024

The Arizona REALTORS® released seven (7) revised forms on or about November 1, 2024, but all include only minor changes. One (1) form was removed from the Arizona REALTORS® library of forms, and one (1) new flyer was created and placed in all Arizona REALTORS® forms platforms. The changes are as follows:

## **BROKER COMPENSATION IS NOT SET BY LAW AND IS NEGOTIABLE**

Five (5) forms were revised to emphasize that broker compensation is not set by law and is fully negotiable.

Per the National Association of REALTORS® practice changes, pre-closing disclosure documents are required to disclose in conspicuous language that broker commissions are not set by law and are fully negotiable. In August 2024, NAR advised that this practice change should be interpreted broadly and that the language should be included in any document that may be considered a pre-closing disclosure provided by a broker. The five (5) forms below were thus revised to include verbiage that broker compensation is not set by law and is fully negotiable:

- Consent to Limited Representation - A redline version can be found [HERE](#).
- Disclosure of Buyer Agency and Seller Waiver and Confirmation - A redline version can be found [HERE](#).
- Real Estate Agency Disclosure and Election - A redline version can be found [HERE](#).
- Unrepresented Buyer Disclosure - A redline version can be found [HERE](#).
- Unrepresented Seller Compensation Consent - A redline version can be found [HERE](#).

## **SELLER FUNDS TO BUYER BROKER MAY BE CREDITED TO BUYER**

Two (2) forms were revised to again disclose to the seller

that funds paid to a buyer broker may be credited to the buyer.

When a seller enters into a listing contract, they acknowledge that the compensation they pay to a buyer broker may be credited to the buyer. (e.g., Residential Listing Contract Exclusive Right to Sell/Rent at lines 59-60). However, sellers may not remember, or may misunderstand, that such a credit could occur when ancillary forms state the funds will be used for broker compensation. The two (2) forms below were thus revised to include verbiage to reiterate that buyer broker compensation may be credited to the buyer in whole or in part.

- Compensation Agreement Between Brokers - A redline version can be found [HERE](#).
- Seller Compensation Addendum - A redline version can be found [HERE](#).

## REMOVAL OF ONE FORM

The [Additional Compensation Consent](#) form has been removed from the Arizona REALTORS® library of forms. The form provided consent from a buyer and seller for a broker to perform additional services for a fee. However, the Risk Management Committee felt the form may be misused to increase broker compensation in violation of the practice changes and therefore withdrew it.

## BUYER REPRESENTATION AGREEMENT FLYER

Finally, a new [Buyer Representation Agreement Flyer](#) was drafted. The flyer can be provided to a potential buyer to help explain what a buyer representation agreement is and why the buyer is being asked to sign one. The flyer is inviting, easy to read, and emphasizes the value a REALTOR® provides to buyers. It is available in the forms library alongside the Buyer Broker Agreement to Show Property and Buyer-Broker Exclusive Employment Agreement forms.

## PRIOR FORM REVISIONS

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

Form updates are made to minimize your risk and ensure legal compliance. Don't take a chance with outdated forms. Prior Arizona REALTORS® form revisions (2014 – 2024) can be found at:

<https://www.aaronline.com/2019/05/20/form-revision-updates/>

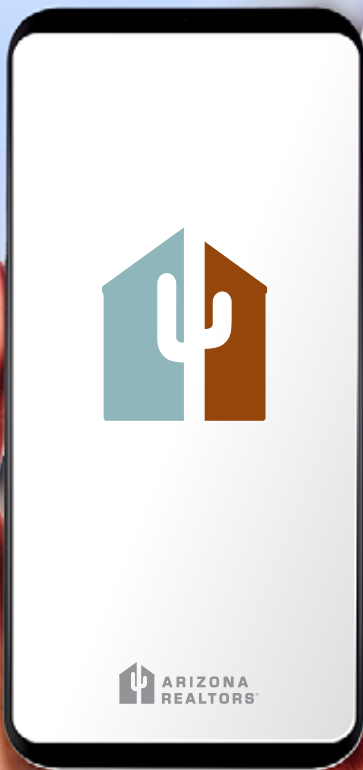


### ABOUT THE AUTHOR

#### **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.



# DOWNLOAD OUR NEW APP

**Be in the know  
while you are on the go!**

**Access valuable content from  
the Arizona REALTORS®**

AVAILABLE  
ON





## Q4 LEGISLATIVE UPDATE



The Key Contact program pairs a REALTOR® with every member of the state legislature so our elected officials can hear directly from our industry practitioners on what is happening in the real estate industry. You are your own best advocate, so whether you have an existing relationship with a state lawmaker or are willing to build a relationship with an elected official, the Arizona REALTORS® are here to help you succeed as a Key Contact or a Contact Team member.

Become part of the Arizona REALTORS®  
Key Contact Program



The REALTOR® Party is a vital part of the Arizona REALTORS® Government Affairs program — a program that includes professional lobbying, legislative analysis, grassroots contacts, and long-term political relationships. It strives to educate city council members, legislators and members of congress about our industry and guarantees that no decision is made that will affect our industry, good or bad, until our voice is heard.

Did you know your office can support the REALTOR® Party through a business investment in the Corporate Ally program? Learn more by watching the video below!

If you are interested in having your office hear more about the advocacy work of the Arizona REALTORS®, contact Tim Beaubien, Arizona REALTORS® Director of Legislative and Political Affairs at [timbeaubien@aaronline.com](mailto:timbeaubien@aaronline.com) to schedule a visit.



### 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.

# TOP FAQs FOR NEW PRACTICE CHANGES AND FORMS: **ROUND 2**



**Q1.** Is a buyer broker required to have a Compensation Agreement Between Brokers (CABB) signed before they show a property to their buyer?

**A1.** No. There is no requirement for a buyer broker to have a CABB signed ever, let alone prior to showing a property. In fact, the workgroup felt that practice would be cumbersome and envisioned that buyer brokers would probably request a CABB only for those properties that their buyer intended to make an offer to purchase.

**Q2.** Is a listing broker required to provide a Compensation Agreement Between Brokers (CABB) if their seller authorized compensation to a potential buyer broker in their ER-Residential Listing Contract (Listing Contract)?

**A2.** No. The Listing Contract allows the seller to authorize their listing broker to communicate an offer of compensation to a potential buyer broker and provides consent for the listing broker to enter into a CABB. There is no requirement for the listing broker to sign a CABB and some brokerages have chosen not to. Instead, those listing brokerages, at their seller's instruction, may request that the buyer submit a Seller Compensation Addendum (SCA) with their purchase offer in which the buyer requests that the seller compensate the buyer broker in the stated amount. Best practice would be for the seller and their listing broker to note in the **Additional Terms and Conditions** section of the Listing Contract the seller's preference for using the SCA. Keep in mind that it must be the seller's decision whether to offer cooperative compensation and, if so, how much.

**Q3.** A listing broker and a buyer broker enter into a Compensation Agreement Between Brokers (CABB) that fully compensates the buyer broker. What line on the Seller Compensation Addendum (SCA) does the buyer broker disclose the existence of the CABB?

**A3.** There is no reason to use the SCA in this situation.

When a CABB is already in place, the SCA should only be used if the buyer is requesting buyer broker compensation in *addition* to any compensation provided in a CABB. Here, the buyer broker is fully compensated via the CABB, so the SCA is unnecessary, and its use would be confusing and possibly in error of the intention of the parties.

**Q4.** The buyer agrees via a written representation agreement to compensate their broker 100 apples. The buyer subsequently submits a purchase offer, attached to which is a Seller Compensation Addendum (SCA). In the SCA, the buyer asks the seller to compensate the buyer broker 100 apples. The seller agrees and signs the SCA, at which point the buyer broker is assured that they will be fully compensated. Should the listing broker now send a Compensation Agreement Between Brokers (CABB) to the buyer broker for 100 apples?

**A4.** No. There is no reason to use the CABB in this situation because the buyer asked the seller, via the SCA, to fully compensate the buyer broker in the amount of 100 apples and the seller agreed. Therefore,

a CABB is unnecessary and would only serve to complicate matters. Please keep in mind that sending a CABB during purchase contract negotiations does not somehow trump or void a previously executed SCA, meaning that the use of a CABB in this situation may result in an unintended additional payment to the buyer broker.

**Q5. If it is agreed that a Compensation Agreement Between Brokers (CABB) is to be used in the transaction, when should it be signed by the brokers?**

**A5.** Best practice would be for the CABB to be fully signed prior to the buyer making a purchase offer. If a CABB that is not fully signed is sent with the buyer's purchase offer, the seller can accept the offer and reject the CABB. In such circumstances, there may be no legal obligation for either the seller or the listing broker to compensate the buyer's broker.

**Q6. The seller is verbally advertising an offer of compensation to a potential buyer's broker, but requests the compensation be requested by the buyer in a Seller Compensation Addendum (SCA). The amount offered is more than the compensation owed in the buyer's broker employment agreement. Can the buyer request the advertised amount of compensation offered in the SCA even though it exceeds the amount owed to the buyer's broker?**

**A6.** Yes, provided that the excess is credited to the buyer and not retained by the buyer's broker. Although the SCA indicates that the amount requested is for the purpose of compensating the buyer broker, there is nothing misleading about accepting the seller's offered amount of compensation that was advertised. Furthermore, the seller is aware and "acknowledge[d] that the buyer broker may credit part, or all, of their compensation to the buyer" in their ER-Residential Listing Contract.

**Q7. An agent intends to represent themselves in the purchase of a home. That purchase will run through the agent's brokerage. Must the agent enter into a buyer broker employment agreement with themselves?**

**A7.** Yes. A buyer broker employment agreement is between the brokerage and the buyer. It is not simply between the agent and the buyer. For that reason, one of two things should probably occur under this scenario:

(i) the agent signs the buyer broker employment agreement in their capacity as the buyer, which is then countersigned by the broker; or (ii) the agent signs the buyer broker employment agreement in two different locations and in two different capacities – one on behalf of the broker and one on their own behalf as the buyer. Either way, the agent should talk to their broker for guidance.

**Q8. The Buyer Broker Exclusive Employment Agreement provides three possibilities for a rate or amount of compensation (lines 33-36). Can a broker choose "other" and include a range of compensation?**

**A8.** No. The amount of compensation must be objectively ascertainable and may not be open-ended. This is required by the NAR Settlement. A range of compensation or writing in "whatever amount a seller offers" is not objectively ascertainable. Rather, it's open-ended, and therefore prohibited by MLS rules. "Other" compensation could include hourly rates, per showing amounts or any other compensation that reflects a sum certain.

**Q9. The seller is willing to pay compensation to a potential buyer broker but wants to pay as little as possible. Can the seller demand to see the buyer broker employment agreement before agreeing to pay buyer broker compensation?**

**A9.** It is not appropriate for the seller to demand the buyer broker employment agreement to gain a negotiating advantage. Conversely, it would not be appropriate for a buyer to demand the listing agreement for the same reason. Offers to compensate a potential buyer broker reflect a strategy to attract buyers. If the seller demands to see the confidential representation agreement between the buyer and their broker, it may turn off the buyer, thus having the opposite effect. Furthermore, a purchase offer that includes a request for buyer broker compensation should be evaluated on the net amount to be received by the seller. Please note a buyer broker cannot disclose the confidential terms of their employment agreement without the buyer's informed, express consent which should be obtained in writing.



The logo features a white house outline containing the Arizona Realtors logo and the text "2025 Spring" in a colorful, flowing script. Below the house outline, the word "CONFERENCE" is written in large, bold, white capital letters with a gold outline.

ARIZONA REALTORS®  
2025  
*Spring*  
CONFERENCE

**MAR 10-12, 2025**

GILA RIVER CASINO WILD HORSE PASS  
5040 W Wildhorse Pass Blvd, Chandler 85226



**SAVE THE DATE**

breeze  
into the

*New Year*

Sign up for Breeze between  
December 1 - 31, 2024

**AND BE ENTERED  
TO WIN A**

**\$200**

**VISA GIFT CARD\***

**WHAT IS BREEZE?** Visit the link below:  
<https://www.aaronline.com/breeze-by-skyslope/>

 breeze  
by SKYSLOPE

 ARIZONA  
REALTORS®

*\*Must be an Arizona REALTOR® member to be eligible to enter.  
Contest dates are from December 1-31, 2024. Five winners will be selected.*



# DO YOU TRULY UNDERSTAND THE IMPORTANCE OF STATEWIDE FORMS AND THE CHAOS THAT WOULD ENSUE WITHOUT THEM?

*“Consistency is one of the biggest factors in leading to accomplishment and success.”*

– Byron Pulsifer

Can you imagine the difficulty in practicing real estate if brokerages and agents each used their own Purchase Contract and ancillary forms, leaving agents to fight over which form will be used in a transaction? What about agents having to negotiate contractual documents with which they are unfamiliar or explain contractual provisions to their clients that they themselves have never seen before?

Fortunately, for decades, the Arizona REALTORS® has maintained transaction forms produced by the Association that have been adopted for use by members statewide. These forms, which can only be used by REALTORS®, have been used in countless transactions and have stood the test of time. In fact, provisions within Arizona REALTORS® forms have been expressly upheld and enforced by Arizona courts.

Furthermore, these forms are not simply drafted by an attorney in private practice who is not a real estate practitioner. These forms are instead drafted by many of the most experienced and knowledgeable REALTORS® in the state with assistance from legal counsel that is employed by the Arizona REALTORS®.

The Arizona REALTORS® currently maintains 70+ forms with several additional advisories. These forms are identified in the Arizona REALTORS® Strategic Plan as one of the Association’s most valuable assets and, in fact, there are many benefits of statewide forms, such as:

## 1. STANDARDIZATION

- **Consistency:** Standard forms ensure that all parties are using the same documents with consistent terms and



language, reducing confusion and miscommunication.

- **Compliance:** Forms are updated to reflect the latest legal requirements and industry practices, helping agents stay compliant with state laws and regulations.
- **Broker Ease of Use:** Brokers do not need to review boilerplate language of each form during their statutorily required review and do not have to approve a myriad of different forms, many of which they may not be familiar with.
- **Agent Ease of Use:** Agents do not need to read each form’s boilerplate provisions when writing or reviewing an offer and do not have to review a myriad of different forms, many of which they may not be familiar with.

## 2. LEGAL PROTECTION

- **Minimized Risk:** Standardized statewide forms are designed to be legally comprehensive, minimizing the risk

of omissions or errors that could lead to legal disputes.

- **Insurance Coverage:** Some insurance policies that cover errors and omissions claims require the insured brokerage to use standardized and established purchase contract forms or the policy provides more favorable coverage for their use.

- **Clear Terms:** Arizona REALTORS® forms provide clear and legally vetted terms with which REALTORS® across the state are familiar and that cover all aspects of real estate transactions.

### 3. EFFICIENCY

- **Time-Saving:** REALTORS® can save time by using standardized statewide forms.

- **Streamlined Transactions:** Using the same set of forms across the state simplifies the transaction process, making it easier to close deals efficiently.

### 4. TRAINING AND EDUCATION

- **Easier Learning Curve:** Agents can more easily learn the industry standard by using statewide forms, which are often covered in licensing courses and continuing education.

- **Consistency in Training:** Brokerages can provide consistent training to agents using these standard forms, improving overall professionalism and service quality.

### 5. ACCESSIBILITY

- **Widely Available:** Statewide forms are available to all REALTORS® in Arizona, ensuring that even smaller brokerages or independent agents have access to high-quality legal documents.

- **Digital Tools Integration:** Arizona REALTORS® forms are integrated into many different digital transaction management platforms, making it easier to fill, sign, and manage documents electronically, including TransactionDesk which is provided by the Association as a member benefit.

### 6. REDUCED DISPUTES

- **Clear Expectations:** Clear, standardized language helps set clear expectations for all parties, reducing the likelihood of misunderstandings and disputes.

- **Precedent of Use:** With widespread use, there is often a precedent in how certain clauses are interpreted, which can assist in resolving any disputes that do arise.

- **Legal Precedent:** Provisions within Arizona REALTORS® forms have been expressly upheld and enforced by Arizona courts.

The use of Arizona REALTORS® forms is not required, nor should it be. But the benefits of standardized statewide forms are undeniable as they provide a reliable framework that supports efficient, transparent, consistent, and legally sound real estate transactions.



ARIZONA REALTORS®

ARIZONA REALTORS®  
**VOICES**  
PODCAST

FEBRUARY 6, 2024  
A Look at Arizona Real Estate in 2023  
Arizona REALTORS® Voices Podcast

Listen on  
Apple Podcasts

Spotify

**NOW PLAYING  
ON YOUR FAVORITE  
PLATFORMS**

# THE BUYER REPRESENTATION AGREEMENT FLYER IS NOW AVAILABLE IN THE FORMS LIBRARY

alongside the  
**Buyer-Broker Agreement to Show Property** and  
the **Buyer-Broker Exclusive Employment Agreement** forms

## WHAT IS A BUYER REPRESENTATION AGREEMENT?

WHY AM I  
*being asked  
to sign one?*

Buying a home is often the largest purchase of your life. But don't worry - your REALTOR® is here to help you navigate the home buying process and is **ethically obligated to work in your best interest, abiding by the REALTOR® Code of Ethics.**

---

Equally important is that you know what your REALTOR® is going to do for you and the cost associated with their services.

For that reason, as of August 17, 2024, all REALTORS® nationwide will require their buyers to enter into a written representation agreement prior to touring a home.

Remember, **broker compensation is not set by law and is fully negotiable** between you and your REALTOR®. Carefully read the document, make sure you understand and agree to all the terms, and ask your REALTOR® or legal advisor any questions you might have. As REALTORS®, we want to ensure the terms of your representation are clear and transparent.



## OUR PROMISE *to you*

**WHEN USING A REALTOR® REPRESENTATION FORM, YOU ARE GUARANTEED THAT THE AGREEMENT WILL INCLUDE:**

- An identifiable and specific amount or rate of compensation your REALTOR® will receive for their services; and
- A term that prohibits your REALTOR® from receiving compensation for brokerage services that exceeds the rate or amount agreed to.



Copyright © 2024 Arizona Association of REALTORS®. All rights reserved.



## NAR CONSUMER GUIDES

The National Association of REALTORS® Consumer Guide series provides resources to consumers to help explain and simplify difficult subject matters.

**CONSUMER GUIDE:**  
**LISTING AGREEMENTS**

[CLICK HERE TO VIEW](#)

The NAR Consumer Guide: Listing Agreement publication is to educate sellers on what a listing agreement provides and what options are available when marketing their home.

**CONSUMER GUIDE:**  
**OPEN HOUSES AND WRITTEN AGREEMENTS**

[CLICK HERE TO VIEW](#)

The NAR Consumer Guide: Open Houses and Written Agreements publication is to educate buyers when they will need a written agreement when working with a REALTOR®.



**FOR OTHER HELPFUL GUIDES IN THIS SERIES, GO TO [FACTS.REALTOR](https://facts.realtor)**

# HIRE AN AZ REALTOR® MEDIA CAMPAIGN

In August, the Arizona REALTORS® launched a statewide consumer advertising campaign highlighting the Benefits of Working with a REALTOR®.

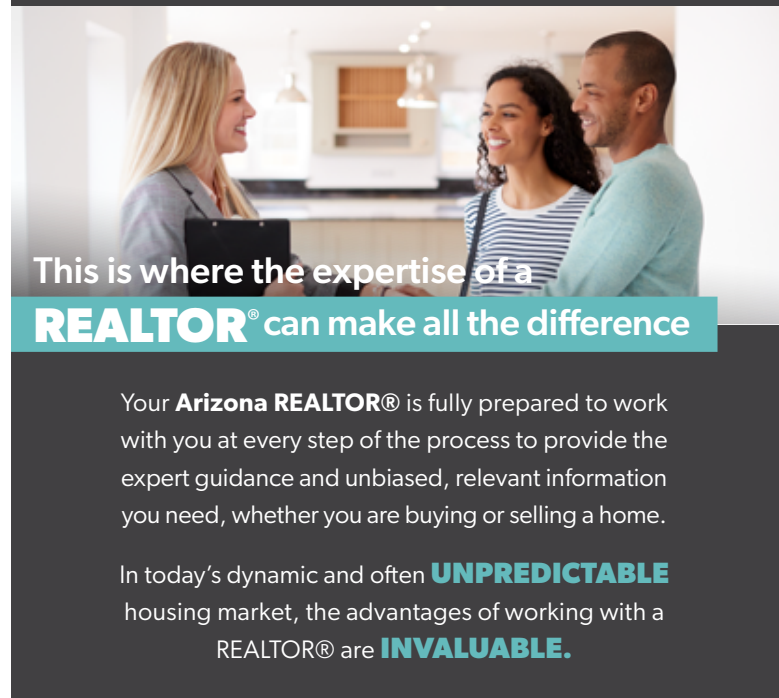
The campaign started on August 1st via a [PRESS RELEASE](#) sent to media statewide announcing the Association's release of new and revised forms; practice changes that are taking effect; and an explanation as to how the changes benefit consumers. The announcement also explained that only REALTORS®, not all real estate licensees, are adopting this pro-consumer policy which mandates the use of buyer representation agreements, once again proving the value of working with a REALTOR®.

The association's public relations firm, HMA Public Relations, coordinated the first stage of our statewide consumer advertising efforts through the following mediums:

1. Radio ads on iHeart stations, a myriad of terrestrial radio stations, NPR, and numerous streaming services. The iHeart radio stations are also playing the ad via their digital platforms.
2. Print ads were designed and placed in magazines throughout the state that reach our desired target audience including lifestyle magazines.
3. Paid targeted social media ads now appear on platforms such as Facebook and Instagram which will show in a consumer's feed based on their recent relevant search history.
4. Finally, editorial and Op-Ed articles have and will continue to appear in print and broadcast media statewide.

The goal of the campaign is to drive consumers to an Arizona REALTORS® consumer facing webpage, [www.hireazrealtors.com](http://www.hireazrealtors.com), which includes reasons to hire a buyer agent and seller agent and contains a directory to assist consumers in locating a REALTOR® in their area.

Our industry has faced numerous challenges over the years, and your state association will continue working to help members navigate these changes in a way that enables all Arizona REALTORS® to continue providing professional representation to their clients while ensuring that their business thrives.



## HIRE AN AZ REALTOR®

A REALTOR® is a member of the National Association of REALTORS®.

For more information on the benefits of using an Arizona REALTOR® and to connect with a qualified professional, visit:

[www.hireazrealtors.com](http://www.hireazrealtors.com)



ARIZONA REALTORS®

# LEGAL HOTLINE

A resource for

**BROKERS**

needing

**LEGAL  
INFORMATION**

The Hotline is provided by the attorneys at  
Zelms Erlich Lenkov & Mack.



## THE ARIZONA REALTORS® LEGAL HOTLINE IS DESIGNED:

- 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.

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](mailto:jamillabrandt@aaronline.com)

**GET ANSWERS TODAY**

[www.aaronline.com/manage-risk/legal-hotline/](http://www.aaronline.com/manage-risk/legal-hotline/)



ARIZONA  
REALTORS®



By Zelms Erlich Lenkov & Mack | Copyright© 2024, all rights reserved.

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.

## REAL ESTATE DOCUMENTS MAY BE SAVED IN THE CLOUD UNDER APPROPRIATE CIRCUMSTANCES

**FACTS:** The real estate broker stores its documents in the cloud pursuant to an agreement with a vendor. The broker does not know the actual physical address of where the server is located. In fact, the vendor has several servers throughout the country that may house the data, depending upon various circumstances.

**ISSUE:** Is this arrangement permissible by statute?

**ANSWER:** Yes.

**DISCUSSION:** By statute, offsite storage of real estate transactions and employment records is permissible if notice is provided to the Arizona Department of Real Estate and the documents are saved in state. See A.R.S. § 32-2151.01(A). Thus, cloud storage may violate the strict interpretation of the statute, especially if the servers storing the data are located out of the state. However, the Arizona Department of Real Estate takes the position that, provided the documents are accessible from the brokerage office located in the state, storage in the cloud does in fact comply with the statutory mandate of A.R.S. § 32-2151.01(A).

## REMOVABLE POOL FENCE LIKELY PERSONAL PROPERTY

**FACTS:** The property has a removable pool fence around the pool that is not drilled into the pool deck. Therefore, the fence is not attached to the real property. Buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (“Contract”), but the removable pool fence was not addressed in section 1(g) of the Contract. Buyer and seller are now in a dispute at close of escrow. The buyer insists that the pool fence is a fixture and conveys with the property. The seller insists that they

always intended to keep the pool fence, it is their personal property, and does not convey with the property.

**ISSUE:** Is an unaffixed removable pool fence a fixture or personal property?

**ANSWER:** See Discussion.

**DISCUSSION:** The issue of whether an item is a fixture or personal property results in many disputes. Arizona courts employ a three-part test for determining when personal property has become a fixture: (1) annexation (affixed) to the realty; (2) adaptability or application as affixed to the use of the real estate; and (3) an intention of the party to make the object a permanent part of the realty. *Murray v. Zerbel*, 159 Ariz. 99, 101, 764 P.2d 1158 (App. 1988). Since the removable pool fence is not drilled into the pool deck and therefore not affixed to the real property, the seller did not intend to make the removable pool fence a part of the real property, and it is not addressed in the Contract, the removable pool fence is probably personal property, which does not convey at close of escrow.

*Note: Best practice would be for the buyer to include any questionable fixtures or personal property that they want to convey with the sale to be explicitly included in their offer. Best practice would also be for the seller to physically remove any questionable fixtures or personal property that they want to keep from the property prior to listing it for sale.*

## THERE IS A REMEDY FOR EVERY BREACH OF CONTRACT BUT THE REMEDY IS NOT ALWAYS CANCELLATION

**FACTS:** At the walkthrough, the buyer discovers that the seller has not repaired a window as agreed upon in the Arizona REALTORS® Residential Buyer’s Inspection Notice and Seller’s Response (BINSR) form. The cost of the window repair is approximately \$500. The purchase price of the property is \$750,000. The buyer wants to cancel the contract due to the seller’s failure to repair the window.

**ISSUE:** Is the buyer entitled to cancel the contract due to the seller's failure to repair the window as agreed?

**ANSWER:** See Discussion.

**DISCUSSION:** Although there is a remedy for every breach of contract, the remedy is not always cancellation. The buyer should deliver a cure notice to the seller. The buyer may then delay closing for up to three (3) days to allow the seller the opportunity to repair the item. In the alternative, the buyer may close escrow and if the seller fails to make the repair within three days, pursue the seller for the breach and recover the cost of the repair (in small-claims court, mediation, arbitration or litigation). If the buyer delays COE for the three-day cure period and the seller still has not completed the repair, the seller is in breach of contract. Section 7b of the contract sets forth the remedies in the event of a breach: "the non-breaching party may cancel this Contract and/or proceed against the breaching party in any claim or remedy that the non-breaching party may have in law or equity, subject to the Alternative Dispute Resolution obligations" set forth. However, if the buyer wants to cancel the contract due to the \$500 unrepaired window on a \$750,000 transaction, the buyer's broker should refer the buyer to legal counsel.

### **SELLER'S REMEDY FOR BUYER'S FAILURE TO SIGN LOAN DOCUMENTS THREE (3) DAYS BEFORE CLOSE DEPENDS UPON THE CIRCUMSTANCES**

**FACTS:** The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract ("Contract"). Three (3) days prior to close of escrow the buyer has not signed loan documents and the buyer's lender has not issued a loan denial.

**ISSUE:** Should the seller issue a cure notice?

**ANSWER:** Yes.

**DISCUSSION:** Pursuant to the Contract at section 2(b), no later than three (3) days prior to COE, the buyer must either: (1) sign the loan documents; (2) deliver notice of loan approval without PTD conditions and dates of receipt of Closing Disclosures from lender; or (3) deliver a notice of inability to obtain loan approval. If the buyer fails to sign the loan documents or deliver the required notice three (3) days prior to the COE Date, the seller should give the buyer a Cure Period Notice pursuant to section 7(a). If the buyer cures by closing escrow, there is no breach. If the buyer cures by submitting the notice of inability to obtain loan approval, there is no breach. If the buyer did not obtain loan approval and fails to deliver the notice of inability to obtain loan approval, the buyer is in breach (not for the failure to

qualify, but for the failure to deliver the notice) and the seller agrees to accept the earnest money as damages as set forth in section 7(b). If the buyer obtained loan approval, but refuses to close escrow, the buyer is in breach of contract and the seller should consult legal counsel.

### **PERSONAL REPRESENTATIVE GENERALLY HAS THE AUTHORITY TO SIGN ON BEHALF OF A PROBATE ESTATE**

**FACTS:** A husband and wife owned the property as tenants in common. The husband died and the death certificate was recorded.

**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(s) of the property. Here, the property was owned by the husband and wife as tenants in common. Holding title as tenants in common, does not have a survivorship feature. In other words, in the event that one owner passes away, the deceased owner's interest does not automatically convert to the survivor's interest. Rather, the interest becomes a part of the deceased owner's estate and must generally be dealt with through probate.

Here, the wife is an owner and can sign the listing agreement for her portion of the property. The husband's portion of the property must be probated. Generally, the personal representative of a probate estate is the person with signing authority for the probate estate. ARS § 14-3711.

*Note: Title companies are never obligated to issue title insurance even under lawful circumstances. Best practice is to contact a title company prior to listing the property for sale if there are any doubts regarding who is legally authorized to sign on behalf of a limited liability company, corporation, trust or probate estate.*

### **A SECURED LENDER MAY CHARGE NO MORE THAN \$30 FOR A PAYOFF STATEMENT**

**FACTS:** A buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract. Prior to close of escrow, the seller, through the escrow company, made a written demand for a payoff statement to the seller's lender. The lender provided a payoff statement to the escrow company and directed the escrow company to charge the seller \$150 for the payoff statement.

**ISSUE:** Can the lender charge \$150 to the seller for the payoff statement?



**ANSWER:** No.

**DISCUSSION:** Pursuant to A.R.S. § 33-715:

(A) On the written demand of an entitled person or that person's authorized agent, a secured lender shall prepare and deliver a payoff demand statement to the person who has requested it within fourteen days after receipt of the demand.

(I) The secured lender may assess a fee of no more than thirty dollars for furnishing each payoff demand statement. This is conclusively presumed to be reasonable.

Pursuant to A.R.S. § 33-420.01:

(C)(2) "Secured lender" means any one of the following:

- (a) A mortgagee on a mortgage.
- (b) A beneficiary on a deed of trust.

Therefore, the lender may only charge the seller \$30 for the payoff statement.

## NOTICE OF CANCELLATION BASED ON APPRAISAL VALUE MUST BE GIVEN WITHIN FIVE (5) DAYS OF NOTICE OF THE APPRAISED VALUE

**FACTS:** The buyer and seller executed an Arizona REALTORS® Residential Resale Real Estate Purchase Contract. The buyer received notice that the appraisal came in \$10,000 under the contract purchase price. The buyer is appealing this appraised value but it will take more than five (5) days to get the results.

**ISSUE:** Does the buyer have five (5) days after receipt of the initial appraisal or the results of the appeal to cancel under the appraisal contingency?

**ANSWER:** See Discussion.

**DISCUSSION:** The appraisal contingency provides as follows:

**Appraisal Contingency:** Buyer's obligation to complete this sale is contingent upon an appraisal of the Premises acceptable to lender for at least the purchase price. If the Premises fails to appraise for the purchase price in any appraisal required by lender, Buyer has five (5) days after notice of the appraised value to cancel this Contract and receive a refund of the Earnest Money or the appraisal contingency shall be waived, unless otherwise prohibited by federal law.

The contract addresses "notice of the appraised value," not an appeal. Accordingly, the cancellation period will expire five (5) days after the buyer's receipt of the appraisal.

*Note: The buyer may contact the seller in an attempt to extend the appraisal contingency period by way of an addendum.*

## DEPOSIT OF EARNEST MONEY IS CURABLE

**FACTS:** In the "Additional Terms" section on the Arizona REALTORS® Residential Resale Real Estate Purchase Contract ("Contract"), it states "earnest money to be deposited within 48 hours." The buyer has not submitted the earnest money within the 48-hour timeframe.

**ISSUE:** Is the Contract cancelled?

**ANSWER:** No. See Discussion.

**DISCUSSION:** Pursuant to Section 7a of the Contract, "If a party fails to comply with any provision of this Contract, the other party shall deliver a notice to the non-complying party specifying the non-compliance. If the non-compliance is not cured within three (3) days after delivery of such notice ("Cure Period"), the failure to comply shall become a breach of Contract." Accordingly, a cure notice is required and if the earnest money is not deposited by the three (3) day cure period expiration, the buyer is in breach.

*Note: Section 1c of the Contract provides that earnest money will be deposited upon acceptance of the offer.*

## EXPANSIVE SOILS IN THE AREA SHOULD BE DISCLOSED IN THE PUBLIC REPORT

**FACTS:** A property owner (Subdivider) offered 40 lots for sale. The Subdivider has a public report from a year earlier which shows there is no expansive soil within the community. The Subdivider and a buyer entered into a contract for one of the lots and the Subdivider provided the buyer with the existing public report. Months later, the Subdivider's broker discovered that the city is requiring all builders to perform soil tests before building because there is expansive soil in the area.

**ISSUE:** Should the public report be updated disclosing the city requirement for soil testing, and can the Buyer cancel with this newly discovered requirement?

**ANSWER:** See Discussion.

**DISCUSSION:** If, at any time after approval and issuance of the Public Report, there is a material change to the development, the offering, or any disclosures in the Public Report, the Report must be amended and any existing purchasers under contract must be given a copy of the approved amended Public Report.

Furthermore, a seller must disclose known material facts. See *Hill v. Jones*, 151 Ariz. 81, 85, 725 P.2d 1115, 1119 (App.

1986). A fact is material if it is one to which a reasonable buyer would attach importance in making a decision as to the consideration to be paid for the property. *Id.* Based on the above, the public report should be amended because the Subdivider is now aware of expansive soils and the city requirement for soil testing. Upon receipt of the newly disclosed information, the buyer may thereafter cancel the contract.

### A REAL ESTATE LICENSEE MUST COMPLY WITH THE FAIR HOUSING ACT EVEN WITH THEIR PERSONAL RESIDENCE.

**FACTS:** A real estate licensee owns a single-family residence. The garage of the home has been converted into a small studio apartment. The licensee wants to advertise the studio apartment for rent to a "Single" person. The licensee

believes she can advertise for single tenants because she is exempt from the Fair Housing Rules as her property is an owner-occupied property.

**ISSUE:** Can a licensee advertise her studio apartment for rent to a single tenant only?

**ANSWER:** No.

**DISCUSSION:** A homeowner cannot publish a discriminatory ad or advertise in violation of the Fair Housing Act. There are, however, limited circumstances where a guest house of an owner-occupied property can be restricted to single persons or a specific gender. Regardless, these limited exceptions to the Fair Housing Act do not apply when a real estate licensee is involved in the transaction. See 42 U.S.C. § 3603.



#### 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.



## CODE OF ETHICS VIDEOS

Videos depicting NAR's Code of Ethics are now available on the Arizona REALTORS® website. Tune in and watch how various scenarios play out and decide for yourself whether there has been a violation of the Code of Ethics.

For a playlist, click below:



# WINDOW TO THE LAW: AVOIDING THE UNAUTHORIZED PRACTICE OF LAW



NATIONAL ASSOCIATION OF REALTORS®

## WINDOW TO THE LAW

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.

**Avoiding the Unauthorized Practice of Law**

Know where the line is between helping your client navigate a transaction, and providing legal advice with these strategies.

Share

**CLICK ARROW ABOVE TO WATCH THE VIDEO**

### Window to the Law

Window to the Law is a monthly video series focusing on a legal topic of interest. Not just for legal professionals, Window to the Law covers topics applicable to legal compliance for real estate professionals, brokerages, and REALTOR® associations.

To view videos visit: <https://www.nar.realtor/videos/window-to-the-law>

**More Legal Information** View NAR's Legal topics <https://www.nar.realtor/legal>



NATIONAL  
ASSOCIATION *of*  
REALTORS®

Welcome to  
**FAIRHAVEN**

Use your fair housing knowledge to navigate challenging real estate scenarios in Fairhaven.

Launch

Fairhaven is a fictional town and does not represent or describe a specific neighborhood, town, organization, or place. Any similarity to an actual place is purely coincidental.  
©2023 National Association of Realtors. All rights reserved.

### Welcome to Fairhaven

Jump into Fairhaven, a fictional town where REALTORS® work against the clock to sell homes while confronting discrimination in the homebuying process.

**CLICK TO LEARN MORE ABOUT FAIRHAVEN**

