



ARIZONA REALTOR® DIGEST ONLINE



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Comprehensive Septic Tank Inspection Program Begins July 1, 2006

by Chuck Graf, R.G.

Effective July 1, 2006, new Arizona Department of Environmental Quality rules require any person transferring a property served by an on-site wastewater treatment facility (either a conventional septic tank system or an alternative system) to have a transfer of ownership inspection of the facility performed.

This will be a change from the current ADEQ program, which requires inspection at the time of property transfer for only newer systems.

Real estate professionals need to be aware of the new requirements because of the great number of property transactions in Arizona that involve a septic tank or alternative wastewater treatment and disposal system. The ADEQ requirements provide a consistent procedure for inspections and permit transfers of ownership for use throughout Arizona. The requirements also are designed to mesh with the inspection provisions contained in the standard Arizona Association of REALTORS® real estate contract. In many property transfer situations, it is anticipated that REALTORS® will facilitate the filing of required forms by sellers and buyers.

By way of background, all sewage facilities in Arizona, from large regional wastewater treatment plants to household on-site systems, are

regulated under ADEQ's Aquifer Protection Permit (APP) program. On-site systems are regulated under the general permit provisions of the APP program, with permitting functions performed either by ADEQ or, in most cases, by a county government agency authorized by ADEQ to perform those duties. ADEQ's regulatory program for on-site systems prescribes the permitting process, establishes site investigation and design standards, and specifies operation and maintenance requirements applicable to the permittee (owner of the on-site wastewater treatment facility). Overall, the intent of ADEQ's program is to protect public health and prevent contamination of Arizona's surface water and groundwater resources. The transfer of ownership inspection is one component of the program to achieve these public health and water quality protection goals.

With regard to the transfer of ownership inspection, the ADEQ rule prescribes both the steps involved in the inspection process and requirements for the actual inspection. The steps in the transfer of ownership inspection process are as follows:

1. The transferor of the property served by the on-site system (i.e., the property owner) must retain a qualified inspector to perform the inspection not

more than six months before the date of the property transfer.

2. Inspector qualification standards apply. An inspector must meet all of the following requirements:

- a. Possess working knowledge of the type of facility and the inspection process,
- b. Hold a certificate of training from a course for inspectors recognized by ADEQ (ADEQ has collaborated with the University of Arizona and other entities to provide such courses), and

c. Hold a license in one of the following categories:

- 1) An Arizona-registered engineer,
- 2) An Arizona-registered sanitarian,
- 3) An owner of a vehicle licensed under ADEQ rules to pump or haul septage, or an employee of the licensee,
- 4) A contractor licensed as either a B-4, C-41, A, A-12, L-41, KA, or K-41 contractor by the Registrar of Contractors,
- 5) A wastewater treatment operator certified by ADEQ,
- 6) A person qualifying under another category designated by ADEQ.

3. The inspector performs the inspection, records the inspection information on the ADEQ Report of Inspection form, signs and dates the form, and delivers it to the person transferring the property.

4. Before the property is transferred, the transferor of the property (seller) must provide the transferee (buyer) the following:

- a. the completed Report of Inspection form, and

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- b. Any documents in the transferor's possession relating to permitting, operation, and maintenance of the on-site system.
5. The transferee must complete the ADEQ Notice of Transfer form and submit it with the applicable fee within 15 days following the property transfer. ADEQ expects to have programming complete by July 1, 2006, to allow the transfer of ownership filing process to be done entirely over the Internet including payment of fee.

(The current fee in ADEQ rules for notices of transfer of ownership is \$50, but this is a blanket fee that applies to all discharging facilities operating under a General Permit under the APP program. ADEQ is in the process of determining a fee specifically applicable to the Notice of Transfer for on-site wastewater treatment facilities and has indicated that it will adjust that fee downward from the \$50 blanket fee.)

6. If ADEQ issued a Discharge Authorization for the on-site wastewater treatment facility but the facility was not put into service before the property transfer, a transfer of ownership inspection is not required, but the new owner of the property must still file the Notice of Transfer form described above to provide new owner information to ADEQ. (For example, a person buying a property from a builder who had constructed a new home and on-site system would have to file the Notice of Transfer, but the builder would not have to obtain a transfer of ownership inspection of the new system.)

The ADEQ rule also prescribes the key elements of the inspection and what the inspector must record on the Report of Inspection form.

1. The inspector must address the physical and operational condition of the on-site wastewater treatment facility and describe observed deficiencies and repairs completed, if any.

2. The Report of Inspection completed by the inspector must indicate that each septic tank or wastewater treatment vessel on the property was pumped or was otherwise serviced to remove, to the maximum extent possible, solid, floating, and liquid waste accumulations. The ADEQ rule allows exceptions from the pumping requirement in three circumstances:

- a. A Discharge Authorization was previously issued for the system and the system was put into service not more than 12 months before the date of the property transfer,
- b. Pumping or servicing was not needed at the time of inspection based on manufacturer's written operation and maintenance instructions (this may apply to certain alternative systems),
- c. No accumulation of floating or settled waste was present in the septic tank or wastewater treatment container (this may exempt certain remote or seasonal systems getting very little use).

The following information regarding transfer of ownership inspections is available on the Internet:

- [Text of the ADEQ rule](#) (scroll down to Arizona Administrative Code R18-9-A316) governing transfer of ownership inspections for on-site wastewater treatment facilities
- The [Report of Inspection form](#) that must be filled out by a qualified inspector and given to the transferor of the property
- The [Notice of Transfer form](#) that must be filled out by the transferee of the property and filed with ADEQ ▲

Chuck Graf is the senior hydrologist, Water Quality Division, Arizona Department of Environmental Quality.

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NATIONAL NEWS

NAR Takes Issue with Good Morning America Segment

AR President Thomas M. Stevens is asking the producers of ABC TV's Good Morning America for equal time after the show ran a misleading and misinformed consumer-advice segment about real estate practitioners. The segment, which aired March 24 under the title, "Tricks of the Trade: Confessions of a REALTOR®," claims consumers shouldn't trust everything practitioners say. The segment "gave a very inaccurate, grossly misleading and unfair depiction of the nation's REALTORS®," says Stevens. "Several of the allegations made by the guest described practices that violate the REALTOR® Code of Ethics, such as intentionally misrepresenting a property and could be grounds for suspension of membership. Because of the Code, all REALTORS® know such behavior is wrong." Stevens called upon the producers to balance the show's coverage by giving REALTORS® the chance to respond. To read what was said on the show, go to [the show's website](#). View NAR's [Code of Ethics on AARonline](#). ▲

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LEGAL ISSUES

The Sale of Manufactured and Mobile Homes by Real Estate Brokers

by K. Michelle Lind Esq., AAR General Counsel

A Department of Building and Fire Safety license is generally required to sell manufactured/mobile homes.

Generally, a license issued by the Office of Administration of the Arizona Department of Building and Fire Safety (“DBFS”) is required to act as a broker or salesperson in the sale of manufactured homes, mobile homes and factory-built buildings (also known as modular) and subassemblies.ⁱ Pursuant to A.R.S. §41-2194(3-4), it is unlawful to “engage in the business of a salesperson of manufactured homes, mobile homes or factory-built buildings...” or engage in the business of contracting to sell any new or used manufactured home, mobile home, factory-built building or sub-assembly (hereinafter collectively referred to as “manufactured/mobile home”) without a license issued by the DBFS.

There is a limited exemption from the DBFS licensing requirements for real estate licensees.

Pursuant to A.R.S. §41-2178(B)(1), the requirements of licensure from the DBFS do not apply to:

Real estate brokers and real estate salesmen licensed under section 32-2122... with respect

to used manufactured homes, mobile homes, factory-built buildings or subassemblies, if the manufactured home, mobile home, factory-built building or subassembly is listed in a contract for transfer of an interest in real property executed by its owner and is installed on the real property.

FAQ’s on qualifying for the DBFS licensing exemption

(1) What are the statutory requirements of the DBFS licensing exemption?

- The manufactured/mobile home must be “used.”
- The manufactured/mobile home must be “installed” on the property.
- The manufactured/mobile home must be “listed” in a contract for transfer of an interest in real property executed by its owner.

(2) When is a manufactured/mobile home “used”?

A used manufactured/mobile home is one “which has been sold, bargained, exchanged or given away from a purchaser who first acquired the unit which was titled in the name of such purchaser. . .in good faith from a licensed dealer or broker for purposes other than resale.” See A.R.S. §41-2142(27) and A.R.S. §41-2142(39).

(3) When is a manufactured/mobile home “installed” on the property?

Pursuant to A.R.S. §41-2142(18), a manufactured/mobile home is installed on the property when it is:

- a) connected to on-site utility terminals.
- b) placed on a foundation system.
- c) secured by ground anchoring.

“Installation” does not require the filing of an affidavit of affixture for purposes of the exemption.

(4) When is a manufactured/mobile home “listed” in a contract for transfer of an interest in real property executed by its owner?

This occurs when both the manufactured/mobile home and the real property interest is transferred in the same purchase contract. In order to transfer both the manufactured/mobile home and an interest in the real property in the same purchase contract, the seller must either own the real property or have the right to directly assign the lease for the property.

(5) What is the significance of recording an affidavit of affixture?

Except in limited circumstances set forth in A.R.S. §33-1501ii, an affidavit of affixture may be recorded by a person who owns a mobile home that is installed on real property owned by the owner. A.R.S. §42-15201 et. seq. A mobile home that has been permanently affixed to real property and for which an affidavit of affixture has been recorded:

- will be assessed as real property A.R.S. §42-15202, and
- any liens against the mobile home must be perfected in the same manner as real property or a fixture. A.R.S. §28-2135

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So, when can a real estate broker sell a manufactured/mobile home?

According to the DFBS, a real estate licensee may list and sell a manufactured/mobile home without a DFBS license only if:

- the manufactured/mobile home is:
 - used,
 - installed on the real property, and
 - listed in the purchase contract for the transfer of an interest in the real property executed by its owner (i.e., the seller owns the real property or has the right to directly assign the lease for the property), or
 - an affidavit of affixture has been recorded against a used manufactured/mobile home so that it is considered real property.

For additional information

- For information on obtaining a DFBS license, visit the Arizona Department of Building and Fire Safety [website](#).
- To review the Arizona statutes governing the sale of manufactured/mobile homes, visit the State Legislature [website](#). ▲

Michelle is general counsel to the Arizona Association of REALTORS® and a State Bar of Arizona board certified real estate specialist.

This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.

i The DBFS maintains and enforces standards of quality and safety for manufactured homes, mobile homes and factory-built buildings and reduces hazards to life and property through the maintenance and enforcement of the state fire code. Its purpose also includes consumer protection. The DBFS consists of the Board of Manufactured housing, the State Fire Safety Committee and the director of the department. The director's office consists of the Office of Manufactured Housing, the Office of the State Fire Marshal and the Office of Administration.

ii Pursuant to A.R.S §33-1501, a person who owns a mobile home located in a mobile home park on real property that is not owned by that person may file an affidavit of affixture with the county recorder of the county in which the real property is located if: (1) the mobile home has been installed on the real property with all wheels and axles removed in compliance with applicable state and local mobile home installation standards; (2) the owner of the mobile home has entered into a lease for the real property on which the mobile home is located for a primary term of at least twenty years and the lease specifically permits the recording of an affidavit of affixture; (3) before filing the affidavit of affixture, a memorandum of lease is recorded that includes all of the requirements set forth in the statute. Once recorded, the mobile home and the leasehold interest to which it is affixed shall be treated as real property.

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YOUR BUSINESS

Zip Tips

Introducing ZipForm® Concierge

ZipForm® Online users are able to help their clients connect/disconnect their utilities in one easy step. No need to reenter data - customer and property information for a client can be sent straight from ZipForm® Online to ZipForm® Concierge. Once sent (How: from ZipForm® Online - Select Action >> Other/Partners >> ZipForm® Concierge), the REALTORS® client will receive an email communication that will allow them to shop, request, and schedule their service connections/disconnections in minutes versus hours. Upon checkout, the service communicates the consumer's request to the selected providers just as if they had spent hours calling each. It simplifies the process and is a one-stop utility and service connection service. The consumer then receives confirmation emails confirming each service request which includes the pertinent request information such as connection dates/times and new phone numbers. It's a nationwide offer and it just takes a minute for REALTORS® to register their clients for fast and hassle-free utility connections.

There is no fee for this additional service to you as a ZipForm® user. There may be a convenience fee of \$19.95 for the consumer. This is determined by what services are ordered. In most cases there is no fee involved. But if there is, it will never be charged without complete disclosure and approval by the consumer.

If you are a broker and are interested in a custom Concierge solution for your company, please contact ZipForm®. For Product Details, a REALTOR® FAQ, Consumer Information and a User Tutorial, please visit ZipForm.com.

New in the NAR Library: eBooks

Several hundred electronic books and digital audio books are available for you to download through the NAR Virtual Library eBooks collection. Read or listen to popular real estate, business, sales and marketing, management, and personal growth titles at your computer, on your handheld device, from your Smartphone, or on the road. To download and register your free eReader software, go to [eBooks](#). Sign in with your NRDS number, and download up to three eBooks at a time for a 21-day period. For more information, contact Mary Martinez, mmartinez@realtors.org or 312/329-8832.

Do You Know Your Federal Fax Laws?

Do your marketing practices comply with the federal Junk Fax Prevention Act of 2005? The act, signed into law on July 9, 2005, governs all facsimile communications that contain an advertisement. Under the law, real estate professionals can only send faxes containing an advertisement that meets certain criteria. Take this quiz to find out if you know all the rules for sending faxes to prospects, customers, and clients.

True or False

1. A brokerage is planning to send faxes to promote its real estate brokerage services. The brokerage will only send faxes to fax numbers it can obtain from a public source. On each fax, the brokerage will include a toll-free number that recipients can call to opt out of receiving future faxes from the brokerage. Because the brokerage provides an opt-out mechanism and obtains its fax numbers from a public source, its practices are legal.

- True
 False

2. A salesperson must obtain written permission from all clients before sending them advertising faxes (e.g., faxes that promote an upcoming open house).

- True
 False

3. The established business relationship exception to the federal faxing rules only lasts for 18 months following a transaction and three months following an inquiry.

- True
 False

4. Electronic advertising faxes that I receive on my computer through a computer modem are still covered by the federal fax laws.

- True
 False

5. The only way to stop "junk faxes" is to call the number on the bottom of the fax.

- True
 False

6. A toll-free number on the bottom of an advertising fax meets the "cost-free opt-out mechanism" required on unsolicited advertising faxes.

- True
 False

7. I participate in a multiple listing service, so I have an established business relationship with other participants; that allows me to send faxes of all my new listings to all other MLS participants.

- True
 False

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8. I can fax new listings to a client who has listed his property with me at the fax number contained on the business card he gave to me.

- True
 False

9. All faxes must contain the sender's name or the name of the entity on behalf of whom the fax is being sent.

- True
 False

10. Federal fax laws preempt my state's fax laws, so I only need to comply with the federal law.

- True
 False

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[Click here for the answers.](#)

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MEMBER BENEFITS

New Benefit Provider: Appleton Dental Plan

Appleton Dental Plan is an innovative, cost-effective alternative to traditional dental insurance plans for residents of Arizona. Appleton provides a discount dental plan that has many of the same benefits as traditional dental insurance...without the restrictions:

- No Waiting Periods
- No Yearly Maximums
- No Pre-existing Clauses

Appleton members simply call an Appleton provider to make an appointment. After dental treatment, the Appleton member pays the provider the price indicated on the fee schedule.

As a special benefit, annual membership rates are discounted for Arizona REALTORS®:

- Individuals \$60 a year (regularly \$120)
- Individuals + 1 (anyone) \$80 a year (regularly \$160)
- Family (up to 10) \$120 a year (regularly \$245)

And now the vision benefits of EyeBenefits are included in the Appleton Plan at no additional charge!

For more information, visit the Appleton [website](#) or call 602-957-6453. ▲

ARIZONA SCENE

City of Phoenix Honored for Commitment to Promoting Cultural Diversity

The National Black Caucus of Local Elected Officials (NBC-LEO), a constituency group of the National League of Cities (NLC), honored Phoenix in March with one of seven annual City Cultural Diversity Awards. Phoenix was selected for its Excellence in Diversity: the City of Phoenix Diversity Performance Achievement Program, which is committed to valuing the diversity of the Phoenix workforce and for exemplary service delivery to the diverse cultures in its community. ▲

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ASSOCIATION NEWS

Congratulations to 2007 AAR Leadership

Your 2007 AAR officers were elected/ appointed during the March AAR Real Estate Summit/Director meeting in Prescott:

President

Frank Dickens, Northern Arizona

President-elect

John Gall, Lake Havasu

First Vice President

Mike Wasmann, Lake Pleasant Regional

Treasurer

Holly Eslinger, Scottsdale Area

Regional Vice President-Region 1

Michelle Pepper, Lake Havasu

Regional Vice President-Region 2

Fred LaBell, Phoenix

Regional Vice President-Region 3

Pat Jegge, Sedona/Verde Valley

Regional Vice President-Region 4

Duane Washkowiak, SouthEast Valley Regional

Regional Vice President-Region 5

David Greenberg, Southeast Arizona

GOVERNMENTAL KEY RESULT AREA

Chairman

Ron Volkman, Sedona/Verde Valley

Vice Chairman,

Sue Fluke, Glendale/West Maricopa

INDUSTRY ISSUES KEY RESULT AREA

Chairman

Martha L. Appel, Phoenix

Vice Chairman

Evan Fuchs, Bullhead City/Mohave Valley

INFORMATION MANAGEMENT

KEY RESULT AREA

Chairman

Gary Best, Tucson

Vice Chairman

Duane Fouts, Phoenix

PROFESSIONAL DEVELOPMENT

KEY RESULT AREA

Chairman

Vickie Frye, Glendale/West Maricopa

Vice Chairman

Nancy Vitkovich, SouthEast Valley Regional

Local Association Executive Representative to Executive Committee

Roger Nelson, Glendale/West Maricopa ▲

LOCAL ASSOCIATIONS

Welcome New AE Debbie Martins

Please join us in welcoming Debbie Martins to the association family. Debbie is the new AE for the White Mountain Association, replacing Vicki Poscharsky, who moved to Texas. Real estate is a new industry for Debbie. She and her husband have been publishing a pricing guide for the pharmaceutical industry as well as teaching CE courses for pharmacists. She has resided in the Pinetop area for 15 years. We wish you success in your new position, Debbie!

New RCE Designees in Arizona

A hearty congratulations to Kim King, RCE, executive vice president of the Sedona/Verde Valley Association, and Marylin Psaros, RCE, administrative

assistant of the Prescott Area Association, for earning the REALTOR® Certified Executive designation. A lot of hard work and the successful completion of a comprehensive exam are required for the RCE.

After hearing about the RCE from the other AZ recipients and recognizing the benefits of earning a designation, Kim applied and was deemed eligible to sit for the three-hour exam. "AEs don't always know what they're getting into when they take the job. I did this for personal satisfaction, validating that I have a broad knowledge base about association management."

Marylin works with Karla Roberts, who holds the RCE designation and encouraged her to apply. Marylin is hoping it will enhance what she is able to do at the association. "I learned so much from it. I feel like I'm more capable of handling association business."

Other Arizona RCE designees are John Stih, CEO, SEVRAR, and Karla Roberts, EO, Prescott Area, as well as AAR staff members Alice Martin, EVP, and Ty Strout, CEO.

In Memoriam: Bruce Sumner

We were all very saddened to learn of Bruce Sumner's passing after an extended illness. The Glendale/West Maricopa Board has set up a fund through AAR's Arizona REALTORS® Disaster Assistance Foundation (ARDAF) to assist Pat Sumner with the medical bills that have accumulated over this extended period of time. Those of you who may wish to contribute can make a tax deductible contribution payable to ARDAF and note in some fashion that it is for the Sumner Fund. Mail to ARDAF, c/o AAR, 255 E. Osborn Rd. #200, Phoenix, AZ 85012. ▲

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RISK MANAGEMENT

2005 Residential Resale Real Estate Purchase Contract One Year Anniversary Quiz

*by K. Michelle Lind Esq.,
AAR General Counsel*

The 2005 Residential Resale Real Estate Purchase Contract was introduced one year ago. To mark the anniversary, test your knowledge of the Contract by taking the following quiz.

1. What should the seller do if the seller receives an offer without the Loan Status Report (“LSR”)?

- a) Accept the offer if it is acceptable.
- b) Accept the offer and send a Cure Period Notice to the buyer.
- c) Reject the offer.
- d) Complete an LSR on behalf of the buyer and submit it as a counter-offer.

2. If the buyer elects to cancel the Contract during the Inspection Period, the buyer must give written notice of the items disapproved.

- a) True
- b) False

3. If a check for earnest money is dishonored:

- a) The seller must give the buyer a notice and three-day opportunity to cure before cancelling the Contract.
- b) The Contract is automatically cancelled.
- c) The Contract is void.
- d) The seller may immediately cancel the Contract.

4. The buyer is entitled to demand a reduction in the purchase price in lieu of providing the seller an opportunity to correct the item disapproved.

- a) True
- b) False

5. If after diligent and good faith effort the buyer is unable to obtain loan approval without conditions by the COE Date:

- a) The seller should send the buyer a three-day Cure Period Notice.
- b) The buyer has three days in which to obtain loan approval and close escrow.
- c) The buyer is automatically in breach of contract.
- d) The buyer has no obligation to close escrow, but must deliver an unfulfilled contingency notice to the seller.

6. If the buyer fails to obtain loan approval by the COE Date, the parties may still complete the transaction and close escrow thereafter if they choose to do so.

- a) True
- b) False

7. On the COE Date, the buyer discovers that the air conditioner is not in working condition. The buyer is entitled to immediately deliver a Cure Period Notice to the seller and may:

- a) Delay closing for up to three days to allow the seller the opportunity to repair the air conditioner.
- b) Close escrow. 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 or mediation.
- c) Consult legal counsel regarding whether cancellation is a viable remedy.
- d) All of the above.

8. A Cure Period Notice is received when sent to the email address provided in Section 8r or 9a of the Contract even if the salesperson does not open the email.

- a) True
- b) False

9. If premises do not appraise for at least the sales price:

- a) The buyer remains obligated to complete the sale unless the buyer cancels the Contract within five days after notice.
- b) The seller may cancel the Contract.
- c) The seller must give the buyer three days to cure the breach of contract.
- d) None of the above.

10. The buyer is not obligated to notify the seller of changes in the loan program if seller is not adversely affected by the changes.

- a) True
- b) False

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11. Which of the following is true regarding buyers' disapproval?

- a) It may not include cosmetic items.
- b) It may be given in bad faith.
- c) It must be delivered in writing.
- d) It must be objectively reasonable.

12. If the seller does not respond to the buyer's request for repairs, the seller has breached the Contract.

- a) True
- b) False

13. The buyer must notify the seller of any title commitment items disapproved:

- a) Within 15 days of Contract acceptance.
- b) Within 10 days of Contract acceptance.
- c) During the Inspection Period.
- d) Five days after receipt.

14. A Cure Period Notice is always a prerequisite to declaring a breach of contract.

- a) True
- b) False

15. The buyer is entitled to a refund of the earnest money if:

- a) The buyer failed to obtain loan approval after a diligent, good-faith effort and provided the seller notice of that fact.
- b) The loan was not available because the buyer did not "lock" the interest rate during the Inspection Period.
- c) The buyer did not have the funds for the down payment.
- d) All of the above.

16. In an in-house sale involving two salespeople acting in a limited representation capacity (dual agency):

- a) The notice sections (Sections 8r and 9a) should be completed with exactly the same information.
- b) The notice sections (Sections 8r and 9a) should specify the individual salesperson's contact information even though the firm name will be the same.
- c) Either notice section (Section 8r or 9a) should be completed, but not both.
- d) None of the above.

17. If the buyer's loan denial letter has three reasons for denial, specifying insufficient credit reference, inadequate collateral and insufficient funds to close, the buyer is in breach of Contract after expiration of the Cure Period.

- a) True
- b) False

18. If a warranted item is not working at walkthrough and the problem was not detected during the Inspection Period:

- a) The seller is obligated to correct the problem prior to COE.
- b) The buyer has waived repair of the warranted item.
- c) The buyer may cancel the Contract immediately.
- d) The broker must have the item repaired.

19. The COE Date is Wednesday. The buyer has loan approval, but fails to deliver funds on Wednesday. If the seller issues a Cure Period Notice on Thursday, the buyer has through Monday to close escrow.

- a) True
- b) False

20. If the buyer does not deliver a notice of the inability to obtain loan approval by the COE Date:

- a) The buyer is still entitled to a return of the earnest money.
- b) The seller is entitled to pursue the buyer for any claim or remedy the seller may have after expiration of the Cure Period.
- c) After the expiration of the Cure Period, the buyer is in breach for failure to deliver the notice, and the seller agrees to accept the earnest money as damages.
- d) The escrow company must hold the earnest money until receiving mutual instructions.

[Click here for the answers.](#) ▲

Michelle is general counsel to the Arizona Association of REALTORS® and a State Bar of Arizona board certified real estate specialist.

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LEGAL HOTLINE

by Christopher A. Combs

Find more Hotline questions and answers addressing the following topics by clicking on the category in italics above each question. For other Hotline topics, click here.

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CONTRACTS: CANCELLATION

Three-day cure period notice required for loan contingency and failure to close

The scheduled close of escrow is Wednesday, March 15. The transaction fails to close on Wednesday, March 15, but the buyer's broker will not return telephone calls as to whether the reason that the transaction did not close was because the buyer did not qualify for financing, or because the buyer qualified for financing but for other reasons was unable to close the transaction. On Thursday, March 16, does the seller issue a Three-Day Cure Period notice for the buyer's failure to furnish a Notice of Unfulfilled Loan Contingency, or for the failure to close the transaction?

Answer: Inasmuch as the seller in good faith does not know the reason for the buyer's failure to close escrow, the seller should issue a Three-Day Cure Period Notice stating both the failure to furnish the Notice of Unfulfilled Loan Contingency, and the failure to close the escrow. If the buyer within three days timely furnishes a Notice of

Unfulfilled Loan Contingency the buyer gets the return of the earnest money; if not, the seller gets the earnest money. If the buyer qualified for financing, but fails to timely close escrow, the seller will get the earnest money. *Note: If this Three-Day Cure Period Notice is issued on Thursday, March 16, and the buyer failed to qualify for financing, the buyer has until 11:59 p.m., Sunday, March 19, to furnish the Notice of Unfulfilled Loan Contingency. If the buyer qualified for financing, the buyer has until 11:59 p.m. Monday, March 20, to close the transaction because the title company and the recorder's office were closed on Sunday, March 19. See Lines 16-17 of the AAR Residential Resale Real Estate Purchase Contract.*

FAIR HOUSING

Seller not obligated to bring premises into compliance with swimming pool barrier laws

The buyer has presented an offer to purchase a home with a swimming pool. There is no fence around the swimming pool. The buyer has small children, and has requested in the buyer's offer that the seller construct a fence around the swimming pool. The seller has refused to accept the buyer's offer. If a buyer has small children, is the seller required to accept the buyer's offer?

Answer: Probably not. The Fair Housing Laws do not require a seller to construct facilities for the protection of small children. *Note: Under the AAR Residential Resale Real Estate Purchase Contract the buyer is required to pay for any costs in constructing a fence or otherwise complying with swimming pool barrier laws. If the buyer does not want to pay these costs, the buyer can cancel the AAR Contract during the inspection period.*

Property management company cannot require compliance with swimming pool barrier laws

The property management company has a swimming pool barrier policy for tenants with children. This policy requires tenants with children to install a fence or otherwise comply with swimming pool barrier laws. Furthermore, at the termination of the tenancy, the tenant is required to remove the fence or other improvements at the tenant's expense. Is this policy in compliance with Fair Housing laws?

Answer: Probably not. Familial status such as tenants with children is a protected class under Fair Housing laws. If the property management company has a policy which places conditions or restrictions upon the rental because of familial status, e.g., compliance with swimming pool barrier laws, the property management company has probably committed a discriminatory act under the Fair Housing laws. See A.R.S. §41-1491.01.

CONTRACTS: GENERAL

New homebuilder can prohibit home inspection at final walk-through

The homebuilder has a purchase contract which all buyers are required to sign in the purchase of a new home in the subdivision. A clause in this contract states that "only the buyer, and not any representative of the buyer" is allowed to be present at the final walkthrough prior to closing. The closing of the buyer's new home has now been

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scheduled, and the buyer wants a home inspector to be present at the final walkthrough prior to closing. The homebuilder is refusing to allow a home inspector to be present at the final walkthrough. Can the clause in the contract prohibiting a buyer's home inspector or other representative at the final walkthrough be enforced by the homebuilder?

Answer: Probably. In general, a homebuilder or any other seller of real property is entitled to enforce clauses in the contract which are not violative of law. There is no law requiring the homebuilder to permit a buyer's home inspector or other representative at the final walkthrough. Therefore, the homebuilder is probably entitled to prohibit the buyer's home inspector at the final walkthrough.

LANDLORD/TENANT ISSUES

Eviction procedure after the death of the tenant

The tenant signs a one-year residential lease. Four months later the tenant dies. After diligent efforts the landlord has been unable to locate any relatives of the tenant. The landlord wants to rent the property to another tenant. How can the landlord terminate the lease after the tenant's death?

Answer: After the death of the tenant, the tenant's estate acquired the interest in the one-year lease. In other words, the tenant's estate acquired all rights and obligations under the lease, including the obligation to make monthly rent payments. If the monthly rent payments are not made, the tenant's estate can be evicted after compliance with probate procedures. In general, the landlord as a creditor of the tenant's estate is entitled to open a probate, and to have a Personal Representative of the tenant's estate appointed, forty-five days after

the death of the tenant. After a Personal Representative is appointed, the landlord can serve the Personal Representative with the five-day notice for non-payment of rent and thereafter complete the eviction. ▲

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Answers to Do You Know Your Federal Fax Laws?

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1. False

The Telephone Consumer Protection Act of 1991 makes it illegal to send “unsolicited advertising facsimiles.” An unsolicited advertising facsimile is a fax containing “any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person without that person's prior express invitation or permission.” To meet the requirement for “express invitation or permission,” the brokerage must gain express consent from the recipient or have an established business relationship with the recipient. In the scenario described in Question 1, at least a portion of the faxes would be sent to individuals with whom the brokerage has no prior relationship. Therefore, the brokerage would violate federal law.

2. False

While written permission is certainly adequate and is a good idea if it can be obtained, all that is required by law to send advertising faxes is that the sender has an established business relationship (EBR) with the recipient. At one time, the Federal Communications Commission proposed rules that would have required written permission from the recipient prior to sending an advertising fax. But with the Junk Fax Prevention Act of 2005, Congress overrode the FCC's proposed rules and enshrined the EBR exception into law. An EBR is defined as (i) anyone with whom it has had a transaction, or (ii) with someone who made an inquiry to the business.

3. False

The established business relationship (EBR)

exception for faxes has no time limit, so anyone who has ever entered into a transaction with a brokerage or made an inquiry to the brokerage would be covered, unless the person has opted out of receiving future faxes from the brokerage. Note that the Junk Fax Prevention Act of 2005 gives the Federal Communications Commission the ability to set a time limit. In order to take such an action, the FCC must make the following findings:

1. That the EBR exception has generated consumer complaints;
2. That the EBR time periods are inconsistent with customer expectations;
3. The costs and benefits to recipients associated with a more limited EBR time period;
4. And the effect of the costs associated with a more limited time period on small businesses.

4. True

The FCC has issued an order clarifying that electronic faxes received directly on a computer are subject to the federal fax laws, even though they are not received by a traditional fax machine.

5. False

Calling the number at the bottom of the fax and opting out of receiving future faxes is one possible solution that should stop the sender from sending unsolicited advertising faxes. Individuals and companies also can take additional actions against companies who are sending them these unsolicited advertising faxes in the following ways:

- **File a lawsuit against the sender.** The Telephone Consumer Protection Act of 1991 provides individuals with a private right of action (right to bring a lawsuit) to enforce violations. Under the act, penalties of up to \$1,500 can be charged per fax violation (the penalty is \$500 per fax, with treble damages available for willful violations). Individuals

interested in pursuing this option should retain the unsolicited advertising faxes they receive because the more faxes they can show they received, the more damages they can collect from the sender.

- **File a complaint with the state attorney general.** The attorney general's office may take action against the sender if the office receives enough complaints and also may enforce the state's fax laws (if any), which can be more restrictive than the federal laws. It is recommended that recipients retain the fax or faxes they have received in case the faxes are needed to prosecute the complaint.

File a complaint with the Federal Communications Commission. The FCC is charged with enforcing the federal fax laws. The FCC Web Site provides information on how to file a complaint. While this is probably the easiest option, the FCC needs to receive a number of complaints before it will take any action. In addition, the FCC requires documentation with its complaints, so people who file a complaint will need to retain the unsolicited advertising faxes they've received.

6. True

The Junk Fax Prevention Act of 2005 requires that faxes containing unsolicited advertisements must contain a cost-free opt-out mechanism in order to allow the recipient the ability to opt-out of receiving future faxes from the business. The opt-out also must be included in faxes even where the sender has the recipient's written consent to send the fax. The FCC is creating rules setting forth opt-out request language and information on what constitutes a “cost-free” mechanism for opting out. Right now, a toll-free number

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qualifies as a cost-free mechanism. It is unclear whether an e-mail address would qualify.

The other requirements for opt-out mechanisms are that the mechanism must:

1. Be clear and conspicuous in its terms and appear on the first page of the fax (cover sheet if using one);
2. State that the recipient has the right to opt out of future unsolicited advertisements and that the sender's failure to comply within the shortest reasonable time (to be determined by the FCC, and until defined, brokerages and associations should quickly process opt-out requests to avoid lawsuits) is unlawful;
3. Include FCC language detailing an effective opt-out request (to be provided by the FCC); and
4. Provide a telephone and fax number where recipient can send an opt-out request as well as a cost-free mechanism for opting out. The opt-out mechanism must be available 24 hours a day, seven days a week.

Possible opt-out language a business could use until the FCC provides its own specific language is:

"The recipient of this facsimile may request that the sender not send any future similar documents to a designated facsimile machine or machines. The sender's failure to comply, within the shortest reasonable time, with an appropriate request is unlawful. To opt out of further facsimile advertisements from this sender, please [call or fax] [toll-free number] [e-mail if desired] at any time on any day of the week."

7. False

Participation in a multiple listing service does not create an established business relationship (EBR)

with other participants. A brokerage will need to show that it has an EBR with other participants before it can fax them listings. By law, a brokerage would have an EBR with any brokerage with which it has participated in a cooperative transaction. Additionally, the brokerage would be allowed to fax listings to any broker who has made an "inquiry" to the brokerage; the inquiry need not be related to the particular listing that the brokerage would like to fax to the other broker. The brokerage could receive the "inquiry" in any communication form, such as by phone call or e-mail. Of course, an e-mail is preferable because it would provide the brokerage with a written record of the inquiry. Brokerages that regularly exchange listing information through faxes may want to exchange written consents to receive each other's faxes (written consent is effective until revoked).

8. True

The Junk Fax Protection Act of 2005 requires the voluntary receipt of the recipient's fax number. "Voluntary receipt" can happen in one of two ways. First, if the sender had an established business relationship (EBR) with the recipient and also possessed the recipient's fax number prior to the act's effective date of July 9, 2005, the sender may send faxes to that number. In this scenario, it does not matter how the sender obtained the recipient's fax number. Any sender that qualifies for this category should retain and document the fact that it had the recipient's fax number before July 9, 2005.

However, if the sender has not obtained the recipient's fax number prior to the act's effective date or does not have an EBR with the recipient at the time of the effective date, the sender will have to obtain the fax number from the recipient through (1) a "voluntary" communication of the fax number within the parties' EBR or (2) a fax number from a

public source, such as a directory, advertisement, or a Web site.

The Junk Fax Prevention Act does not define a "voluntary" communication, but any of the following written communications would likely qualify: a business card, letterhead, invoices, and fax cover sheets. Of course, any communication in which the receiving parties voluntarily gives the sender their fax number qualifies, whether it is given in an e-mail or even in a conversation. However, senders should obtain a written record of the fax number as protection against anyone who later claims to have not given the fax number to the sender. If senders obtain the fax number from a public source, such as a directory or Web site, they should make a copy of the source.

9. True

The Federal Communications Commission established rules pursuant to the Telephone Consumer Protection Act of 1991 that require all messages sent by fax machines to clearly state the date and time that the message is sent, the identification of the business or individual sending the message, and the telephone number of the machine sending the message or of the business or individual sending the message. This information must be contained in a margin either at the top or the bottom of each page transmitted or on the first page of the transmission.

10. False

Federal law preempts state law for interstate faxes. However, for purely intrastate faxes, state fax laws that are more restrictive than the federal laws are still in effect. Therefore, you will need to know your state fax laws when sending intrastate faxes.

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Answers to Risk Management

Quiz *(click to return to questions)*

1. c) The buyer's obligation to complete the sale is contingent upon buyer obtaining loan approval for the loan described in the AAR LSR by the COE Date. (Section 2a) If this is not included in the Contract, the contingency is ambiguous.

2. a) True. If the buyer disapproves of an item, the buyer must deliver to the seller written notice of the items disapproved and state in the notice that the buyer elects to cancel. (Section 6j, lines 234-235)

3. a) Every non-compliance with the terms of the Contract is subject to the Cure Period.

4. b) False. The Contract provides that the buyer may either elect to immediately cancel the Contract or provide the seller an opportunity to correct the items disapproved. (Section 6j)

5. d) If the buyer is unable to obtain loan approval without conditions by COE Date, the buyer is obligated to deliver a notice of the inability to obtain loan approval without conditions to the seller or the escrow company no later than COE Date. (Section 2a)

6. a) True. However, any agreement to extend the COE Date should be reduced to writing and signed by both parties.

7. d) The failure to comply with any provision in the Contract requires the Cure Period. Thereafter, the buyer has options regarding what remedies to pursue for the breach. (Section 7b) However, if the buyer wants to cancel due to a repair item, the buyer's broker should refer the buyer to independent legal counsel.

8. a) True. Notices are received when hand-delivered to the firm address or sent to the facsimile number or email address provided in Section 8r or 9a of the Contract, even if the notice is not picked up from the office, the fax machine is out of paper, or the email is not opened.

9. a) If the premises fail to appraise for the sales price, the buyer has five days after notice of the appraised value to cancel the Contract and receive a refund of the earnest money or the appraisal contingency is waived. (Section 2c)

10. b) False. The buyer is obligated to immediately notify the seller of any changes in the loan program, financing terms, or lender described in the LSR. The buyer may make such changes without the seller's consent if the changes do not adversely affect the buyer's ability to obtain loan approval without conditions, increase the seller's closing costs, or delay COE.

11. c) All notices must be in writing.

12. b) False. The seller's failure to respond to the buyer in writing within the specified time period is conclusively deemed to be the seller's refusal to correct any of the items disapproved. (Section 6j, lines 239-240)

13. d) The buyer has five days after receipt of the Title Commitment and after receipt of notice of any subsequent exceptions to provide notice to the seller of any items disapproved. (Section 3c, lines 98-99)

14. a) True. A party has a three-day opportunity to cure any potential breach of the Contract. (Section 7a)

15. a) The LSR requires the buyer to lock the loan during the Inspection Period, and Section 2b

specifies that the failure to have the down payment is a breach of Contract.

16. b) The Notice Sections 8r and 9a specify where notices are to be sent, which may be at different addresses even in a dual agency situation.

17. b) False. Even if the buyer had sufficient funds to close, the buyer would not have obtained loan approval. Therefore, the loan contingency is unfulfilled.

18. a) The seller is obligated to repair warranted items (Section 5a). This warranty is only waived if the buyer discovers the non-working warranted item during the Inspection Period and fails to notify the seller. (Section 6k)

19. a) The Contract has been interpreted to allow for the extra day under these limited circumstances due to lines 16-17, which state that if the escrow company or recorder's office is closed on the COE Date, COE shall occur on the next day that both are open.

20. c) Section 7b of the Contract provides that in the event of the buyer's breach arising from the buyer's failure to deliver the notice of the inability to obtain loan approval as required by Section 2a, the seller agrees to accept the earnest money as the seller's sole right to damages after expiration of the Cure Period. If on the COE date the buyer neither closes nor provides the notice, the seller can send a Cure Period Notice stating that the buyer has failed to comply by neither closing escrow nor delivering the unfulfilled loan contingency notice and that the buyer has three days to do one or the other.

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