

BROKER & MANAGER

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ENFORCEMENT ACTIONS ON THE RISE



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THIRD QUARTER 2016 | ARIZONA BROKER/MANAGER QUARTERLY

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Real Estate Teams FAQs

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

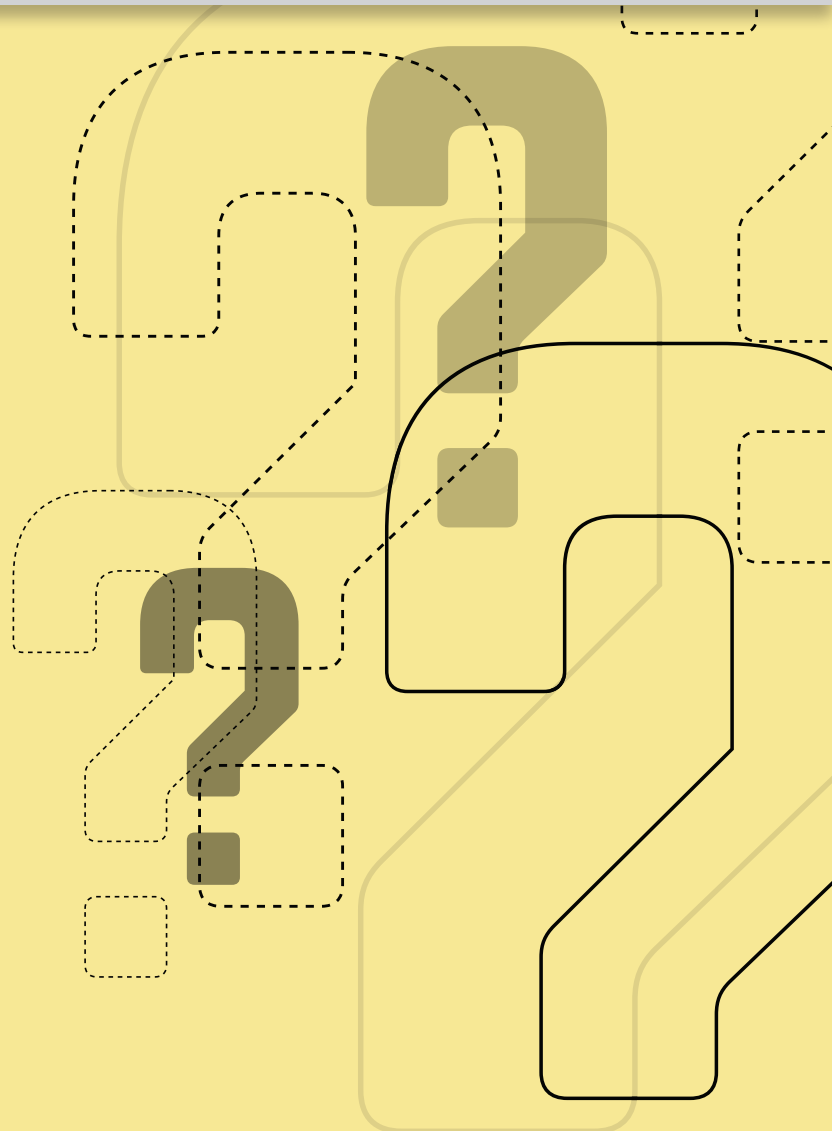
Real estate teams continue to increase in popularity in Arizona and across the country, but as this business model evolves, questions abound. Below are questions about real estate teams that Arizona REALTORS® routinely pose, the answers to which their fellow REALTORS® may find instructive.

Q: Must a real estate team possess a license issued by the Arizona Department of Real Estate (ADRE)?

A: No. A team is simply two or more licensees within a brokerage working together for a common purpose. There is no separate licensing requirements imposed upon real estate teams and teams are not specifically recognized under Arizona law.

Q: Does the ADRE regulate team names?

A: Arizona law does not directly impose regulations as to the name of a real estate team. As such, team names are not regulated by the ADRE. Nonetheless, the ADRE has opined that team names should not create the impression that the team is an independent entity separate and distinct from the employing broker. Terms such as "Realty" or "Associates" should therefore be avoided.



Q: Can a team member advertise identifying only the name of the team and the team leader?

A: No. The ADRE Commissioner's Rules, A.A.C. R4-28-502, set forth the rules for all advertising, including advertising by teams. Pursuant to these rules, all advertising must identify in a "clear and prominent manner the employing broker's legal name or the dba name contained on the employing broker's license certificate." Identifying only the team leader is therefore insufficient.

Q: Is the Designated Broker responsible for advertising undertaken by the team?

A: Yes. The designated broker must supervise all advertising, for real estate, cemetery, or membership camping brokerage services. See A.A.C. R4-28-502(G).

Q: Can the Designated Broker delegate supervisory responsibilities to the team leader?

A: No. The Designated Broker is legally responsible for supervising those salespersons affiliated with the brokerage firm. In fact, a broker may be sanctioned for failing to "exercise reasonable supervision over the activities of salespersons, associate brokers or others under the broker's employ." See. A.R.S. § 32-2153(A)(21).

Q: Can a broker prohibit his or her salespersons from forming a team or using a team name?

A: Yes. The broker retains the right to prohibit their salespersons from forming a team or using a team name.

Q: Can a Designated Broker sever a team member without the consent of the team leader?

A: Yes. A Designated Broker can sever any salesperson affiliated with that brokerage.

Q: Must the team leader keep records of the team's real estate transactions for a period of at least five years from the date of the termination of the transaction?

A: No. Pursuant to A.R.S. § 32-2151.01(A), this obligation is imposed only upon the licensed employing broker.

Q: Can a team member accept compensation as a licensee from their team leader?

A: No. A.R.S. § 32-2155(A) dictates that a licensee shall accept employment and compensation as a licensee only from the legally licensed broker to whom the licensee is licensed.

Q: Can a team become a legal entity, such as a PLC?

A: Yes. While a team can function as a loosely organized group of licensees operating within the same brokerage, a team can also become a legal entity.

Q: Is it acceptable for the Residential Resale Real Estate Purchase Contract to identify only the name of the team leader, not the individual agent that is working directly with either the buyer or seller?

A: No. The licensee in direct contact with the consumer must be identified on the Purchase Contract.

Scott M. Drucker, Esq., a licensed Arizona attorney, is General Counsel for the Arizona Association of REALTORS® serving as the primary legal advisor to the association. 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.

Make Sure To Use The Most Current Forms

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL AND NICK CATANESI, VICE PRESIDENT, BUSINESS SERVICES AND TECHNOLOGY

Would it shock you to know that the **WRONG** version of the Residential Purchase Contract was used **2,585** times from January 1, 2016 through June 30, 2016? (see graph below):

Form Version	Jan	Feb	Mar	Apr	May	Jun	2016 Total	Bad	Good
Residential Purchase Contract - 02/2011	71	176	21	141	57	45	511	511	0
Residential Purchase Contract - 05/05	1	18	1	1	2	2	25	25	0
Residential Purchase Contract - 06/2014	203	275	164	278	257	186	1363	1363	0
Residential Purchase Contract (TRID) - 09/2015	22909	9430	173	207	142	164	33025	686	32339
Residential Purchase Contract (TRID) - 02/16		17855	29689	29383	28245	26397	131569		131569
								2585	163908

zipForm® data

*Residential Resale Real Estate
Purchase Contract
The Correct Form*



The Arizona Association of REALTORS® (AAR) creates standard real estate forms for use by AAR members. As laws change or industry practice evolves, the forms are revised and updated. New and revised forms are released three times a year, on or about February 1, June 1 and October 1, unless law or regulation mandates an earlier release. Once released, the forms library contained on all of AAR's forms licensing platforms, such as zipForm® and dotloop®, are automatically updated.

For a number of reasons, it is important for Arizona REALTORS® to ensure that they are always using the most current version of each form. **In April, 2016 alone, outdated versions of the Residential Resale Real Estate Purchase Contract (RPC) were used 621 times.** In light of the fact that the RPC was updated in October 2015 to ensure compliance with the TILA-RESPA Integrated Disclosure Rule, use of the most recent version of the form can prove critical. To protect their interests, as well as the interests of their clients, Brokers should make certain that any form presented for their review and approval is up-to-date. (A list of form revisions can be found at <https://www.aaronline.com/2012/04/form-revision-updates/>.)

Generally speaking, there are two ways that outdated forms continue to be used: 1) forms are printed out in large quantities and used until the supply is gone; and 2) transactions in zipForm® are reused.

Printed forms – When forms are printed out in large quantities for use when needed, there is no way for an agent to know when a form has been updated. So while it may be handy to have a supply of forms in the trunk to grab whenever needed, the form may be out of date.

Reused zipForm® transactions – When using zipForm® to obtain forms for a new transaction, listing or purchase, a new transaction should be created. Do not reuse previous transactions. By creating a new transaction, forms added to the transaction are pulled from the current library, thereby ensuring that each form used is the most up-to-date version. Unfortunately, forms used in prior transactions remain fixed, meaning that they are not updated. When pulling a form from a prior transaction, there is no guarantee that the form represents the most recent version.

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

Avoid Using “On or Before” in Contracts

“On or before” is often included in contracts to show that performance may be completed prior to the deadline date. When submitting or accepting an offer, there are many scenarios in which it might seem prudent to insert this verbiage before the close of escrow date.

For example, a home has to sell before a new home can be purchased. Or, the parties are hoping for a quicker close of escrow than the designated close of escrow date. Regardless of the reason, DO NOT DO IT! Inserting additional language into the contract such as “on or before” may have unintended consequences.

Consider the following scenario: In order to purchase a new home, the buyers must sell their current home. The sale is scheduled to close escrow on August 1, 2016. Subsequently, the buyers submit an offer on a new home requesting to close escrow on or before August 4, 2016. The buyers’ offer is accepted. As luck would have it, the buyers are able to close escrow on the sale of their home one week early. The buyers are now demanding the seller close the transaction before August 4. Unfortunately, the seller cannot possibly be out of the house by then. The buyers are upset and both parties have decided to consult legal counsel.

The best outcome for the above scenario is that the parties are able to close escrow early. However, the worst case scenario could involve a lawsuit with claims for breach of fiduciary duty against each parties’ agent. The outcome? It depends.

In spite of the uncertainty of a lawsuit’s outcome, you can be certain a lawsuit will cause anguish, take time away from your business, and cost money. Therefore, the best practice is to have a definitive close of escrow date so that the parties’ expectations are managed accordingly. If the parties thereafter mutually agree to a different date, the parties can amend the contract.

Find this article online at: <https://www.aaronline.com/2016/07/avoid-using-on-or-before-in-contracts/>

Nikki J. Salgat, Esq. is associate counsel to 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.



CONTRACT

Steps to Increased Website Accessibility

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

REALTORS® throughout Arizona are working to make their websites more accessible to those with disabilities. In some instances, this step is taken in response to threats of litigation alleging that the real estate professional's website violates the civil rights of individuals with disabilities. But more commonly, REALTORS® are taking this step because they deem it morally proper.

Additionally, web accessibility increases the available audience and, in turn, a REALTOR's® potential customer base.

The lack of federal regulations governing website accessibility has made it difficult for REALTORS® to ascertain precisely what an accessible website should look like. But that should not stop REALTORS® from helping those with disabilities perceive, understand, navigate, and interact with the web. With that in mind, there are a number of steps REALTORS® can take to increase website accessibility.

Many people with disabilities use assistive technology to help them navigate the web. This includes the use of screen readers, text enlargement software, and refreshable Braille displays that translate the text on the web page into Braille symbols (small plastic or metal pins that move up and down to display the Braille character). To optimize your site for these adaptive tools, below are some key principals of accessible design that can be implemented relatively easily and without impacting the overall "look and feel" of your website.

Text Equivalents

Because assistive technologies cannot interpret photographs, charts or other graphic information, adding a line of H.T.M.L. code to provide text for each image will enable a sight disabled user to understand the content being displayed. Such descriptions, called "ALT" text, should provide a text equivalent of the visual, thereby enabling screen readers to interpret the images for those with disabilities.

Subtitles and Audio Descriptions

If your web content includes videos, consider the use of

subtitles or captions to assist those users with hearing disabilities. Popular video hosting sites such as YouTube offer tools that allow users to add subtitles to their clips. Similarly, audio descriptions of images can help make videos accessible to individuals who are blind or have low vision.

Text-Based Documents

P.D.F. documents and related image based formats are often inaccessible to disabled users as they typically integrate poorly with screen readers and text enlargement programs. In addition to P.D.F.s, documents should therefore be provided in alternative H.T.M.L. web pages. If this is not possible, provide a series of tags to accompany the P.D.F., which provide a hidden structured, textual representation of the P.D.F. content that is presented to screen readers.

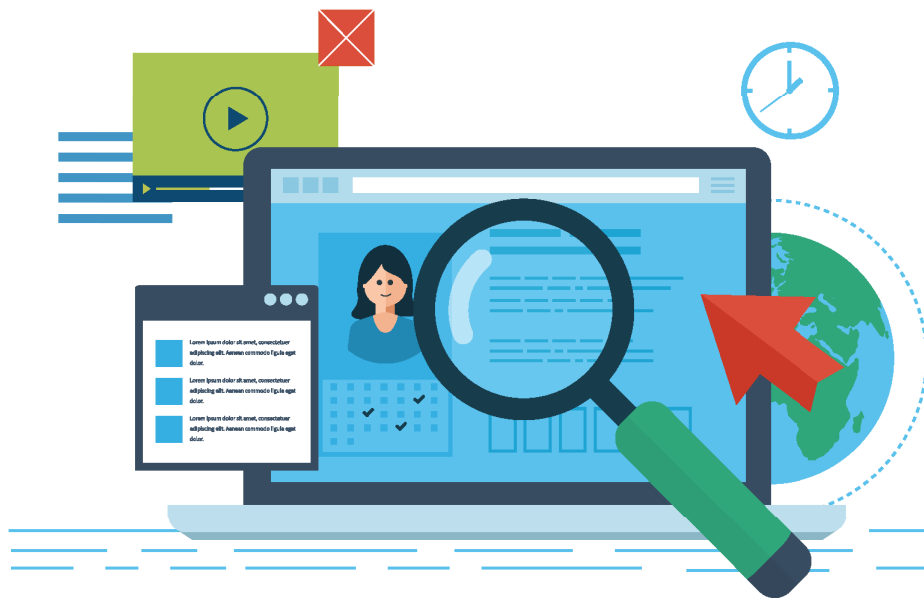
Color and Font Control

Often times, disabled users need to manipulate color and font settings in order to make pages readable. As far as possible, do not "hard code" colors and ensure that the site can be viewed with the color and font sizes set in a user's web browsers and operating systems. If the site is designed to prohibit changing the color

and font settings, users with low vision may struggle to absorb the content. It is also advisable to use highly contrasting colors for text and background. Certain color combinations are extremely difficult to distinguish for people with poor eyesight. Generally speaking, black or dark colored text on a white background is the best practice because it is readable for most audiences.

Skip to Main Content Link

A typical website includes a variety of navigational links on each page. In fact, the main content is not usually the first thing on a web page. Unfortunately, this means that keyboard and screen reader users must navigate a long list of navigation links, sub-lists of links, icons, site searches and other elements before they are able to access the main content. Without a mechanism for bypassing these links, disabled users are unable to navigate the site in an efficient manner. By placing a "skip to main content link" at the top of each page, this problem can be avoided. →



Periods in Abbreviations

Screen readers attempt to phonetically pronounce acronyms if the letters are not separated by periods. For example, the acronym "URL" will be read by a screen reader as "earl" if not written as "U.R.L." Sites should therefore distinguish acronyms by the use of periods.

Descriptive Links

Some screen readers allow users to read only the links on a webpage. Therefore, every link should make sense in the abstract, meaning even if the link text is read by itself, the user will understand the content. Link phrases like "click here," when read independent of context, will prove meaningless to a user relying on a screen reader. When embedding a link in a post, it is therefore far more useful to describe the link.

For example, "check out [Arizona REALTORS® Bylaws](#)" is better than writing "to check out Arizona REALTORS® Bylaws [click here](#)."

This list is certainly not exhaustive and REALTORS® should consult with web developers to better understand [Web Content Accessibility Guidelines 2.0](#), which is a series of guidelines created by the World Wide Web Consortium for improving web accessibility. However, by addressing these basic principles, REALTORS® can increase accessibility to their website and avoid excluding a segment of the population that may want to retain their services.

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LENDERS ASSOCIATION



INDUSTRY PARTNERS CONFERENCE

REALTORS®... LOAN OFFICERS... ESCROW OFFICERS... *ALL LEARNING TOGETHER!*

REALTORS®, Loan Officers, Escrow Officers - We all have the same client. So let's learn how to work together to get to closing! Register to attend Industry Partners Conference on September 16th where we'll cover different everyday transactional scenarios ... with a few curve balls. If This ... Then What??

If you didn't know the buyer received the title commitment 2 weeks ago ... Then what? If the lender received the appraisal the week before closing ... now what? Register early as this event always sells out! Early bird registration ends August 26.

SEP. 16TH @ EMBASSY SUITES REGISTRATION THROUGH 8/27-9/9 = \$99
4415 E PARADISE VILLAGE PKWY S, PHOENIX, AZ 85032 AT-DOOR REGISTRATION = \$119

7:30am - CHECK-IN/CONTINENTAL BREAKFAST, 8:30am-3:30pm - PROGRAM

REGISTER ONLINE AT WWW.REGONLINE.COM/2016IPC CE FOR REALTORS®
3 CONTRACT LAW, 3 AGENCY LAW

THIS CONFERENCE SELLS OUT EVERY YEAR! REGISTER SOON!

A World Without AAR?

Imagine a world without the Arizona Association of REALTORS®. Don't worry, the Association isn't going away, but AAR CEO Michelle Lind asks you to consider the value of your membership by imagining what life would be like...*without* AAR.

The video clip links AAR offers (see below), make an excellent addition to your next office meeting. The same videos (with different thumbnail images) are online at <https://www.youtube.com/playlist?list=PL6qnIvVKBYffKKYfVQIZRp2DFHqoYR1p0>



YouTube Link: <https://youtu.be/cJ9VwKDj2ZY>



YouTube Link: <https://youtu.be/O4zvBRndTI>



YouTube Link: <https://youtu.be/P7otXTolbbU>



YouTube Link: <https://youtu.be/NZiEwXgpkIA>



YouTube Link: https://youtu.be/_fRg_y3fGG8?list=PL6qnIvVKBYffKKYfVQIZRp2DFHqoYR1p0

Homeowner Association Dispute Process Now with Arizona Department of Real Estate (ADRE)...

The 2011 Arizona Legislature passed legislation providing Arizona homeowners, the Condominium Homeowners Associations (HOA) and Planned Community Associations (HOA's) a venue for resolving disputes. These administrative procedures provide an alternative to the civil court system and do not limit the legal rights of the parties to further pursue matters. This legislation became law on July 20, 2011.

The 2016 Arizona Legislature passed legislation moving the Homeowners Association (HOA) Dispute Process to the Arizona Department of Real Estate from the Arizona Department of Fire, Building, and Life Safety, effective July 1, 2016.

Let's review the situation ... Homeowner's associations, unlike neighborhood associations, are formal legal entities created to maintain common areas and enforce private deed restrictions (CC&R's). Most condominium and townhome developments and some newer single-family subdivisions have homeowners' associations, which were usually created when the development was built. It is estimated that there are 9,000+ HOAs in Arizona.

A Homeowner's Association is governed by governing documents (By Laws, CCR's, Rules, etc.), as well as Federal, State and Local Jurisdictional laws/statutes. Arizona Revised Statutes that apply to Condominiums are found in ARS Title 33, Chapter 9, and for Planned Communities in ARS Title 33, Chapter 16, and since Associations may be Arizona Non-Profit Corporations, in ARS Title 10, Chapter 24 through 40.

The structure of an Association may include...The Builder/Declarant of the community, the owners of the individual properties comprising the community and the elected Board of Directors. The Board of Directors, when approved by the Owners in the HOA governing documents, has the right to hire a Community Management Company (not Property Management Company) to oversee the maintenance, collection of monthly assessments, issue violation notices, etc. for the entire community. Sometimes a dispute may occur between an HOA and an owner. When a dispute cannot be

settled among the parties, a resolution is sought outside of the community. The ADRE will now act as the medium for facilitating a settlement through an Ombudsman, mediation, or a hearing by an Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ). The Process will include the following steps, utilizing the ADRE message center at www.azre.gov

- Only the Property Owner or the Association, files a written Petition to ADRE pertaining to dispute between the Owner and the Association, or vice versa, including all required documents.
- Petitioner pays a fee to ADRE for a single issue complaint of \$500, and \$500 for each additional issue, which may be made by check or money order (online payment available soon).
- The Respondent will be notified of the Petition, with a request for a timely response.
- The ADRE HOA Ombudsman may make a call to the parties.
- When the OAH hearing date is requested the Petition Fee becomes non-refundable.

How Can The Real Estate Industry Help With This Process?

Let's all make sure that we emphasize to ALL Buyers to a Homeowner's Association community that they read the HOA CC&R's and Rules prior to the Buyer Inspection Period. Also, encourage new Owners to stay involved in the election of the HOA Board of Directors, and to attend all Board meetings and Annual meetings.

*Article republished from the Arizona Department of Real Estate's Quarterly Bulletin [Volume 2016, Issue 2](#).



What's Making the Phone Ring at the ADRE?

ADRE Advisory Board

Part 6 of an interview between Arizona REALTORS® 2016 President-Elect Paula Monthofer and Arizona Department of Real Estate Commissioner Judy Lowe.

Read the transcription below or [view the video](#).

Paula Monthofer: I've had some friends who've had the privilege of serving on the (ADRE) Advisory Board, but I'd love for you to share with our members what that is, what the makeup is and what the purpose is of the Advisory Board.

Judy Lowe: Well, the advisory board is a group, a board of a very diverse group appointed by the governor. The diverse group are seven...10 members...it just went up. It's 10 members who serve six-year terms in most instances – unless they're replacing a board member who left their position. So, it's a six-year term.

It's a representation from the brokerage community. It's a representation from the builder community. Representation now from the property management community. And then, the public members.

It's a group who meet quarterly and they come together and get an overview of what the Department does, get an update on what we do and their charge in the statute is to make recommendations to the Department around issues that are facing the Department.

We have an Advisory Board meeting coming up this week and one of the recommendations that they'll be getting educated on will be how to encourage the online companies – the Zillows of the world, the REALTOR.coms® of the world to remember that the employing broker's name, the brokerage name, must be on all advertising.

Any place that the real estate licensing name appears, the employing broker's name appears. And, you know, those companies are not real estate licensees, so we really don't have any leverage over them to encourage them to abide by our Arizona State statutes.

So, the board is looking at listening, getting educated and then hopefully coming back and making recommendations. Paula Monthofer: Nice. And how are the members selected to be on the Advisory Board?

Judy Lowe: There is a Boards & Commissions Board (<http://bc.azgovernor.gov>) – it's not an agency of the...

Paula Monthofer: There's a board that selects the board.

Judy Lowe: That's right, a board that selects the board...but it's a board (that) operates either under the governor or the legislature. This particular board operates under the governor.

They post on their website the availability of positions on our advisory board (for this information contact ADRE), individual submit applications. They're all reviewed by the board – the Commissions Board and those recommendations are narrowed down, they're passed onto the governor. The governor makes the decision and makes the appointment.



S.B. 1193: Real Estate Licenses Industry Partners
Part 7 of an interview between Arizona REALTORS® 2016 President Paula Serven, 2016 President-Elect Paula Monthofer and Arizona Department of Real Estate Commissioner Judy Lowe.

Read the transcription below or [view the video](#).

Judy Lowe: The challenge as it's been given legislatively to the Department is to only bring forward bills that will reduce regulation. So, in reviewing we came forward with three or four bills. We only moved one forward and that was to reduce the regulation in statute that requires the designated broker to post all real estate licensees' licenses on the wall. ([S.B. 1193](#))

There were a couple of HOA bills that were moved forward, and signed off on by the governor, that we had more say-so in because that particular item was going to be on our agenda and our plate to move forward. So, there were two bills, I think, regarding HOAs. →

Paula Serven: Is that the bills that Senator Farnsworth...

Judy Lowe: ...Farnsworth had and he's still moving forward to bring back a couple that did not move forward this year, that he's hoping to move forward next year.

Paula Serven: What lofty goals do you have that you're looking to really get accomplished?

Judy Lowe: We are looking at partnering more strongly going forward with the industry as a whole. Sometimes it's easy for the Department of Real Estate to be perceived that we only work with the residential brokerages and that's not the way it is. Our customer is the real estate industry – the builders, cemetery, membership campgrounds. Those are our customers.

But who is the individual that we have to bring protection to? And that's the consumer. Well, we know as a department that we partner with the real estate industry to bring protection to the consumer. So, the more we can partner with the industry, the better we can all bring additional protection to the consumer, the taxpayer who in Arizona pays the taxes that supports all of us.

Paula Serven: So, that will be the continuation of our Industry Partners.

Judy Lowe: That's right!

Paula Serven: Which is always a bonus because then we all see what goes on in each other's lives and how we can intermingle and help work out the problems or the challenges that we have, that are facing us daily. That change daily.

Judy Lowe: That's right. Haven't you really enjoyed being, sitting in the same room with mortgage and title and all the associations coming together?

Paula Serven: It should have been that way in the beginning, really. Because we are all a team. You know, I was thinking about when you were talking about team – about your team and how it is a team most like any real estate team, or a mortgage team, or an escrow team. And you do have to all work together.

It's important to know what everybody's plan is from the entry-level person, all the way to the top to make and achieve the goals for all of our industry.



Is It a Condo and Why Does It Matter?

BY GUEST BLOGGER AND REALTOR® AMY MONAHAN, GRI, MBA

In light of President Obama recently signing [H.R. 3700](#) into law, which includes reforms to FHA restrictions on condominium financing, now is a great time to try and define the word condo.

Some townhomes and patio homes are condos, and some are not. According to [HUD 4155.1 4.B.1.b](#):

A condominium is a multi-unit project that

- *has individually-owned units, which may be either*
 - *attached in one or more structures, or*
 - *detached from each other, and*
- *is essentially residential in use (for FHA purposes).*

A condominium regime is created by state or local law and is characterized by fee-simple ownership of a unit which is defined in the condominium documents, together with common areas. The property interest in these areas is both common and undivided on the part of all unit owners, each of whom belongs to the Homeowners Association (HOA) that typically maintains the property and collects assessments or dues from each unit owner.

Many condo communities will include “Condominiums” as part of the name. If it is a condo community, the Legal Description

in the tax records will often include the unit together with an undivided interest in common elements; for example, WONDERFUL VILLAS AMD MCR XXX-XX UNIT 100 TOG W/AN UNDIV .49% INT IN COMMON ELEMENTS. If you are unsure, check with the HOA.

If the legal description contains the words “condominium” or “horizontal regime,” the lender typically considers it a condo. – John Rapasky, president, Counsel Mortgage Group, LLC

The best resource for locating the Legal Description is to verify the recorded document on County Records. The recorded documents will provide the full legal description.

– Sherry Olsen, REALTOR® relations manager, [Desert Schools Federal Credit Union](#)

It is important to determine if a home is a condo because it can affect financing. For conventional loans, the community must meet requirements for Fannie/Freddie approval. For FHA loans, the community must be on the approved list. VA loans typically follow FHA guidelines. For FHA financing, look up the community ([click here](#)). Even if it indicates “Approved” for that community, you need to check Status & Expiration Dates. Many communities that were once approved have had their approval expire.

On a new listing, it is helpful to indicate if it is a condo in the MLS for agents and prospective buyers.

REALTOR® Amy Monahan works with [West USA Realty](#) in Mesa and has been an AAR member since 2003. She is also a faculty instructor at ASREB.

From the Beginning... the Backstory of AAR's Legal Hotline

BY JAN STEWARD, MANAGER OF RISK MANAGEMENT

The Legal Hotline program received approval from AAR's Board of Directors in 1987 and “opened for business” in January, 1988. That same month, AAR published a check list of membership benefits and services asking designated brokers to assess, in actual dollars, the cost of various services that their brokerages would otherwise pay for if not a member benefit. Among the list of items was the category for legal costs.

The question was posed, “How many times in the last 12 months have you felt the need to place a phone call to an attorney for advice or – wish you could have?” The broker was instructed to fill in a figure that would include at least one year's savings for legal costs and increase the estimate if the broker thought the Legal Hotline program would save the firm costly litigation fees.

Imagine the savings this singular program has returned to

AAR's members since its inception in 1988; money that brokerages could reinvest in their businesses, year after year. When the Legal Hotline program was initiated, three attorneys and a paralegal serviced the hotline at the firm of Combs & Stoops, P.C. There were a few changes in the law firm thereafter. On January 2, 1992, K. Michelle Lind, Esq., joined Chris Combs and Richard Mack and immediately began working with broker-members as a hotline attorney. That was eight years before Michelle joined AAR on December 20, 1999 as General Counsel, eventually becoming CEO.

In January, 2013, Scott M. Drucker Esq., a hotline attorney and partner at the law firm Mack, Drucker and Watson, accepted the position of General Counsel at AAR. And in 2014, another former employee and hotline attorney at Mack, Drucker and Watson, Nikki Salgat, Esq., joined AAR as Associate Counsel for the association.

In 1988, Chris Combs, Esq. was quoted as saying that the first month the legal hotline was available, an average of four to five calls per day were received. By comparison, nearly twenty calls were received daily in 2015 and numerous emails are responded to on a daily basis by the current hotline providers at Manning & Kass, Ellrod, Ramirez & Trester LLP. Richard Mack, Esq., has supervised AAR's Legal Hotline service since October, 2011.

ARIZONA ASSOCIATION
OF REALTORS®

LEGAL HOTLINE



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

The AAR Legal Hotline is designed...

- * As a member benefit for Designated REALTORS® (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
- * To answer legally related questions about the many diversified areas of today's real estate industry.

The Hotline is
provided by
the attorneys at
Manning & Kass

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LEGAL HOTLINE

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The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Written Cancellation Required Pursuant to the Contract

FACTS: A buyer and seller entered into a Residential Resale Real Estate Purchase Contract (the "Contract"). The buyer received notice that the appraisal came in low and decided to cancel. The buyer's agent telephoned the listing agent and notified him that the buyer was cancelling. The seller is now making a demand for the earnest deposit because the buyer did not cancel in writing within five (5) days.

ISSUE: Can the buyer verbally cancel the contract?

ANSWER: No.

DISCUSSION: The cancellation of the Contract needs to be in writing and therefore, a verbal cancellation would be ineffective. Lines 92-93 of the Contract state: "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."

Further, Contract lines 372-373 state: "**Cancellation:** A party who wishes to exercise the right of cancellation as allowed herein may cancel this Contract by delivering notice stating the reason for cancellation to the other party or to the escrow Company." (emphasis added.)

Finally, lines 375-376 of the Contract state: "**Notice:** Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing" (emphasis added.) Therefore, to be effective, the notice of cancellation must be in writing.

BINSR May Continue on Additional Pages

FACTS: After entering into a Residential Resale Real Estate Purchase Contract (the "Contract") with a seller, the buyer hired a home inspector to perform a home inspection. After reviewing the inspection, the buyer had a list of requested repairs, all of which would not fit on page 1 of the Buyer's Inspection Notice and Seller's Response ("BINSR"). The buyer's agent continued the list on an addendum,

incorporating the addendum into the BINSR. The seller now refuses to sign the addendum because he does not agree to make all of the requested repairs.

ISSUE: Does the seller have to sign the addendum?

ANSWER: Probably not.

DISCUSSION: An addendum is a mutual agreement to amend the Contract. Here, the seller does not agree to all of the repairs and, by signing the addendum, it may represent that the seller agrees to all of the repairs on the addendum.

Practice tip: To avoid confusion, the buyer's agent should have used a blank word document incorporated into the BINSR to continue the list of requested repairs to submit to the seller.

Appraisal Contingency May Begin Again

FACTS: A buyer and seller entered into a Residential Resale Real Estate Purchase Contract (the "Contract"). During the escrow process, the buyer received notice from her lender that the property appraised for the contract price. The buyer therefore notified the seller that the property had appraised for the contract price.

However, ten (10) days before close of escrow, the underwriter notified the buyer that the appraisal had been flagged for review. Within three (3) days, the buyer was notified that the appraisal value had been decreased during the review. The buyer now notifies the seller that she cannot qualify and, pursuant to section 2m of the Contract, is electing to cancel based on the appraisal contingency.

ISSUE: Can the buyer cancel based on section 2m of the Contract during an appraisal review?

ANSWER: Probably.

DISCUSSION: Section 2m of the contract reads: "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." →



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During an appraisal review, the buyer received a new notice of value, therefore, the buyer likely had five (5) days from the notice of the new value to cancel or waive the contingency. If the buyer fails to cancel within five (5) days, then the buyer must proceed with the Contract.

Interest Only Payment Okay When Seller Originates Only One Loan in a 12-Month Period

FACTS: The buyer and seller entered into a Residential Resale Real Estate Purchase Contract where the seller is going to finance the transaction. This is the only seller financed transaction the seller will originate in a 12-month period. The buyer wants to make interest only payments, and wants to include a seven year balloon payment in the loan documents.

ISSUE: Does the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) allow interest only payments and a balloon payment in this transaction?

ANSWER: Yes.

DISCUSSION: Sellers originating a residential consumer loan must be registered and/or licensed as mortgage loan originators unless an exemption applies. One such exemption, known as the “one property exemption,” includes the following requirements: (1) the Seller originates consumer financing for only one property in any 12-month period; (2) the Seller is a natural person, estate or trust; (3) the financing does not result in negative amortization; and (4) the financing has a fixed rate or does not adjust for the first five years. See 12 CFR § 1026.36(a)(5).

In this case, interest only payments will not result in negative amortization because the amount of the loan does not increase. As such, interest only payments are permitted. Furthermore, unlike the “three property exemption” set forth in 12 CFR § 1026.36(a)(5) which requires that the loan be fully amortizing, the “one property exemption” does not prohibit a balloon payment.

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Finally, lines 375-376 of the Contract state: “**Notice:** Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing” (emphasis added.) Therefore, to be effective, the notice of cancellation must be in writing.

All Other Terms and Conditions Remain the Same

FACTS: A buyer presents an offer to the seller on the Residential Resale Real Estate Purchase Contract (the “Contract”). The seller wishes to counter the purchase price and the inspection period. The listing agent counters the purchase price on Counter-Offer #1, stating: “The purchase price shall be \$200,000. All other terms and conditions remain the same.” However, the listing agent also marked through line 185 of the Contract, crossing out ten (10) days, and indicating the inspection period would be five (5) days.

ISSUE: In the seller’s Counter-Offer, should the listing agent have written, “All other terms and conditions remain the same” if the seller countered additional terms within the Contract?

ANSWER: Probably not.

DISCUSSION: Before a binding contract is formed, parties must mutually consent to all material terms. *Hill-Shafer Partnership v. Chilson Family Trust*, 165 Ariz. 469, 799 P.2d 810 (Ariz. 1979).

Oftentimes, disputes arise because ambiguity has occurred. →

Here, the Counter-Offer language is ambiguous within the “four corners” of the document because it can be reasonably interpreted in more than one way. To avoid ambiguity, the listing agent should have countered all Contract terms on the Counter-Offer, *and then* used “all other terms and conditions remain the same.” This would indicate that the seller has placed in the Counter-Offer only those terms she wishes to change and any item(s) not specifically negotiated in the Counter-Offer remain and are agreed upon between the two parties.

Deed Can Be Valid Without Recordation

FACTS: John Smith was the owner of the property. Smith signed the property over to Quincy by way of a Quit Claim Deed. Quincy did not record the Deed. Subsequently, some years later, Smith then signed a Quit Claim Deed to the John Smith Family Trust, of which John Smith was the only Trustee, and recorded the Deed.

ISSUE: Who is the owner of the property?

ANSWER: Quincy.

DISCUSSION: Deeds should be recorded in the office of the county recorder in which the property is located. If a deed is not recorded, it is binding between the grantor and grantee, but void as to creditors and subsequent purchasers for valuable consideration without notice (such as a recorded deed with the county recorder’s office.) A.R.S. §33-412.

A bona fide purchaser (BFP) is a purchaser for value without notice and is used to refer to an innocent party who purchases property without notice of any other party’s claim to the title of that property (such as a recorded document).

Here, because John Smith signed both Deeds, the John Smith Family Trust was not a BFP. The Quit Claim Deed to the Trust would not be valid because the Trust had “notice” that Quincy was the owner of the property.

A/C Must Comply With Municipal Ordinance

FACTS: A tenant states that the A/C is not functioning properly. The landlord had the system tested and the unit was found to be running at proper capacity. The A/C company advised the tenant that when the exterior temperature is 110+ degrees’ outside, a consistent interior temperature of 77 degrees is expected and reasonable. The A/C vendor states that, in extreme heat, the unit will never get to 65 degrees, as the tenant has requested.

ISSUE: What is an acceptable temperature in the summer?

ANSWER: See discussion.

DISCUSSION: Various municipalities have ordinances addressing this issue. For example, City of Phoenix Ord. 39-5(B)(1)(b) requires: Every rental housing unit where

such systems are installed shall have cooling capable of safely cooling all habitable rooms, bathrooms and flushing toilet rooms to a temperature no greater than 86 degrees Fahrenheit, if cooled by evaporative cooling, or 82 degrees Fahrenheit, if cooled by air conditioning.

Thus, a landlord should check the municipality ordinances in each town he/she owns a rental in to be certain of compliance.

Disclosure of Second Purchase Contract Required

FACTS: The buyer used Agent A for both contracts.

Agent A advised buyer how to cancel the Maple Contract to obtain a refund of his earnest money deposit, and proceed with the Elm Contract.

ISSUE: Should Agent A disclose to the sellers the fact that buyer had entered into multiple contracts to purchase property?

ANSWER: Yes.

DISCUSSION: Any buyer of real property must disclose to a seller any known fact relating to the potential inability to close the transaction. See *Lombardo v. Albu*, 199 Ariz. 97, 14 P.3d 288 (2000). This same obligation is imposed upon real estate licensees. Furthermore, A.A.C. R4-28-1101(B)(1) obligates all licensees to disclose in writing to all other parties “any information that the buyer or lessee is, or may be unable to perform.”

Knowing that buyer would and could purchase only one property, buyer’s execution of a second purchase contract directly impacted his ability to purchase the Maple Ave. Property. Disclosure was therefore required.

HOA Costs Related to the Transfer or Use of the Property

FACTS: A Buyer and Seller entered into a Residential Resale Real Estate Purchase Contract. The HOA was notified of the sale. When the HOA sent the fees to the title company, title was told to charge the Seller \$300 for the transfer fee, and \$300 for the disclosure fee.

ISSUE: Is the transfer fee part of the \$400 aggregate amount an HOA may charge?

ANSWER: No.

DISCUSSION: A.R.S. § 33-1806(C) allows an HOA to “charge the member a fee of no more than an aggregate of four hundred dollars to compensate the association for the costs incurred in the preparation of a statement or other documents furnished by the association pursuant to this section for purposes of resale disclosure, lien estoppels and any other services related to the transfer or use of the property.” →

In this case, the HOA seeks to charge a resale disclosure fee of \$300, which does not exceed the statutory cap. Additionally, the HOA has a transfer fee of \$300, which is separate from the disclosure fee.

Thus, the HOA may charge \$300 for the disclosure fee and an additional \$300 for the transfer fee.

These situations are fact-specific. A broker should consult with counsel about the specific situation before taking action.

ABOUT THE AUTHOR

Richard V. Mack



Richard V. Mack is a partner at [Manning and Kass](#), which provides the AAR Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.



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Arizona Association of REALTORS® is very excited to announce the first ever Arizona RAPAC Rally Ride & Poker Run! Become a Major Investors in RAPAC for 2016 and we invite you to take part in this grand event for FREE! Put this on your calendar for Wednesday, September 28th – Thursday, September 29th with the pre-ride party and waiver/registration on Tuesday evening at the Scottsdale Area Association of REALTORS®.

Register [HERE!](#) Registration includes hotel accommodations for one night on September 28th in Cottonwood Arizona. Don't worry if you don't have a motorcycle... you can rent one, ride on the back of an experienced driver, or take a seat in a convertible car and enjoy the scenery that way.

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Arizona Do Not Call Registry Enforcement Actions On the Rise

Various services throughout the United States sell leads to REALTORS®. To generate leads, several of these services undertake the often tedious task of ascertaining the contact information for expired, FSBO, and pre-foreclosure leads. This contact information, including phone numbers, is then sold to real estate agents who use the information to make unsolicited contact with homeowners in an effort to solicit business.

Unbeknownst to the real estate agent, many of the calls placed are to phone numbers registered with the National Do Not Call Registry. Historically, violations of this federal law have not been vigorously prosecuted. However, recent events suggest that enforcement actions will soon be on the rise.

On June 14, 2016, Arizona Attorney General Mark Brnovich filed a Consumer Fraud Lawsuit against AJ's Auto Glass, which is accused of placing calls to Arizonans on the Do Not Call Registry.

"This lawsuit should serve as a warning to telemarketers who ignore the law and continue to harass Arizonans on the Do Not Call list," said Attorney General Mark Brnovich. "This office will take action against any business that blatantly violates Arizona's telephone solicitation laws."

In light of this warning, brokers should be more vigilant than ever in educating their agents about the law and monitoring their compliance. If calling consumers is part of your agents' business model, it is imperative that you take the time to familiarize yourself with the Do Not Call rules and ensure that your agents do the same. A failure to do so may place your firm in a vulnerable position.

For more information about the National Do Not Call Registry go to:

<https://www.donotcall.gov/>

<http://www.realtor.org/user/login?destination=/law-and-ethics/complying-with-federal-regulations/do-not-call-registry/accessing-the-registry>

<http://www.realtor.org/law-and-ethics/complying-with-federal-regulations/do-not-call-registry/faq>

