

# BROKER & MANAGER

QUARTERLY

## FEBRUARY 2016 FORM REVISIONS

AAR'S CONTRACT FORMS REVISED

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REAL ESTATE



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FIRST QUARTER 2016 | ARIZONA BROKER/MANAGER QUARTERLY

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## February 2016 Form Revisions

BY SCOTT M. DRUCKER, ESQ.

AAR Policy Statement P.30 states, "New or revised forms shall be released on or about February 1, June 1 and October 1 unless law or regulation mandates earlier release." Pursuant to this Policy, at the beginning of February two of AAR's standard forms have been revised as follows:

### PRE-QUALIFICATION FORM

12 CFR 1026.19(e) (2)(ii) states: **"Written information provided to consumer. If a creditor or other person provides a consumer with a written estimate of terms or costs specific to that consumer before the consumer receives the disclosures required under Paragraph (e) (1)(i) of this section, the creditor or such person shall clearly and conspicuously state at the top of the front of the first page of the estimate in a font size that is no smaller than 12-point font: 'Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan.' The written estimate of terms or costs may not be made with headings, content, and format substantially similar to form H-24 or H-25 of Appendix H to this part."**

To ensure compliance with this federal law, a sentence has been added to the top of the form stating "Your actual rate, payment, and costs could be higher. Get an official Loan Estimate before choosing a loan."

### PROPERTY MANAGEMENT AGREEMENT

In cases of an automatic renewal provision, A.R.S. § 32-2173(A)(2)(a) requires a property management firm to send the owner a reminder notice at least 30 days before the renewal date. Based on this language, the Arizona Department of Real Estate (ADRE) has expressed that property management agreements cannot be for a term of less than 30 days. Consequently, the box for "days" that appeared on line 13 has been removed. Additionally, because the renewal notice is sent prior to each renewal date, for clarification line 14 has been revised as follows: "Broker shall send Owner a reminder notice at least thirty (30) days prior to the **each** renewal date."



# AAR's Contract Forms Revised

BY SCOTT DRUCKER, ESQ.

Three additional forms have been revised effective mid-February. They are the **Residential Resale Real Estate Purchase Contract**, the **Vacant Land/Lot Purchase Contract** and the **Commercial Real Estate Purchase Contract**.

The reason behind these changes is that The Protecting Americans from Tax Hikes Act (The PATH Act) was signed into law on December 18, 2015 and includes a provision modifying the Foreign Investment in Real Property Tax Act (FIRPTA). The modification increases the tax withholding from 10% to 15% for homes over \$1 million. The withholding tax rate increase is effective 60 days after the enactment of the PATH Act, which is February 16, 2016. Because of this federal law change, the FIRPTA section in AAR's above-referenced purchase contracts have been revised to now refer to the FIRPTA withholding cap as "up to 15%."

Find it here: <https://www.aaronline.com/2016/01/february-2016-form-revisions/>

**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.

The image displays three overlapping real estate purchase contract forms from the Arizona Association of REALTORS. The forms are: **RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT**, **VACANT LAND/LOT PURCHASE CONTRACT**, and **COMMERCIAL REAL ESTATE PURCHASE CONTRACT**. Each form includes sections for property details, buyer/seller information, and financial terms. A hand is visible at the bottom, holding a pen over the forms.



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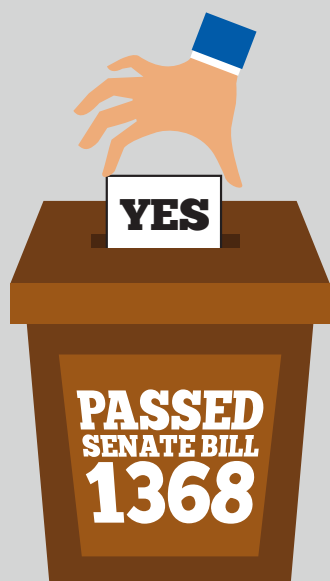
# ARIZONA association of REALTORS® **TOP 10 ACCOMPLISHMENTS 2015**



**RETAINED PR FIRM**  
(BigYAM to Help Coordinate  
Consumer Outreach and Promote  
REALTOR® Value)

 **TechHelpline**  
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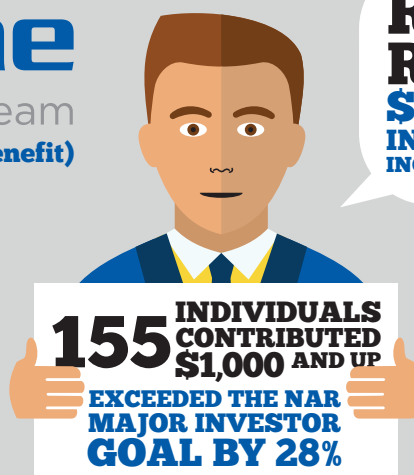
**RAPAC  
RAISED  
\$577,769.50**  
IN 2015, A 34.16%  
INCREASE OVER 2014



**PASSED  
SENATE BILL  
1368**  
**PREVENTED  
REQUIREMENT OF ADDITIONAL  
BUSINESS LICENSES  
FOR REALTORS®**



**REVISED  
RPC, LSU  
& PRE-QUAL  
FORMS**



**1ST ANNUAL  
COMMUNITY OUTREACH  
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(5 Grants in 2015 Foundation Challenge)



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(Text-based System to Alert  
REALTORS® of Safety Threats)



**SAVED  
HOMEOWNERS OVER  
\$20.2 MILLION**  
(By Preserving the Arizona  
Homeowner's Rebate)



# Pre-Possession and Post Possession Checklists

AAR's Risk Management Committee ("Committee") has previously avoided developing pre-possession and post possession agreement forms due to the inherent risk and liability associated with transactions of this nature. The Committee, however, recognizes these type of agreements are entered into. As a way of minimalizing the risk, the Committee approved of providing checklists to association members so that they may address important issues with pre-possession and post possession agreements. Such issues include but are not limited to: insurance; condition of premises at time of possession; repairs and maintenance; occupancy rights; rental payments and/or deposits; contract contingencies; alterations and a failed transaction. To access those checklists, go to page 6 and page 7.

Note: Due to the risk and liability involved with pre-possession and post possession of a property, the best practice is for the parties to not enter into a pre-possession or post possession agreement. However, if the parties insist on entering into such an agreement, the real estate agent should consult with their broker. Moreover, per Commissioner's rule R4-28-1101 (K), **"A salesperson or broker shall recommend to a client that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property."**

For more information on pre-possession and post possession agreements, please go to <https://www.aaronline.com/2015/01/prepossession-and-post-possession-risks/>.



# Pre-possession Agreement Checklist

**Pre-possession and Post Possession agreements are NOT recommended**, carry inherent risks, and raise a variety of legal and practical issues. For that reason, Commissioner's Rule R4-28-1101(K) provides that "A salesperson or broker shall recommend to a client that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property." **Due to the risk and liability involved with pre-possession and post possession, the best practice is for the parties to enter into a lease agreement rather than a pre or post possession agreement.**

1. **Purpose:** State whether the Buyer and Seller's relationship will create a landlord-tenant relationship and thereby be governed by the Arizona Residential Landlord Tenant Act or whether the pre-possession agreement will not create a landlord-tenant relationship under A.R.S. § 33-1308(2).
2. **Possession date:** Provide the date Buyer's possession of the premises will begin and when the Buyer has to vacate the premises if close of escrow does not occur.
3. **Occupancy:** State the reason for the occupancy (e.g., Buyer will occupy the premises or Buyer is moving personal property into premises) and who/how many occupants are allowed, including pets, if any.
4. **Compensation:** Determine the amount Buyer will compensate Seller to pre-possess the premises (e.g., daily rate, flat rate, etc.), whether Buyer will directly pay Seller the compensation, and whether Buyer will owe additional funds if close of escrow is extended.
5. **Security deposit:** Consider whether Seller will charge an additional security deposit and how much, whether Seller will hold the security deposit, and how the security deposit will be used and/or returned to Buyer.
6. **Use of premises:** Include how the premises are to be utilized (e.g., personal residence) and that Buyer will comply with any and all applicable laws, ordinances, regulations, CC&Rs, etc. Additionally, address who is responsible if any fines or assessments are incurred during the pre-possession.
7. **Utilities/services:** Determine who will pay the utility bills and other services for the premises during the pre-possession.
8. **Condition of the premises:** The parties should agree on the condition of the premises prior to Buyer's pre-possession.
9. **Insurance:** Address whether renter's insurance and/or additional insurance is needed.
10. **Risk of loss:** Determine who is responsible in the case of damage to the premises during the pre-possession.
11. **Contingencies:** Consider whether any remaining contingencies that are not met will continue to be effective or whether the contingencies will be deemed waived once Buyer takes occupancy of the premises.
12. **Maintenance:** Determine who is responsible for any repairs or maintenance of the premises during the pre-possession. The parties may want to consider purchasing a home warranty that will cover the premises prior to close of escrow.
13. **Improvements:** State whether alterations, repairs, or improvements are allowed during the pre-possession and what happens if any alterations, repairs, or improvements were made and then escrow fails to close.
14. **Assignment:** Consider whether the Buyer is allowed to assign their right to the premises.
15. **Entry to premises:** The parties should determine what type and how much notice Seller should give Buyer to enter the premises for completing repairs or inspecting the premises.
16. **Indemnification:** REALTORS® should ensure the Buyer and Seller will hold harmless and indemnify their broker(s) in the transaction from any and all liability and responsibility related to the pre-possession.
17. **Other terms and conditions:** Include any other items of importance (e.g., no smoking in the property).

Note: Prior to any parties signing a pre-possession agreement, the Broker should review the agreement and the parties should be encouraged to seek appropriate counsel.

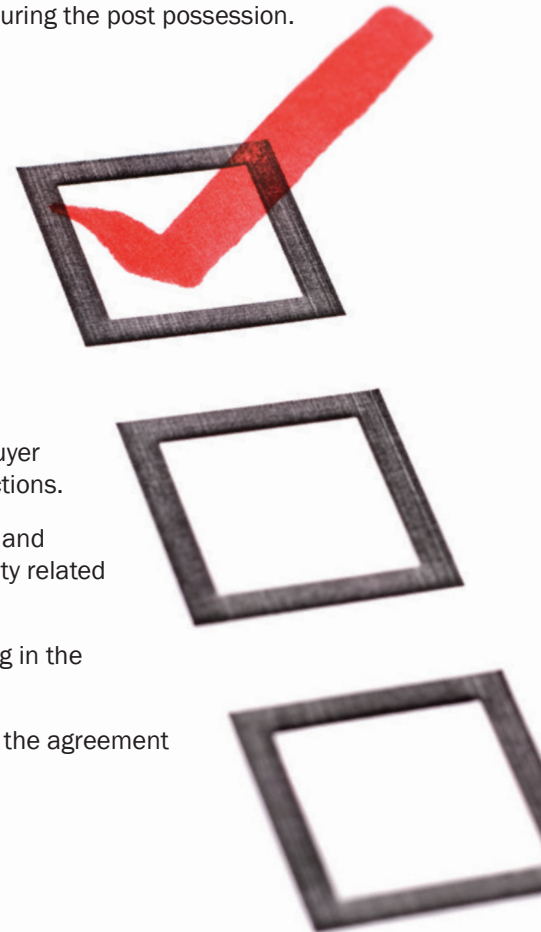


# Post Possession Agreement Checklist

**Pre-possession and Post Possession agreements are NOT recommended**, carry inherent risks, and raise a variety of legal and practical issues. For that reason, Commissioner's Rule R4-28-1101(K) provides that "A salesperson or broker shall recommend to a client that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property." **Due to the risk and liability involved with pre-possession and post possession, the best practice is for the parties to enter into a lease agreement rather than a pre or post possession agreement.**

1. **Purpose:** State whether the Buyer and Seller's relationship will create a landlord-tenant relationship and thereby be governed by the Arizona Residential Landlord Tenant Act.
2. **Possession date:** Provide the length of the term for Seller's possession of the premises. Include verbiage that the agreement is void if escrow fails to close.
3. **Occupancy:** State the reason for the occupancy (e.g., Seller will continue to occupy the premises or Seller is storing personal property on the premises) and who/how many occupants are allowed, including animals, if any.
4. **Compensation:** Determine the amount Seller will compensate Buyer to possess the premises (e.g., daily rate, flat rate, etc.), whether Seller will directly pay Buyer the compensation, and whether Seller will owe additional funds if Seller remains in possession of the premises following the agreed upon move-out date.
5. **Security deposit:** Consider whether Buyer will charge a security deposit and how much, whether Buyer will hold the security deposit, and how the security deposit will be used and/or returned to Seller.
6. **Use of premises:** Include how the premises are to be utilized (e.g., personal residence) and that Seller will comply with any and all applicable laws, ordinances, regulations, CC&Rs, etc. Additionally, address who is responsible if any fines or assessments are incurred during the post possession.
7. **Utilities/services:** Determine who will pay the utility bills and other services for the premises during the post possession.
8. **Insurance:** Address whether renter's insurance and/or additional insurance is needed.
9. **Risk of loss:** Determine who is responsible in the case of damage to the premises during the post possession.
10. **Maintenance:** Determine who is responsible for any repairs or maintenance of the premises during the post possession. Additionally, the parties may want to consider the amount Seller is responsible for paying for any maintenance or repair during Seller's post possession (e.g., Seller is responsible for home warranty deductible).
11. **Improvements:** State whether alterations, repairs, or improvements are allowed during the post possession and what happens if any alterations, repairs, or improvements are made.
12. **Assignment:** Consider whether the Seller is allowed to assign their post possession right to the premises.
13. **Entry to premises:** The parties should determine what type and how much notice Buyer should give Seller to enter the premises for completing repairs or conducting inspections.
14. **Indemnification:** REALTORS® should ensure the Buyer and Seller will hold harmless and indemnify their broker(s) in the transaction from any and all liability and responsibility related to the post possession.
15. **Other terms and conditions:** Include any other items of importance (e.g., no smoking in the property).

Note: Prior to any parties signing a post possession agreement, the Broker should review the agreement and the parties should be encouraged to seek appropriate counsel.





# Proper Use of Section 1d of the Residential Purchase Contract

Generally speaking, a contract is an agreement with **specific terms** between two or more persons or entities in which there is a promise to do something in exchange for a valuable benefit known as consideration. Although it may seem obvious, an essential element of a valid contract is that all parties agree on all major issues. While anyone can make an offer, a contract cannot be formed until the offer is accepted, resulting in a meeting of the minds.

Among the many critical terms to be addressed in a contract is time of performance. Parties to a contract should therefore identify the time of performance with as much specificity as possible, evidencing a common understanding.

Section 1d of the Residential Resale Real Estate Purchase Contract (the “Purchase Contract”) asks the parties to state a date upon which Close of Escrow (“COE”) will occur. Although contracts are not required to identify a specific date for close of escrow, a date certain is the best way to identify with particularity when this important event will occur. It will also ensure that the expectations of both the buyer and seller are the same, thereby avoiding a potentially costly dispute. Nonetheless, instances occur in which a day, month and year are not entered on line 18 of the Purchase Contract. In contradiction to what the date field requests, it has on occasion been populated with ambiguous terms such as “after Labor Day” or “upon completion of all repairs.”

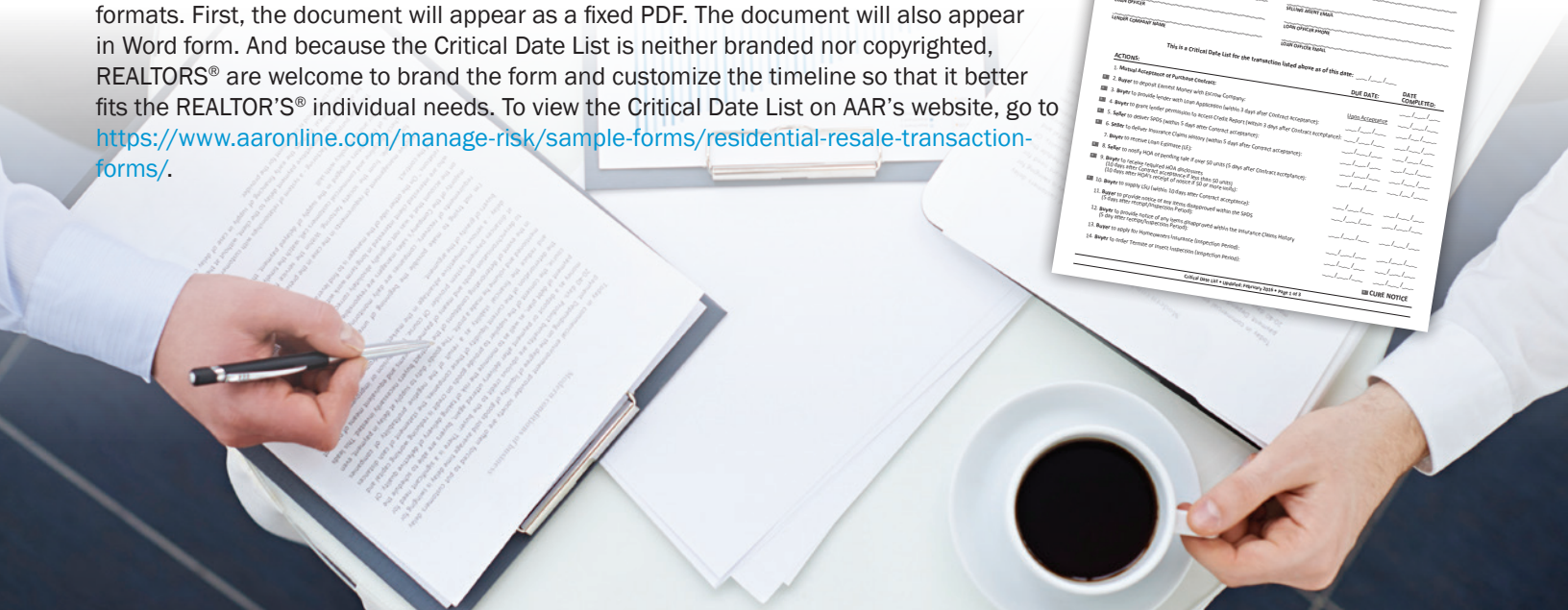
In an effort to address this issue, zipForm will now limit the field on line 18 of the Purchase Contract strictly to a day, month and year. When the field is being populated, REALTORS® will be presented with a calendar and asked to select a precise date on which escrow will close. While this date can subsequently be changed via an Addendum, limiting the manner in which the date field can be populated will help avoid ambiguity and uncertainty in regard to this important contractual term.

## Critical Date List

The Critical Date List, a document designed to assist you and your clients track the status of the transaction and monitor upcoming deadlines, is now on zipForm and all of AAR’s forms licensing platforms, effective February 2016.

For many years, AAR maintained exclusively on its website a prior version of the Critical Date List. But when the Residential Resale Real Estate Purchase Contract was revised in September 2015, the Critical Date List was significantly restructured to: (1) comply with the new TRID timelines; and (2) make it easier to use and simpler to understand. AAR’s Risk Management Committee then voted to place the updated version on all of AAR’s forms licensing platforms, including zipForm.

Nonetheless, the Critical Date List will continue to appear on AAR’s website in two different formats. First, the document will appear as a fixed PDF. The document will also appear in Word form. And because the Critical Date List is neither branded nor copyrighted, REALTORS® are welcome to brand the form and customize the timeline so that it better fits the REALTOR’S® individual needs. To view the Critical Date List on AAR’s website, go to <https://www.aaronline.com/manage-risk/sample-forms/residential-resale-transaction-forms/>.



The image shows a hand holding a pen over a desk with a coffee cup. A 'CRITICAL DATE LIST' form is overlaid on the right side of the image. The form is titled 'CRITICAL DATE LIST' and 'Updated: February 2016'. It contains a table with columns for 'ACTION', 'DUE DATE', and 'DATE COMPLETED'. The table lists various actions related to a real estate transaction, such as 'Review and sign the Purchase Contract', 'Provide lender with loan application', 'Obtain lender's commitment', etc. The form is designed to help track the status of the transaction and monitor upcoming deadlines.





## Buyer-Seller MEDIATION PROGRAM

### MEDIATION

**Me-di-a-tion** (noun):  
intervention between  
conflicting parties to  
promote reconciliation,  
settlement, or compromise.

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# Data Breaches and Cyberfraud

BY SCOTT M. DRUCKER, ESQ.

Data breaches and cyberfraud are becoming increasingly common. A March 2015 study performed by Javelin, a Greenwich Associates LLC company, found that 12.7 million adults in the United States became a victim of some form of identity fraud during 2014. Unfortunately, the real estate industry is not immune to cybercrime. In fact, Arizona real estate transactions continue to be targeted by hackers perpetrating wire transfer fraud. (See <https://www.aaronline.com/2015/05/hackers-perpetrate-wire-transfer-fraud-scams-across-arizona/>.)

For these reasons, the National Association of REALTORS® recommends that REALTORS® “create, maintain and follow a comprehensive Data Security Program” and properly dispose of consumer information. But in doing so, REALTORS® must balance state imposed record keeping requirements with federal law, namely The Fair and Accurate Credit Transactions Act of 2003.

## Arizona Record Keeping Requirements

Arizona state law mandates a number of record keeping requirements, including those imposed upon members of the real estate industry. For example:

- Each licensed employing broker must retain completed transaction and employee files for a period of at least five years from the date of the termination of the transaction or employment. See A.R.S. § 32.2151.01(A).
- Property management firms must keep a residential rental agreement and related residential rental agreement documents for one year from the expiration of the rental agreement or until the rental agreement and related documents are given to the owner at the termination of any property management agreement. See A.R.S. § 32.2175(A).
- Property management firms must keep all financial records pertaining to clients for at least three years from the date each document was executed, including bank statements, canceled checks or bank generated check images, deposit slips, bank receipts, receipts and disbursement journals, owner statements, client ledgers and applicable bills, invoices and statements. See A.R.S. § 32.2151.01(C).

And while the Arizona Department of Real Estate audits compliance with the above-referenced state statutes, REALTORS® must also consider how to properly dispose of records once their retention obligations are at an end.

## The Fair and Accurate Credit Transactions Act of 2003

The Fair and Accurate Credit Transactions Act of 2003 (FACTA), 15 U.S.C. § 1681, regulates the disposal of consumer credit information in an effort to reduce the risk of consumer fraud, including cyberfraud. Any business or individual who uses a consumer report for a business purpose is subject to the requirements imposed by FACTA and a failure to comply can result in per violation liability that may prove to be very expensive.

Under FACTA, any person or entity that maintains or otherwise possesses “consumer information” for a business purpose must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with disposal. See 16 CFR 682.3(a).

Consumer information is defined as any record about an individual, whether in paper, electronic, or other form, that is a consumer report or is derived from a consumer report. Consumer information also means a compilation of such records. See 16 CFR 682.1(b).

Real estate firms are governed by FACTA, along with lenders, brokers/agents, landlords, property managers, title agents, and short sale negotiators, all of whom maintain significant amounts of confidential third-party information. For example, short sale applications, rental applications, credit reports and leases all contain personal information of the nature targeted by cyber criminals.

So what constitutes proper disposal? Generally speaking, the disposal rule mandates practices that are reasonable and appropriate to prevent unauthorized access or use of consumer information. According to the Federal Trade Commission (FTC), the standard for proper disposal is flexible and allows those covered by FACTA to reasonably determine what measures are appropriate based, in part, on the sensitivity of the information, the costs of compliance, and advances in technology. And while FACTA does not dictate specific disposal measures, the FTC provides examples of disposal methods that may prove appropriate, such as:





- burning or shredding papers;
- destroying or erasing electronic files so that the information cannot be reconstructed; and
- retaining a document destruction contractor, after due diligence on the company is performed.

Businesses and individuals governed by FACTA must also consider that it requires them to protect against unauthorized access to or use of confidential information in conjunction with its disposal. The FTC has emphasized that this requirement applies both during and after the disposal process and affects not only the processes and procedures employed, but also the personnel retained to implement them.

### Conclusion

As recommended by the National Association of REALTORS®,

brokers should consider establishing and implementing internal policies and procedures dictating how confidential information is handled, and the manner in which it is disposed. These guidelines should include such things as defining confidential information, explaining how the information will be stored and transmitted, setting timelines for retention and destruction, and outlining procedures by which consumer information, including that in digital form, will be purged. Clearly, the threat of data breach and cybercrime has changed the landscape and, as a result, the days of simply tossing files and reports in the garbage are over.

**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.





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# LEGAL HOTLINE



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\* To answer legally related questions about the many diversified areas of today's real estate industry.

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the attorneys at  
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For More Information

Please contact Jamilla Brandt,  
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at [jamillabrandt@aaronline.com](mailto:jamillabrandt@aaronline.com)  
or 602-248-7787.

Primary access to the  
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Brokers, who may also give  
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REALTOR-ASSOCIATE® member  
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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.*

## Deposit of Earnest Money is Curable

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

**ISSUE:** Is the Contract cancelled?

**ANSWER:** No. See Discussion.

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

Note: Section 8n provides that earnest money will be deposited upon acceptance of the offer.

<https://www.aaronline.com/2016/01/deposit-of-earnest-money-is-curable/>

## Broker Must Maintain a Definite Place of Business

**FACTS:** A broker leases space in an executive suite. The broker does not have a defined office. However, per the executive suite lease, the broker is allowed access to an office and conference room by appointment for an agreed upon fee.

**ISSUE:** Must a real estate broker have a definite physical office by statute?

**ANSWER:** Yes.

**DISCUSSION:** Pursuant to A.R.S. § 32-2126(A), a broker must "have and maintain a definite place of business." The Arizona Department of Real Estate (ADRE) takes the position that leasing space at an executive suite satisfies this requirement only if there is a definite space leased on a continual basis.

Here, because the broker only gets an office and a conference room on an as-needed basis and does not have a definite place, he is in violation of the statute as interpreted by the ADRE.

<https://www.aaronline.com/2016/01/broker-must-maintain-a-definite-place-of-business/>

## Real Estate Documents May Be Saved in the Cloud Under Appropriate Circumstances

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

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

**ANSWER:** Yes.

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

<https://www.aaronline.com/2016/01/broker-must-maintain-a-definite-place-of-business/>

## Notice of Cancellation Based on Appraisal Value Must be Given Within Five (5) days of Notice of Appraised Value

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





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[www.aaronline.com/wp-content/uploads/2015/03/Legal-Hotline-Access-Process-2015-03-31-fillable.pdf](http://www.aaronline.com/wp-content/uploads/2015/03/Legal-Hotline-Access-Process-2015-03-31-fillable.pdf)

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

**ANSWER:** See Discussion.

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

**Appraisal Contingency:** Buyer's obligation to complete this sale is contingent upon an appraisal of the Premises acceptable to lender for at least the purchase price. If the Premises fails to appraise for the purchase price in any appraisal required by lender, Buyer has five (5) days after notice of the appraised value to cancel this Contract and receive a refund of the Earnest Money or the appraisal contingency shall be waived. The contract addresses "notice of the appraised value," not an appeal. Accordingly, the cancellation period will expire five (5) days after the buyer's receipt of the appraisal.

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

<https://www.aaronline.com/2016/01/broker-must-maintain-a-definite-place-of-business/>

## Real Estate Licensee Must Comply With Fair Housing Act Even With Personal Residence

**FACTS:** A real estate licensee owns a single family residence. The garage of the home has been converted into a small studio apartment. The licensee wants to advertise the studio apartment for rent to a "Single" person. The licensee believes she can advertise for single tenants because she is exempt from the Fair Housing Rules as her property is an owner-occupied property.

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

**ANSWER:** No.

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

<https://www.aaronline.com/2016/01/real-estate-licensee-must-comply-with-fair-housing-act-even-with-personal-residence/>

## Buyer Has Options When Trees Are Knocked Down After the Inspection Period

**FACTS:** Two (2) days before closing, a large storm occurred and the buyer discovered two (2) trees had been knocked down during the storm. The buyer wants to cancel the AAR Residential Resale Real Estate Purchase Contract ("Purchase Contract") if the seller refuses to replace the trees. The seller states he will not replace the trees, and that the buyer is in breach if he fails to close escrow. The buyer claims there is a change in the Premises and seller should now update the Seller's Property Disclosure Statement ("SPDS") so that the buyer may cancel within five (5) days, according to section 4e of the Purchase Contract. However, the buyer also believes the trees were knocked down by "an act of God," and that the seller is obligated to replace the trees, as the cost of such would not exceed 10% of the purchase price, according to section 8e of the Purchase Contract.

**ISSUE:** Can the buyer require the seller to replace the two (2) trees according to sections 4e, and 8b of the Purchase Contract?

**ANSWER:** See Discussion.

**DISCUSSION:** Sections 4e and 8b of the Purchase Contract offer separate options to the buyer – cancel the Purchase Contract or continue towards closing.

Section 4e at lines 168-171 of the Purchase Contract reads: *Changes During Escrow: Seller shall immediately notify Buyer of any changes in the Premises or disclosures made herein, in the SPDS, or otherwise. Such notice shall be considered an update of the SPDS. Unless Seller is already obligated by Section 5a or otherwise by this Contract or any amendments hereto, to correct or repair the changed item disclosed, Buyer shall be allowed five (5) days after delivery of such notice to provide notice of disapproval to Seller.*

Under this option, because there is a change in the Premises, the buyer can request that the seller update the SPDS per lines 168-171 of the Purchase Contract. Once the buyer receives the revised SPDS, the buyer then has five (5) days to either accept the property, attempt to renegotiate for the loss of the trees, or cancel the contract and retain their earnest money deposit.



The second option under section 8b at lines 341-344, titled Risk of Loss provides that:

*If there is any loss or damage to the Premises between the date of Contract acceptance and COE or possession, whichever is earlier, by reason of fire, vandalism, flood, earthquake, or act of God, the risk of loss shall be on the Seller, provided, however, that if the cost of repairing such loss or damage would exceed ten percent (10%) of the purchase price, either Seller or Buyer may elect to cancel the Contract.*

If the buyer decides to proceed with the transaction, because a large storm knocked down the trees before close of escrow, the storm is most likely an “act of God.” If replacing the trees costs less than ten percent (10%) of the purchase price, the seller is required to replace the trees. If the seller refuses to replace the trees, the buyer should proceed toward closing and thereafter pursue the seller in small claims court.

<https://www.aaronline.com/2016/01/real-estate-licensee-must-comply-with-fair-housing-act-even-with-personal-residence/>

### **SPDS Waiver Does Not Eliminate Disclosure Obligations**

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

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

**ANSWER:** Yes.

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

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

<https://www.aaronline.com/2015/11/spds-waiver-does-not-eliminate-disclosure-obligations/>

### **Using “Realty” in a Team Name is Likely Unacceptable to the Arizona Department of Real Estate (ADRE)**

**FACTS:** Several licensees in an office want to create a “team” and market their services as such. The team would like to include the word “Realty” in their team name (e.g., “The Home

Realty Team”).

**ISSUE:** Can the team use the word “Realty” in their team name?

**ANSWER:** See Discussion.

**DISCUSSION:** The ADRE is clear that team names must not create the impression that the team is an independent entity or separate from the employing broker. A.A.C. R4-28-502(C) provides: “A salesperson or broker shall ensure that all advertising contains accurate claims and representations, and fully states factual material relating to the information advertised. A salesperson or broker shall not misrepresent the facts or create misleading impressions.”

Thus, the use of the words “Associates,” or “Realty” should be avoided because they create the impression of a brokerage, rather than a team and are typically not acceptable to the ADRE.

<https://www.aaronline.com/2015/11/using-realty-in-a-team-name-is-likely-unacceptable-to-the-arizona-department-of-real-estate-adre/>

### **TILA RESPA Integrated Disclosure (TRID) Rule Does Not Alter Contract Between Buyer & Seller**

**FACTS:** The buyer submits an offer to a seller. The listing agent suggests countering with a clause that makes the buyer’s earnest deposit non-refundable three (3) days prior to close of escrow. The listing agent believes this will give the seller more protection because the agent believes there is now a three (3)-day rescission period under the new TRID rules.

**ISSUE:** Does the buyer have a three (3)-day rescission period under the new TRID rules?

**ANSWER:** No.

**DISCUSSION:** The new TRID rules, which became effective on October 3, 2015, are designed to provide disclosures that will help buyers better understand all of the costs associated with the transaction. Even with the implementation of the new Closing Disclosure form (CD), the underlying contract between the buyer and seller remains unaffected. In other words, the buyer does not have a unilateral right of rescission within three (3) days of closing.

**Note:** The CD must be provided three (3) business days before a buyer closes on their mortgage loan. This three (3) business day waiting period provides the buyer a period to review the CD supplied by his lender.

<https://www.aaronline.com/2015/11/tila-respa-integrated-disclosure-trid-rule-does-not-alter-contract-between-buyer-seller/>

## **Seller Violates RESPA by Dictating Title Company for a Transaction**

**ISSUE:** Is it a violation of RESPA for the seller in a real estate transaction to specify the title company which will close the transaction?

**ANSWER:** See Discussion.

**DISCUSSION:** Section 9 of RESPA provides: "No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company." See 12 U.S.C. § 2608.

The Department of Housing and Urban Development ("HUD") has indicated that it will not enforce Section 9 of RESPA against a seller who selects the title insurance company if the seller is paying for the owner's title insurance policy and does not require the buyer to use the title insurance company for the simultaneously issued lender's policy. HUD would take

action under Section 9, however, in situations where a seller required a buyer to pay the seller an amount towards closing costs and the seller used a portion of the buyer's paid closing costs for the owner's title insurance without providing the buyer with a choice of that title company.

<https://www.aaronline.com/manage-risk/legal-hotline/legal-hotline-q-a-miscellaneous/>

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

### **ABOUT THE AUTHOR**

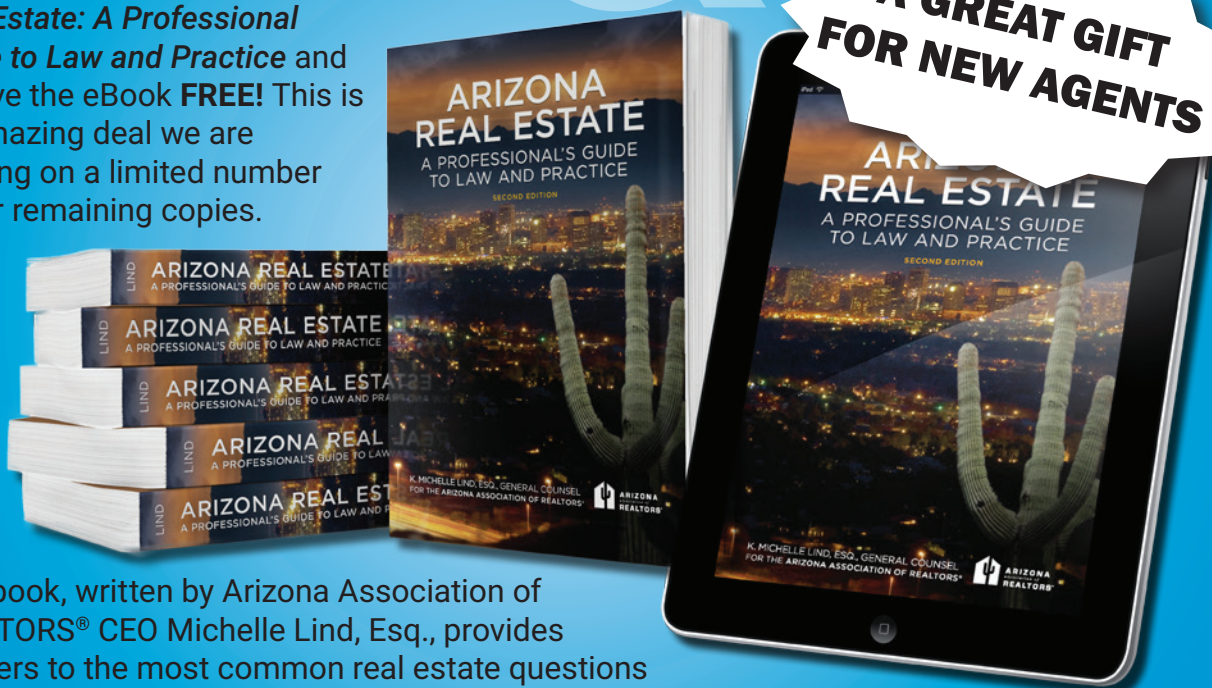
*Richard V. Mack*



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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# Resolving Disputes – Ethics Enforcement

REALTORS® pledge to abide by the NATIONAL ASSOCIATION OF REALTORS® (NAR) Code of Ethics, or code of conduct. The enforcement of the REALTOR® Code of Ethics is a responsibility of the REALTOR® Association. If a consumer or another REALTOR® believes a member is guilty of violating the REALTOR® Code of Ethics, they may file a written complaint with AAR.

Ethics enforcement by the REALTOR® association is the most important distinction between a REALTOR® and a real estate licensee. REALTORS® are obligated by their membership to follow the Code of Ethics and are subject to discipline if found in violation.

One of the important functions of the Arizona Association of REALTORS® is to ensure that due process is served to both members and the general public, through the enforcement of the [Code of Ethics](#) and in the arbitration of business disputes arising out of the real estate business. **Note:** Arizona Association of REALTORS® cannot affect an Arizona Real Estate License. If your pursuit is to affect an Arizona real estate agent's license, refer to the [Arizona Department of Real Estate \(ADRE\)](#).

Find it here: <https://www.aaronline.com/resolve-disputes/ethics/>

## Information on Filing an Ethics Complaint

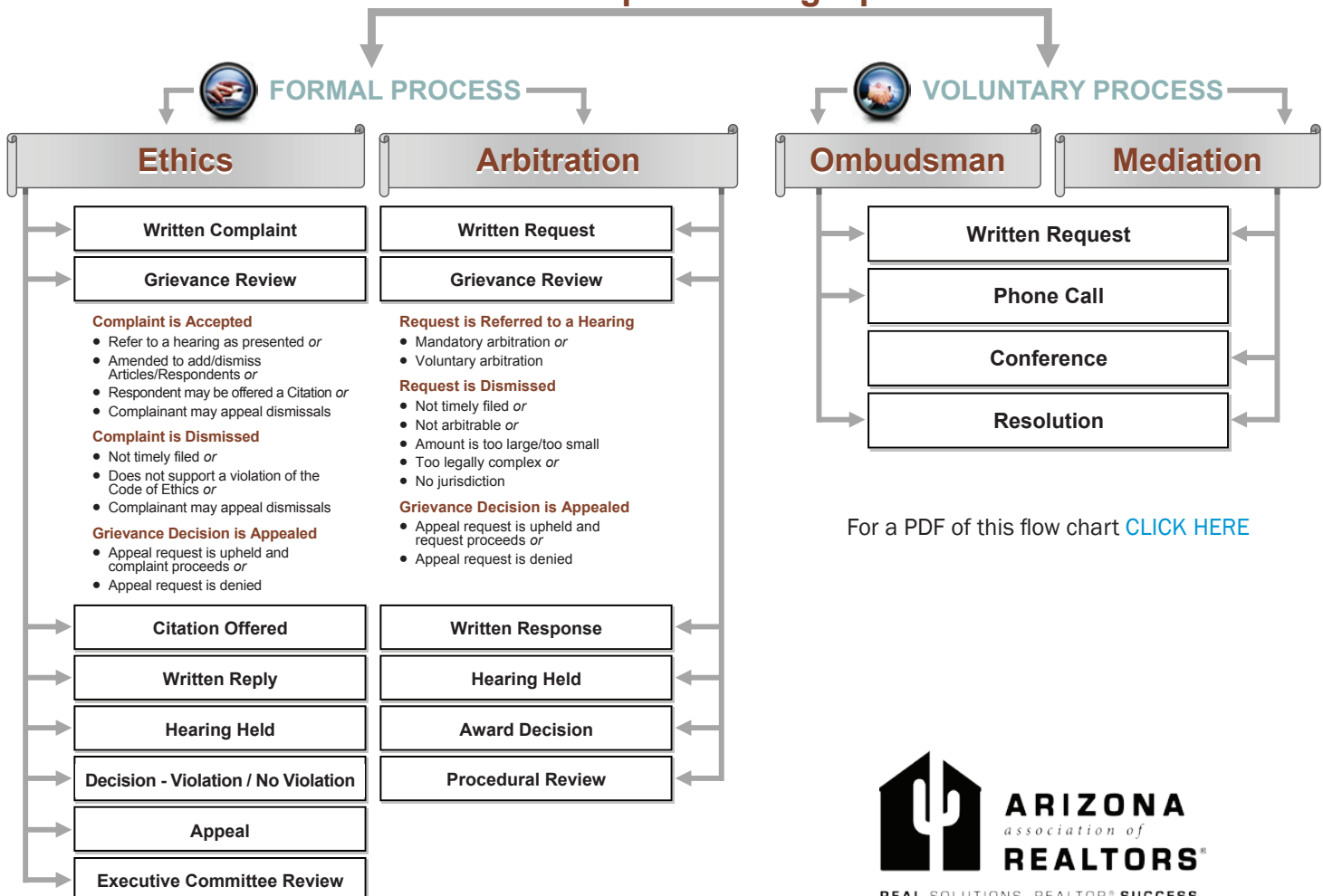
File an ethics complaint when you want to consider a disciplinary action.

[Information About Filing an Ethics Complaint \(PDF\)](#)

[Ethics Complaint Form \(PDF\)](#)

[Ethics Complaint FAQs \(PDF\)](#)

### Complaint Filing Options



For a PDF of this flow chart [CLICK HERE](#)

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## DETAILS

Grab your three favorite superhero REALTORS® to join your cornhole team. Tournament proceeds benefit RAPAC. This is a single elimination tournament!

## WHEN

Tuesday, March 29 at 5:00 p.m.  
during the "Welcome AARtini" at the  
Spring Convention in Prescott, Arizona.  
Tournament begins promptly at 5:30 p.m.

## WHERE

At Eagle's Nest outside patio at the  
Prescott Resort & Conference Center.

## TEAMS

Four individuals make up one team with a \$20  
RAPAC Investment per player. **Winning team will  
receive \$100 gift card per team member!**

## WHY

Healthy competition, RAPAC fundraising and who  
doesn't like to dress up like a superhero?!

