

# BROKER & MANAGER

QUARTERLY

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2017 ARIZONA REALTOR® CONVENTION

"LET'S MAKE A REAL DEAL" GAME SHOW





# BROKER & MANAGER

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## Lockboxes on Rental Properties: Legal, but Unwise

BY SCOTT M. DRUCKER, ESQ., GENERAL COUNSEL

In considering whether lockboxes are permitted to be placed on rental properties in Arizona, the following two statutes must be considered:

**A.R.S. § 33-1315(A)(1)** – A rental agreement shall not provide that the tenant does any of the following: Agrees to waive or to forego rights or remedies under this chapter.

**A.R.S. § 33-1343(D)** – The landlord shall not abuse the right to access or use it to harass the tenant. Except in case of emergency or if it is impracticable to do so, the landlord shall give the tenant at least two days' notice of the landlord's intent to enter and enter only at reasonable times.

Based on the language contained in A.R.S. § 33-1315(A)(1), it is evident that a tenant cannot, by way of a rental agreement, waive any of the rights conveyed upon them in the Arizona Residential Landlord & Tenant Act (the "Act").

Accordingly, a rental agreement cannot be used to create a valid and enforceable waiver of the tenant's rights in regard to property access. Any such provision within a rental agreement would therefore prove unenforceable.

Despite the above, landlords and property managers are not legally prohibited from placing lockboxes on rental property. But under no circumstances can the landlord or property manager require the tenant to waive a right that is provided to them under the Act.

Furthermore, even if a lockbox is placed on rental property, it does not constitute consent to a waiver of the above referenced two day notice requirement.

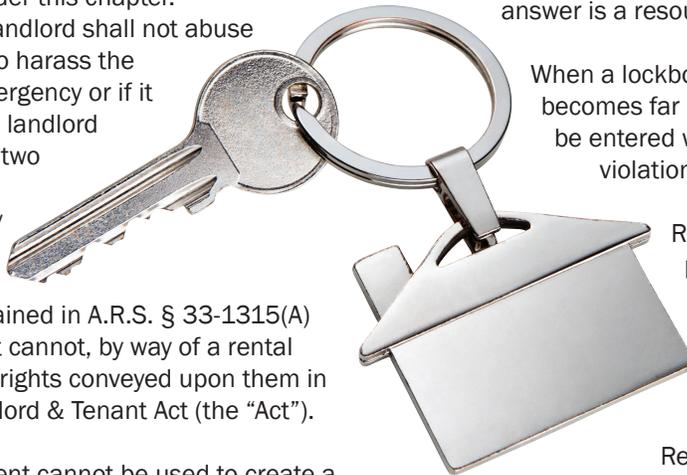
While the law may allow lockboxes to be placed on rental properties under certain circumstances, the question that must be asked is whether doing so is a good policy? The answer is a resounding "no."

When a lockbox is placed on a rental property it becomes far more likely that the property will be entered without at least two days' notice, in violation of A.R.S. § 33-1343(D).

Rather than run this risk and face the potential liability associated with a violation of this statute, as a general policy landlords should opt against placing a lockbox on their rental property.

Remember, just because something is legal doesn't make it a good idea.

**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.



# Safeguards Ward Off Fraud

BY NIKKI SALGAT, ESQ.

Cybercrime is a growing problem that will likely not go away. Because of this and the Consumer Financial Protection Bureau's regulations to protect personally identifiable financial information, title companies are increasing their security measures to provide greater protection to their clients.

One particular safeguard title companies have implemented is the use of encrypted emails.

Email encryption involves concealing the content of email messages in order to protect information from being read by someone other than the intended recipient. Upon receipt of the email, the recipient must authenticate it by entering a code or password or by using a certificate to decode the email. In other words, the recipient must "unlock" the email to view the contents.

Without encrypted emails, sensitive consumer or personal data is at risk and can be accessed by hackers regardless of whether email messages are stored, cached, or archived. Additionally, even if an unencrypted email is sent on a secured server, hackers can gain access to the information contained in the email.

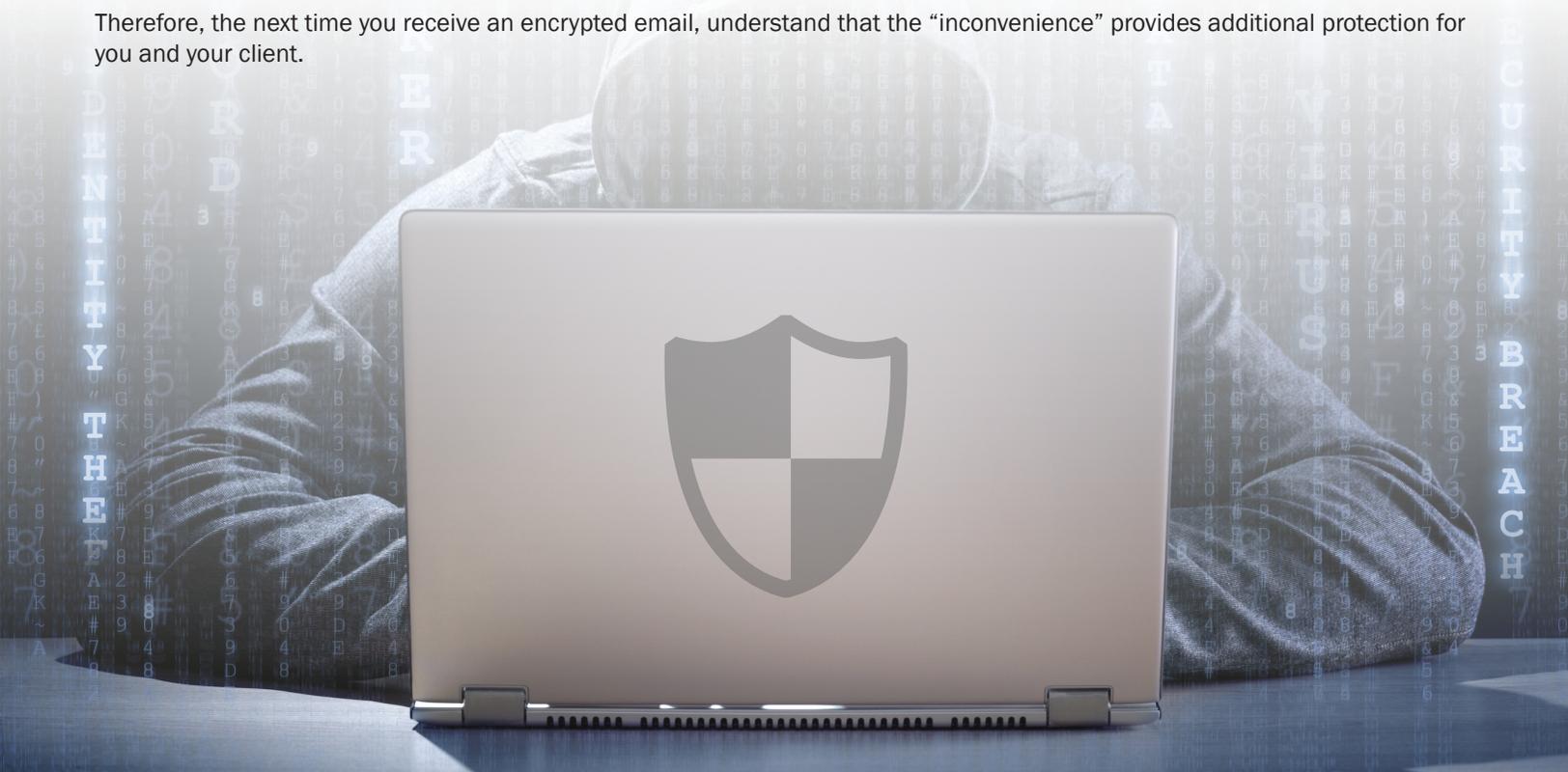
Because title companies handle *nonpublic personal information* (NPI) like social security numbers, personal tax ID numbers, and financial information, they are required to protect that information. Thus, implementing the use of encrypted email is a necessary precaution and best practice.

While information such as when close of escrow is to occur, how much money is needed to close, and wiring instructions is not considered NPI, the increase in cybercrime as it relates to interception of wired funds in real estate transactions necessitates that this information be kept private.

Hackers have exploited information from unencrypted emails by stealing information and redirecting wired funds for their own financial gain. This results in a consumer's loss of funds and potential loss of a sale and commission. Accordingly, the use of encrypted email assists in the prevention of this type of cybercrime.

Although the additional step to encrypt or "unlock" an email may seem like a nuisance, the precaution is being taken for your benefit, as well as your client's. Namely, encrypted emails help preserve confidential information and prevent hacker's from intercepting information which could have damaging results.

Therefore, the next time you receive an encrypted email, understand that the "inconvenience" provides additional protection for you and your client.



# Identifying Elderly Client Competency

BY FRANK DICKENS, ABR, SRES, SFR, SRS AND NIKKI SALGAT, ESQ.

The elderly population is on the rise. Currently, almost 13 percent of the population is age 71 to 92 and 1.5 percent is over 92 years old. With this increase in growth, real estate practitioners today are finding that many transactions involve senior citizens.

Consequently, real estate professionals may find themselves in a situation where they suspect competency issues or even elder abuse.

First and foremost, it is not up to agents to determine whether someone is competent or if abuse exists. In fact, it is beyond our scope of expertise. However, when we spot problematic signs, it may be up to us as professionals to refer family members or the elder to helpful resources.

According to the Mayo Clinic, Alzheimer's disease is the most common cause of dementia in people age 65 and older. As such, if your client is over the age of 65 there is a possibility that competency issues may arise. As the real estate professional, you may recognize some of the following signs that present themselves when cognitive issues are present.

Signs of incompetency:

- Cognitive changes
- Memory loss
- Difficulty communicating or finding words
- Difficulty reasoning or problem-solving
- Difficulty handling complex tasks
- Difficulty with planning and organizing
- Difficulty with coordination and motor functions
- Confusion and disorientation
- Psychological changes
- Personality changes
- Depression
- Anxiety
- Inappropriate behavior
- Paranoia
- Agitation
- Hallucinations

The legal concept of competency generally considers whether a person has the mental capacity to decide in accordance with their goals, concerns and values. If you have an elderly client that displays any of the above signs, you may run into competency issues. If that is the case, you should enlist the

help of family members who, in turn, can seek assistance from a health care professional and/or an elder law attorney.

If these options are unavailable, it may prove beneficial to put the elderly client in touch with the Arizona Department of Economic Security – Aging and Disability Services Division (ADS). ADS serves to protect the rights of older adults and provides information and assistance on rights, benefits and options. Additionally, every county in Arizona has a [local agency on aging](#) designed to provide services, offer information and advocate for older adults.

You may also want to consider asking your client if they have executed a Power of Attorney (POA). A POA is a legal document that gives another adult the authority to act on that person's behalf. In other words, a POA assigns a person(s) to step into another person's shoes and make legal decisions in the same way that they would.

The following are different types of POAs:

1. General – permits the person to do any legal act on behalf of the grantor
2. Specific/Special – gives limited authority to only perform certain acts such as a one-time business transaction or a specific sale of real or personal property
3. Durable – extends the duration of the agent's authority in the event of mental incompetence at the time the POA expires, rendering the POA legally enforceable until mental competency is regained
  - a. POA can be effective immediately; or
  - b. Springing – POA only becomes effective when the grantor becomes disabled or incapacitated
4. Health Care – gives another person authority over the grantor's health care decisions

Significantly, Arizona law provides that if the person with POA is directed to transfer real property, the POA must be recorded. The POA does not have to be recorded immediately, but will need to be recorded at the time of the transaction. [See A.R.S. §§ 33-411 through 33-423.](#)

# Identifying Elderly Client Abuse

BY FRANK DICKENS ABR, SRES, SFR, SRS AND NIKKI SALGAT, ESQ.

Elder abuse generally refers to any knowing, intentional or negligent act by a caregiver, or other person that causes harm or a serious risk of harm to a vulnerable adult.

While there are many different forms of elder abuse, it typically occurs by way of financial or material exploitation via illegal or improper use of property and assets. It often occurs by way of criminal financial abuse and identity theft. Unfortunately, caregivers and family members are also found to be perpetrators.

One popular scam is calling an elderly person and posing as a relative who asks for money to “get out of trouble.” You might think that the victim would be anxious to report fraud of this nature, but many are hesitant to report the incident because they fear losing their independence or are simply embarrassed.

Another common form of elder abuse is physical abuse due to neglect.

Signs of abuse:

- Assets are transferred to a friend or family member who is assisting in financial decisions. While there are legitimate transfers of assets, this is typically unnecessary when assisting an elderly person with their finances.
- Changes in an elder’s mood, personality and interaction can be a sign of someone taking advantage financially and physically. These changes are typically observed in those who are isolated, alone and located far away from family members.
- Changes in spending habits can be prevalent in the elder population as they are often approached by so-called “non-profit” organizations for donations and even systematic withdrawals to satisfy a scam pledge.
- Missing property and lost valuables can be a sign of scammers or dementia as the elder is afraid of theft and begins hiding valuables without recalling where they are hidden. Alternatively, the abuser could have removed the valuables from the elder’s home.

- Family members or caregivers attempting to isolate the elder, changes in daily habits and circles of friends, lack of hygiene, empty refrigerators and kitchen shelves can all be signs of abuse or dementia.
- Changes in or the inability to perform Activities of Daily Living (ADLs) can be a telltale sign of abuse or dementia. ADLs include bathing, dressing, toileting, eating, moving from a bed to a chair and maintaining continence.
- Legal issues such as a receipt of a foreclosure notice, unpaid bills, changing bank accounts, unusual transfers of money, checks made out to CASH, forged signatures, quitclaim deeds and new property liens are examples of what may be a scam or opportunism.

If you see signs of abuse, you should be cautious about making accusations. Instead, consider enlisting the proper assistance of family members, elder law attorneys and maybe even law enforcement officials. If appropriate, an available resource is Adult Protective Services, a governmental entity that receives and evaluates reports of suspected adult abuse, neglect and exploitation.

Read: [Look Out for Older Clients](#) to see how real estate scams often target seniors. – REALTOR® Mag

For more information on the prevention of abuse and neglect, visit the [Area Agency on Aging, Region One \(Maricopa County\)](#) and watch [Window to the Law: Prevent Elder Abuse \(video\)](#).

# Remember to Update zipForm® Templates

BY REBECCA PERKS, BUSINESS APPLICATION SPECIALIST



On February 1, 2017, Arizona REALTORS® released a number of revised forms. You can find a complete list here: [2017 Revisions to \[Purchase Contract and\] Ancillary Forms.](#)

How does this affect your Transactions and Templates in zipForm®? If you are using zipForm® Plus, the new forms will automatically be added to your Arizona REALTORS® Library.

If you are using zipForm® Standard, you will be prompted upon login to update your forms. Simply select the “Update All” option to be sure you have the latest version of zipForm® and all forms in your library.

Some forms will be available in both versions for a short time.\* There will be cover pages on these forms to alert you as to which version you should use.

If you have any forms saved in Templates, you will be alerted that new forms have been added. Be sure to view all Template updates and confirm that any data previously typed into these forms is still accurate.

In order to be sure the most current forms are being used in the new Transaction, **NEVER copy or re-use existing Transactions.** Always start with a NEW Transaction and, if applicable, apply a Template.

For additional assistance, email [support@aaronline.com](mailto:support@aaronline.com).

\*Both versions available until Sunday, April 2, 2017:

- Buyer Pre-Closing Walkthrough
- Loan Status Update (LSU)

## RESIDENTIAL BUYER'S INSPECTION NOTICE AND SELLER'S RESPONSE (BINSR)



The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. Any change in the pre-printed language of this form must be made in a prominent manner. No representations are made as to the legal validity, adequacy and/or effects of any provision, including tax consequences thereof. If you desire legal, tax or other professional advice, please consult your attorney, tax advisor or professional consultant.

Page 1 of 2  
Document updated:  
February 2017



1. Contract dated: \_\_\_\_\_
2. Seller: \_\_\_\_\_
3. Buyer: \_\_\_\_\_
4. Premises Address: \_\_\_\_\_

## RESIDENTIAL SELLER DISCLOSURE ADVISORY



**WHEN IN DOUBT – DISCLOSE!**

Document updated:  
February 2017



### BUYER INSPECTION (See Section 6)

- Buyer has completed:
- (a) physical, visual inspection of the property
  - (b) inquiries of the Seller
  - (c) investigation of the property
  - (d) inquiries of the Seller on the property
  - (e) inspection of the swimming pool
  - (f) inspection of the property

- Buyer has verified:
- (a) MLS or other listing information
  - (b) all other information

- Buyer acknowledges:
- (a) All desired inspections have been completed
  - (b) All inspections were conducted truthfully and accurately
  - (c) Buyer's election to purchase the property is based on the reports and answers provided
  - (d) Buyer is not relying on the Seller's representations

- Buyer elects as to whether to:
- Premises
  - Premises
  - Buyer elects to purchase the property
- Items displayed on the property are:

Arizona law requires the proper use of these disclosures. No Seller's

The SPDS is designed to avoid inadvertently causing you to agree to purchase the property truthfully and accurately based on reports and answers provided by the Seller. Use the blank lines to:



If the information provided to you is missing or incomplete, you should:

If you are unable to verify the information, you should:

## BUYER PRE-CLOSING WALKTHROUGH



The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. Any change in the pre-printed language of this form must be made in a prominent manner. No representations are made as to the legal validity, adequacy and/or effects of any provision, including tax consequences thereof. If you desire legal, tax or other professional advice, please consult your attorney, tax advisor or professional consultant.

Document:  
February 2017



- Buyer: \_\_\_\_\_  
Seller: \_\_\_\_\_  
Premises Address: \_\_\_\_\_
- Upon advice of Broker(s) and Buyer's Inspector(s) complete the following:

### BUYER MUST COMPLETE

1. Buyer finds that the property is in good condition or repairs agreed to by Seller.

2. Buyer finds that the property is in good condition or repairs agreed to by Seller.

## LOAN STATUS UPDATE (LSU)



The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. Any change in the pre-printed language of this form must be made in a prominent manner. No representations are made as to the legal validity, adequacy and/or effects of any provision, including tax consequences thereof. If you desire legal, tax or other professional advice, please consult your attorney, tax advisor or professional consultant.

1. Pursuant to Section 2e of the Contract, Buyer shall deliver to Seller the AAR Loan Status Update (“LSU”) description of the proposed loan.
2. status of Buyer's proposed loan within ten (10) days after Contract acceptance and hereby instructs lender to provide the Loan Status Update (“LSU”) to the Broker(s) and Seller upon request. “Lender” is indicated on lines 4 and 5.
3. LSU to Broker(s) and Seller upon request. “Lender” is indicated on lines 4 and 5.

4. Lender: \_\_\_\_\_

COMPANY

ARIZONA LICENSE # \_\_\_\_\_

5. \_\_\_\_\_

LOAN OFFICER

ARIZONA LICENSE # \_\_\_\_\_

6. ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_

PHONE \_\_\_\_\_

# It's No Fun Getting Sued: Ways to Minimize Your Risk & Avoid Lawsuits

J.T. TSIGHIS, ABR, CRB, RCRMS, CRS, GRI, EPRO

Even when you know and can ultimately prove you've done everything right, it can still happen to you. Being named in a lawsuit is unsettling at best. It can also be scary, emotionally draining and in some instances downright nasty. It can even temporarily destroy your self-respect, challenge your integrity and make you question whether you should be listing or selling real estate at all.

While it's a fact that many real estate brokerages in Arizona have the expense and comfort of carrying E&O insurance, many other firms do not. Some brokers boast about being in the business for 10, 20 or even 30 years without ever having been sued. As a result, they refuse to get any form of coverage for their firm and agents. With all due respect to that business decision, which is rightfully theirs to make, the common response by those who are insured is: *"Either they've been very lucky over the years or just haven't done enough business."*

Whether you do or don't have the security of E&O insurance, agents, brokers, managing brokers and designated brokers have an on-going responsibility and fiduciary obligation to reduce risk for their clients, customers, themselves and fellow real estate practitioners.

In addition to satisfying standard statutory and broker requirements for proper file management and always having a discussion on a potential problem with your broker first, consider some of these ideas, which at little or no cost can help you minimize your risk and avoid potential lawsuits:

- Check to see if your firm's designated broker is signed up for [AAR's Legal Hotline](#). It's free, a member benefit and an inexpensive way to get professional input on a particular dilemma you may be facing.
- Set aside some time on a weekly basis to log on to the [Law & Policy section](#) of NAR's site and become familiar with current podcasts (a favorite of mine is on social media) and the latest risk management ideas.
- Visit the [Legal section](#) of AAR's site and select an article written by Michelle Lind to read and discuss with fellow agents.
- Explore your local association's risk management resources or find out about attending one of the local risk management committee meetings. Committee members openly discuss current emerging trends and potential challenges that arise.

Want to learn more and become better educated on reducing risk? Spend a couple of bucks wisely and invest in yourself:

- Sign up for the [rCRMS](#) courses and state designation. These courses are held throughout the year at different locations within the state. The instructors are attorneys who specialize in their given area of expertise. This certification is a must for designated and managing brokers as well as agents practicing in Arizona.
- Attend local and state seminars such as Tucson's RESPA Round Tables and AAR's Industry Partners Conference to name just two of the many programs offered throughout the year.
- Buy either the hard copy or e-book format of the second edition of Michelle Lind's book, ["Arizona Real Estate-A Professional's Guide to Law and Practice."](#)

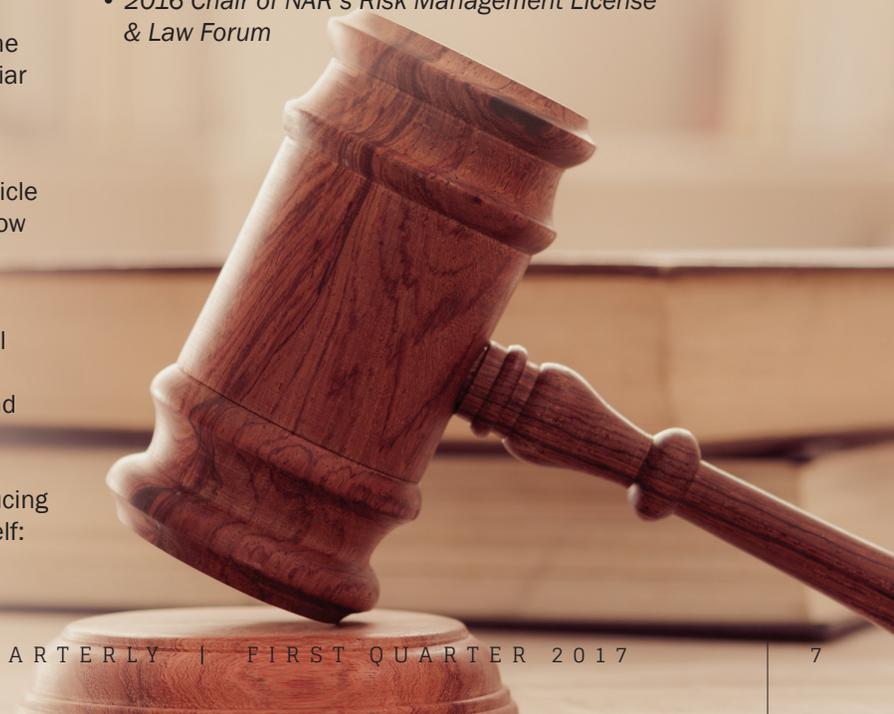
What are some of the ideas you have put into practice to minimize risk in your real estate practice? Let us know in the comments section below. We'd love to hear from you and share the ideas with fellow REALTORS®!

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#### **About the Author:**

*James J. "JT" Tsighis, ABR, CRB, rCRMS, CRS, GRI, ePro Serving the real estate industry and REALTOR® members having chaired dozens of workgroups and committees for Arizona REALTORS® in areas involving risk management, forms development and professional standards, as well as, the AAR Executive Committee, AAR Board of Directors and NAR Board of Directors. J.T. has REALTOR® Emeritus Status, is an Associate Broker, Coach and Mentor with Keller William Southern Arizona and proudly, a RAPAC Major Investor.*

- 2007-2017 NAR Risk Management Committee as Chair, Past Chair, Member
- 2017 AAR Risk Management Committee
- 2016 Chair of NAR's Risk Management License & Law Forum



# National Do Not Call Registry

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**Before making calls to consumers do you or your company verify the number you're calling is not registered on the National Do Not Call Registry? Here are some FAQ's from the Federal Trade Commission (The government agency that protects consumers). More information is available at: <https://www.ftc.gov>**

## **What is the National Do Not Call Registry?**

The National Do Not Call Registry is a list of phone numbers from consumers who have indicated their preference to limit the telemarketing calls they receive.

The registry is managed by the Federal Trade Commission (FTC), the nation's consumer protection agency. It is enforced by the FTC, the Federal Communications Commission (FCC), and state officials.

## **What calls are covered?**

The do not call provisions of the TSR cover any plan, program or campaign to sell goods or services through interstate phone calls. This includes calls by telemarketers who solicit consumers, often on behalf of third party sellers. It also includes sellers who are paid to provide, offer to provide, or arrange to provide goods or services to consumers.

## **What types of calls are not covered by the National Do Not Call Registry?**

The do not call provisions do not cover calls from political organizations, charities, telephone surveyors, or companies with which a consumer has an existing business relationship.

## **How does the established business relationship provision work for a consumer whose number is on the registry?**

A company with which a consumer has an established business relationship may call for up to 18 months after the consumer's last purchase or last delivery, or last payment, unless the consumer asks the company not to call again. In that case, the company must honor the request not to call. If the company calls again, it may be subject to a fine of up to \$16,000. If a consumer makes an inquiry or submits an application to a company, the company can call for three months. Once again, if the consumer makes a specific request to that company not to call, the company may not call, even if it has an established business relationship with the consumer.

A consumer whose number is not on the national registry can still prohibit individual telemarketers from calling by asking to be put on the company's own do not call list.

## **How can I access the registry?**

The registry can be accessed only through the fully automated and secure website at [www.telemarketing.donotcall.gov](http://www.telemarketing.donotcall.gov). The first time you access the registry, you must set up a profile and provide identifying information about you and your organization. If you are a telemarketer or service provider accessing the registry on behalf of your seller-clients, you will be required to identify your seller-clients and provide their unique Subscription Account Numbers (SANs). The only consumer information available from the registry is telephone numbers. After you (or the company telemarketing on your behalf) have accessed the registry and downloaded telephone numbers the first time, you'll have the option of downloading only changes in the data that have occurred since the last time you accessed the registry.

## **DO NOT CALL**

The Federal Trade Commission (FTC) created the Do Not Call Registry to stop unwanted telemarketing calls. You can register your home or cellphone either online at [www.donotcall.gov](http://www.donotcall.gov) or using the FTC's toll number at (888) 290-4236, TTY: (866) 290-4236. You must call from the number you want to register. Registration is free and never expires.

## **Arizona State Law**

Arizona's Telephone Solicitations Statute requires telemarketers to make certain disclosures and prohibits certain misrepresentations. The statute requires most telemarketers to file a registration statement with the Secretary of State and a bond with the State Treasurer's Office. There are some exceptions to the statute's registration requirements. You can visit the Secretary of State's website at [www.azsos.gov](http://www.azsos.gov) to check to see if a company is registered or falls under an exception to the registration requirement.

This article can be found online at:

[http://www.re.state.az.us/Bulletins/Bulletin\\_07\\_16.pdf](http://www.re.state.az.us/Bulletins/Bulletin_07_16.pdf)



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

For More Information  
Please contact Jamilla Brandt,  
AAR Risk Management Coordinator,  
at jamillabrandt@aaronline.com  
or 602-248-7787.

Primary access to the Hotline is for Designated Brokers, who may also give access to one REALTOR® or REALTOR-ASSOCIATE® member per office and/or branch.

Get Answers Today!

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

REAL SOLUTIONS. REALTOR® SUCCESS.



# 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.*

## Remote Access Into Vacant Rental Properties

**FACTS:** A landlord has asked if the property manager can provide remote access, allowing renters to enter vacant properties.

**ISSUE:** Can a property manager provide potential renters remote access to a vacant property?

**ANSWER:** See discussion

**DISCUSSION:** Remote access, which allows users a one-time access code to enter into a vacant rental for potential tenants to view the property, is legal. However, there is risk involved. There is always the chance that the caller is posing as a potential tenant, but in actuality is interested in stealing appliances or copper wiring. There have also been scams where people enter a property, change the locks and then try to "rent" the property out to other unsuspecting tenants.

Therefore, the best business practice would be to show the property with an agent physically present.

## More Than One Cure Period Notice May Be Required

**FACTS:** A seller issued the buyer a Cure Period Notice ("Cure Notice") citing Section 2b, because the buyer had not signed loan documents three (3) days prior to the close of escrow date. Based upon statements from the buyer's lender, the seller was hopeful the buyer would still be able to close and did not cancel after the three (3) days had expired in the cure period. The seller sent the buyer an addendum extending the close of escrow, which the buyer never signed.

Two weeks later, the buyer has still not closed. The seller wants to cancel without providing a new Cure Notice believing the original Cure Notice issued two weeks ago is still a valid notice.

**ISSUE:** Does the seller have to issue a new Cure Notice?

**ANSWER:** Probably.

**DISCUSSION:** A "Party to [a] contract, permitting other to perform, waives breach, and cannot excuse own nonperformance by other's prior default." *Pima Farms Co. v. Fowler*, 258 P. 256, 32 Ariz. 331.

Here, the seller likely waived the buyer's breach when the seller failed to cancel after the first Cure Notice, and then signed an addendum to proceed. Thus, the best practice would be to issue a second Cure Notice.

## Disclosure of Offers and Terms May Be Provided

**FACTS:** A listing agent received two offers on his listing. A buyer's agent called and asked if the listing agent had any offers, and if so, what were the offers?

**ISSUE:** Does an agent have to disclose an offer and, if so, does the agent have to disclose the terms?

**ANSWER:** See discussion.

### **DISCUSSION:**

**Commissioner's Rule R4-28-1101(A). Duties to Client:** A licensee owes a fiduciary duty to the client and shall protect and promote the client's interests. The licensee shall also deal fairly with all other parties to a transaction.

**Commissioner's Rule R4-28-802(B)** states: *Upon receiving permission* from the seller or lessor, the salesperson or broker acting on behalf of the seller or lessor may disclose to all offerors or their agents the existence and terms of all additional offers on the listed property. (Emphasis added.)

Thus, the listing agent can disclose the terms of the two offers if the seller provides him with permission to disclose the terms.

Note: The best business practice would be to get the seller's permission in writing.



# Have you signed up for the Legal Hotline?

The Legal Hotline provides all AAR broker members (designated REALTORS®) free access to a qualified attorney who can provide information on real estate law and related matters.

## FIND OUT HOW BROKERS CAN ACCESS THE LEGAL HOTLINE

[www.aaronline.com/wp-content/uploads/2016/02/Legal-Hotline-Memorandum-2016-02-11.pdf](http://www.aaronline.com/wp-content/uploads/2016/02/Legal-Hotline-Memorandum-2016-02-11.pdf)

## BROWSE MORE LEGAL HOTLINE TOPICS ONLINE

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

### Cure Notice Must be Delivered to Buyer Through Agent

**FACTS:** Wednesday was the Close of Escrow Date. The buyer did not close escrow. Thursday, the listing agent delivered a Cure Notice to the Title Company and to the buyer's lender.

The listing agent did not send a copy of the Cure Notice to the buyer's agent.

**ISSUE:** Did the buyer receive a valid Cure Notice?

**ANSWER:** No.

**DISCUSSION:** Pursuant to Section 7a of the Residential Resale Real Estate Purchase 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.

Because neither the buyer nor the buyer's agent received a copy of the Cure Notice, the buyer has not been given a valid Cure Notice. The listing agent should immediately provide a Cure Notice to the buyer's agent.

### Buyer Can Cancel if Buyer Discovers There is a Septic Tank That Was Not Disclosed

**FACTS:** The buyer went through the inspection period and is set to close in two weeks. The property has a septic tank on it, which the seller disclosed. The seller now orders the septic tank inspection. The septic tank company notifies all parties that there are two septic tanks on the property. The seller did not know about the unused abandoned tank but updated the SPDS upon learning of the abandoned tank.

The buyer does not want to close unless the seller agrees to have the abandoned tank removed.

**ISSUE:** Can the buyer cancel if buyer discovers there is a septic tank that was not disclosed?

**ANSWER:** Probably.

**DISCUSSION:** A seller has a duty to disclose facts materially affecting the value of the property that are not readily observable and are not known to the buyer. See *Hill v. Jones*, 151 Ariz. 81, 725 P.2d 1115 (App. 1986). Although the buyer could have confirmed there was a second septic tank during the inspection period, the seller still has liability for failing

to disclose the second septic tank. See *Barnes v. Lopez*, 25 Ariz. App 477, 544 P.2d 694 (App. 1976) (Seller still liable for zoning misrepresentation even though buyer could have confirmed correct zoning.)

Therefore, the buyer may cancel under section 4f, which provides the buyer a five day opportunity to "disapprove" of the updated SPDS and cancel.

Note: There is a correct process to "abandon" a septic tank if it is no longer used. Each County in Arizona has a form available online regarding how to abandon a septic tank properly.

### Removal of Contingency Does Not Affect Closing Date

**FACTS:** Buyer submitted an offer to the Seller with a Close of Escrow date indicated as January 5, 2017. Buyer used the Buyer Contingency Addendum (the "Addendum"). The Addendum stated the Buyer must deliver Accepted Offer Documents by November 12, 2016, and the buyer's offer was contingent on the closing of buyer's Property by January 4, 2017. Seller accepted the offer.

Subsequently, seller accepted a back-up contract and provided buyer with notice.

Within five (5) days, buyer provided notice to the seller that buyer would remove the Buyer Contingency.

Seller now insists the buyer must close by November 12, 2016.

**ISSUE:** Does buyer have to close by November 12, 2016?

**ANSWER:** No.

**DISCUSSION:** A contingency is a clause that requires the completion of a certain act before the parties are obligated to perform their contractual obligations.

Here, the buyer simply removed the Buyer Contingency. The underlying contract terms remain the same and the previously agreed upon close of escrow date of January 5, 2017 remains effective.

## Agent Should Disclose Relation to Seller Who is Her Brother-in-law

**FACTS:** A listing agent is asked to list for sale her brother-in-law's house.

**ISSUE:** Should the agent disclose her relation to the seller who is her brother-in-law?

**ANSWER:** Yes.

**DISCUSSION:** A.A.C. R4-28-1101(E)(2): A real estate salesperson or broker shall not act directly or indirectly in a transaction without informing the other parties in the transaction, in writing and before the parties enter any binding agreement, of a present or prospective interest or conflict in the transaction, including that the:

2. Purchaser or seller is a member of the salesperson's, broker's, or designated broker's immediate family;

A.A.C. R4-28-101: "Immediate family" means persons related to an individual by blood, **marriage**, or adoption, including spouse, siblings, parents, grandparents, children, and grandchildren (emphasis added).

Therefore, the agent must disclose that the property is owned by her brother-in-law.

## An Agent's Bankruptcy Need Not Be Reported to The Arizona Department of Real Estate

**ISSUE:** Does a real estate agent have to disclose a personal bankruptcy to the Arizona Department of Real Estate?

**ANSWER:** No. Under A.A.C. R4-28-301, an agent is required to notify the department within 10 days of (a) conviction, (b) adverse decision involving dishonesty or real estate, (c) restriction, suspension or revocation of a professional license, and (d) an order enjoining the agent from engaging in real estate activity. However, there is no obligation for an agent to report a personal bankruptcy to the Arizona Department of Real Estate.

## An Individual Who Does Not Hold A License May Hold An Ownership Interest In A Brokerage Firm

**ISSUE:** Can a non-licensed individual be an owner of a real estate brokerage?

**ANSWER:** Yes. A non-licensee may own a real estate brokerage through a corporation, limited liability company (LLC), or partnership provided that: (1) the entity itself is licensed with the Department of Real Estate as an employing broker; and (2) the entity designates a licensed broker who is an officer of the corporation, manager or member of the LLC (as applicable), or a partner of the partnership, to act as the designated broker. See A.R.S. § 32-2125.

## Designated Broker May Report Agent's Misconduct to Arizona Department of Real Estate and Be Absolved of Administrative Liability

**FACTS:** The broker has a listing for a husband and wife, who live out of state. The broker discovers that, after the husband's death, the agent continues to use blank, pre-signed status change forms signed only by the husband. The broker has since entered into an exclusive listing agreement with the wife to correct the issue.

**ISSUE:** Does the broker have an obligation to self-report this issue to the Arizona Department of Real Estate?

**ANSWER:** No.

**DISCUSSION:** The Arizona Department of Real Estate does not require the reporting of this issue. However, A.A.C. § R4-28-1103(F) provides that "[a] designated broker who, upon learning of a violation of real estate statutes or rules by a salesperson or associate broker under the broker's supervision, immediately reports the violation to the Department is not subject to disciplinary action by the Department for failure to supervise the salesperson or broker." Accordingly, disclosure is not mandatory, but disclosure would absolve the broker of any administrative liability for failure to supervise the agent.

### 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.



# REALTOR® Safety



## Agent Safety Alert Program (ASAP)

ASAP is a program to alert REALTORS® of critical safety issues. Members may submit reports of incidents they see or know about using the link below. A response team will evaluate the report and may take action, up to and including issuing a text alert to all affected members.

[Click here to submit an Incident Report](#) (must be an active REALTOR®)

To ensure that your cell phone is in our system for alerts, please contact your local association or [edit your own information at NAR's site](#). For details about the ASAP program, [here is a list of FAQs](#).

## Arizona REALTOR® Safety Alerts

- [REALTOR® Safety Alert: Agent's Credentials Being Falsely Used – September 2016](#)
- [REALTOR® Safety Alert: Disturbing Calls Made by Phony Real Estate Agent – July 2016](#)
- [REALTOR® Safety Alert: Phoenix REALTOR® Receives Explicit Phone Messages – October 2015](#)
- [REALTOR® Safety Alert: Angry/Aggressive Client Shopping for Golf Properties – August 2015](#)
- [Reported by 12News: MCSO Looking For Queen Creek Flasher – August 2015](#)
- [REALTOR® Safety Alert: Man claims to be Reflexologist – April 2015](#)

## Arizona REALTOR® Safety Videos & Webinar

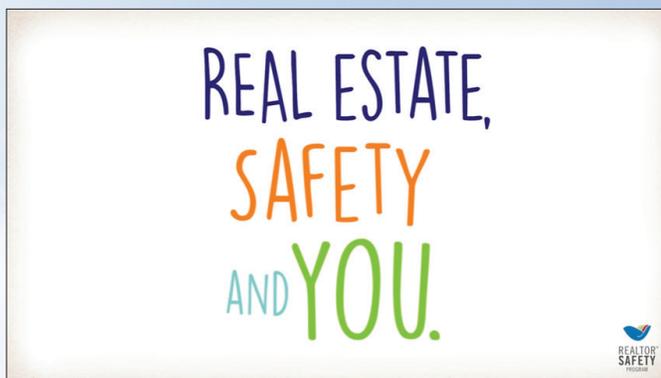
- [Arizona REALTOR® Safety Series Featuring Paula Monthofer](#)
- [Arizona REALTOR® ProActive Agent Safety Webinar featuring Paula Monthofer](#)
- [Agent Safety Alert Program \(ASAP\) Demo featuring Lori Kennedy](#)

## Safety Articles

- [UPDATE: Former Arizona REALTOR® Missing Since June 2015 Found Dead](#)
- [SC Man Accused of Chaining Woman has Arizona Kidnapping Conviction](#)
- [Safety Tips for REALTORS® From Peoria Police Dept.](#)
- [REALTOR® Safety is More Than Just Us](#)
- [Common Practices That Put You In Danger](#)
- [Personal Safety Technology](#)
- [Size Doesn't Matter When It Comes to REALTOR® Safety](#)
- [REALTOR® Safety is a Year Round Concern](#)
- [Man to Man: You're Just As At-Risk](#)
- [Safety Tips for REALTORS® From the Scottsdale Police](#)
- [Safety Tips for Showing a Home](#)
- [Keeping Yourself Safe](#)

## Videos

- [Real Estate, Safety, and You](#)



\*Winner of Best Associations Online Video by the Web Marketing Association's 2016 Internet Advertising Competition Awards. Winner of a Bronze Stevie at the 2016 American Business Awards.

In this award-winning video\*, consumers learn about the potential safety protocols they may encounter when working with a REALTOR®. It's a great resource to share with clients to educate them about the importance of REALTOR® safety.

Helping NAR members understand the risks they face through knowledge, awareness, and empowerment. To learn more about the program, [click here](#).

If you need assistance or have suggestions, email: [safety@realtors.org](mailto:safety@realtors.org)



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Leigh Brown



Marki Lemons



Chris Ulrich



Debra Trappen

A complete list of sessions and presenters can be found at [aaronline.com/convention](http://aaronline.com/convention).

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

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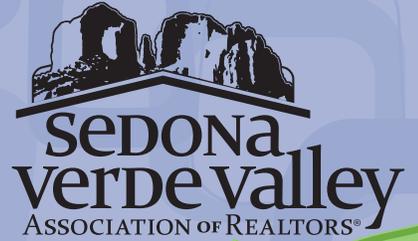
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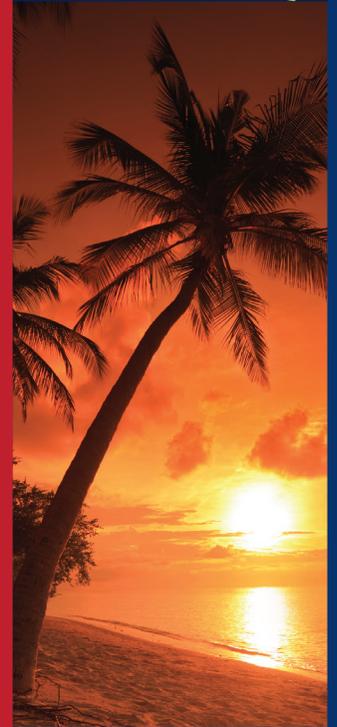
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