ARIZONA

FOURTH QUARTER 2015

BROKER & MANAGER

QUARTERLY

AGENT SAFETY ALERT PROGRAM

Introducing...

Arizona Association of REALTORS®
NEW Agent Safety Alert Program!
AgentSafetyAlert.com

What is ASAP (Agent Safety Alert Program)?

- ASAP is a text-based alert program created as a means to notify Arizona REALTORS® of a possible safety threat

What are the criteria for an ASAP alert?

- The health, safety or well-being of a REALTOR® or client is in imminent danger, or
- Help is needed to locate a missing person, apprehend a suspect, or place other REALTORS® on notice of a possible threat

How does ASAP work?

- Once it is determined that an incident meets ASAP criteria, members located in the geographic area where the incident occurred will receive a text alert briefly describing the incident; the text will also contain a link to additional information
- REALTORS® will automatically be signed up to receive ASAP alerts (please ensure your local association has your current cell phone number, so that you may receive ASAP alerts)
- REALTORS® may opt out of receiving future alerts; for details, go to **AgentSafetyAlert.com** and look for the link in the second paragraph that says "click here for a list of FAQs"

How do I report an incident?

- Incident reports can be submitted to AAR via phone (602) 248-7787 or through the internet at **AgentSafetyAlert.com**; regardless of whether a report is submitted to AAR, any safety concern should immediately be reported to local law enforcement

Where can I go to get information about ASAP alerts?

- AgentSafetyAlert.com

ARIZONA association of REALTORS®
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ARIZONA association of REALTORS®

BROKER & MANAGER

FOURTH QUARTER 2015 | ARIZONA BROKER/MANAGER QUARTERLY

IN THIS ISSUE

ASAP AGENT SAFETY ALERT PROGRAM

FAQs???

Q: What does ASAP mean?
A: ASAP is an acronym that stands for "Agent Safety Alert Program."

Q: What is ASAP?
A: ASAP is a text based alert program that was created as a means to notify Arizona REALTORS® of a possible safety threat.

Q: What is the criteria for an ASAP alert?
A: (1) The health, safety, or well-being of a REALTOR® or client is in imminent danger; and/or (2) Help is needed to locate a missing person, apprehend a suspect, and/or place other REALTORS® on notice of a possible threat.

Q: How does ASAP work?
A: Once it is determined that an incident meets ASAP criteria, members will receive a text alert. The text will be similar to an Amber or weather alert, but will only be sent once unless there are extenuating circumstances that require a second text.

Q: What type of information will be included in the text alert?
A: In 160 characters or less, the text will describe the incident and the general area in which the incident occurred. The text will also contain a link that the receiver can click on for additional information.

Q: Do I need to sign up to receive an ASAP alert?
A: No. All REALTORS® will automatically be signed up to receive ASAP alerts.
Note: Please ensure your local association has your current cell phone number so that you may receive ASAP alerts.

Q: Can I opt out of receiving an ASAP alert?
A: Yes. REALTORS® may opt out of receiving future alerts by choosing one of the following options: (1) email abuse@eztexting.com; (2) reply to an ASAP alert with the text "opt-out," "unsubscribe," "remove," or "stop;" and (3) send a text message containing the word "stop" to the number 313131.

Q: How will I know if an ASAP alert is sent?
A: If you are located in the geographic area where an incident occurs, you will receive a text alert notifying you of the incident.

Q: How do I report an incident?
A: Incident reports can be submitted to AAR via phone or →

through the internet at https://www.aaronline.com/manage-risk/realtor-safety/asap-safety-report/. Regardless of whether a report is submitted to AAR, any safety issue should immediately be reported to local law enforcement.

Q: Will the reporting individual's name remain anonymous?
A: Yes. AAR will only release an individual's name if it is the name of a missing person.

Q: What if a reported incident does not meet ASAP criteria?
A: If an incident does not meet ASAP criteria for a text alert to be issued, that incident will still be posted on AAR's REALTOR® Safety webpage for members and the public to access.

Q: Will receiving an ASAP alert cost me any money?
A: If you have an unlimited texting plan, there will be no charge. If, however, you have a plan that charges for receiving texts, the charges will vary depending on the provider and plan chosen.

Q: Where can I go to get information about ASAP alerts?
A: Members that receive an alert will be able to immediately access a link to AAR's REALTOR® Safety webpage which will have more information. Members and the public alike may go to AAR's REALTOR® Safety webpage at any time to get information about current and prior alerts. The website is https://www.aaronline.com/manage-risk/realtor-safety/.

Find this FAQ online at:
https://www.aaronline.com/2015/08/agent-safety-alert-program-asap-faqs/

Arizona REALTOR® Safety Series Featuring Paula Monthofer

We are very excited to introduce you to a new video series we are producing this year which will provide you with actions and tips you can take and utilize to be safer on the job.

Narrated by AAA First Vice President Paula Monthofer (pictured on the left), this series will follow the acronym PASS - Professional, Alert, Systemized and Self.

Episode 1 - Be Professional (CLICK HERE)

Episode 2 - Stay Alert (CLICK HERE)

Episode 3 - Get Systematized (CLICK HERE)

Episode 4 - Looking Out for Yourself (CLICK HERE)

To view the page with all the videos click the link below:
https://blog.aaronline.com/2015/02/arizona-realtor-safety-series-featuring-paula-monthofer/

REALTOR® SAFETY PROGRAM

www.realtor.org/topics/realtor-safety/safety-resources

Additional Resources for Arizona REALTORS® from NAR

Real Estate, Safety, and You
October 20, 2015: In this 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.
http://www.realtor.org/topics/realtor-safety

NAR – 103 Safety Tips for REALTORS® by REALTORS® Order Form
https://store.realtor.org/product/guide/little-red-book-safety-rules-live-realtors?cid=Prod00524&om_rid=AABX2n&om_mid=_BWH8L4B9GqIRku&om_ntype=RESMonthly

NAR – REALTORS® Safety Information and Tips
http://www.realtor.org/topics/realtor-safety/safety-resources

OCTOBER, 2015 BULLETIN

CFPB Provides Guidance About Marketing Services Agreements

Bulletin Highlights Risks of Agreements Violating Federal Prohibition on Mortgage Kickbacks

http://www.consumerfinance.gov/newsroom/cfpb-provides-guidance-about-marketing-services-agreements/

Marketing Services Agreements: What Agents Need to Know

BY SCOTT M. DRUCKER, ESQ.

August 2015 Update
In light of increased scrutiny, Wells Fargo and Prospect Mortgage each announced plans on July 30 to phase out their existing MSAs and refrain from entering into such agreements in the future. Prospect expects its phase out to be complete by September 30, while Wells Fargo's wind down is expected to take approximately 90 days. In discussing its decision, Prospect expressed it was due in part to recent RESPA interpretations that introduced uncertainty to the rules and requirements applicable to MSAs. It is this growing uncertainty that has made it increasingly difficult to properly utilize MSAs in today's regulatory environment. Agents must therefore continue to exercise caution. Read more here: http://www.housingwire.com/articles/34641-cfpb-to-mortgage-industry-get-out-of-msas

Do you engage in joint marketing with title companies, lenders, mortgage brokers or other real estate professionals? If so, you are now the focus of the Consumer Financial Protection Bureau's (CFPB) most recent enforcement actions.

In an effort to grow their business and expand their marketing endeavors, many REALTORS® elect to partner with other real estate businesses, often by way of marketing services agreements (MSAs). And while cross-marketing agreements and co-marketing relationships among settlement service providers can be of great benefit to both parties, there are risks involved which agents must be aware of.

An MSA is an agreement by which a settlement service provider, such as a real estate broker, agrees to market and promote the business of another provider, such as a title company, in exchange for payment. And while the Real Estate Settlement Procedures Act (RESPA) allows for the existence of joint advertising among settlement service providers, the Consumer Financial Protection Bureau (CFPB) has expressed concern that many existing MSAs are merely shams that operate to allow for payment for the referral of business.

Section 8(a) of RESPA prohibits giving and receiving any fee, kickback or thing of value for the referral of settlement service business. Things of value are defined broadly under the law and can include money, trips, an opportunity to win a prize, etc. However, where many real estate professionals run afoul of RESPA is by providing or accepting marketing, advertising or other promotional materials to and from another settlement service provider free of charge. It is therefore critical that all marketing fees paid, accurately reflect the value of the services performed.

Mortgage brokers, lenders and title companies frequently assist real estate agents in promoting themselves or their listings by providing items of value such as postcards, virtual tours, and other marketing materials. However, RESPA allows for joint advertising by settlement service providers only where there is a pro-rata sharing of costs, which means that the expenses and proportionate space be equally divided. For example, a 40 second radio advertisement is recorded at a cost of $500.00. The advertisement spends 20 seconds promoting the services of the title company and 20 seconds promoting the services of the REALTOR®. In order to be RESPA compliant, the title company and REALTOR® must equally split the cost of the advertisement, each paying $250.00.

An example that illustrates a potential violation of RESPA could involve the production of a promotional flyer, 75% of which promotes a lender with the remaining 25% advertising the services of a REALTOR®. Unless the subject REALTOR® pays for 25% of the cost of the flyer, it could be determined that the REALTOR® received a thing of value in exchange for the referral of business to the lender. It is for this reason that lenders and title companies are prohibited from providing real estate agents with personalized pens, notepads, and other promotional items free of charge.

And while some RESPA violations are rather blatant examples of payment for the referral of business, others are far less obvious. During the depressed housing market recently experienced in Arizona, foreclosures and REOs were relatively common. At the time, it was not unheard of for a real estate agent to refer clients to a specific bank's loan officer with the expectation that such referrals would generate future REO listings from that same bank. Such arrangements even occurred within the context of an MSA. Unfortunately, referrals of this nature likely violate RESPA, especially if a referral agreement can be established from the parties' conduct.

In light of new enforcement endeavors pursued by the CFPB, all agents should proceed with caution and be mindful of the risks associated with MSAs and other joint marketing relationships. First and foremost, before entering into any such agreement, agents should always consult with their broker to determine whether the company even allows individual agents to enter into MSAs with other settlement service providers. If the broker maintains no such restrictions, agents should nonetheless ask their broker or independently retained counsel to review and approve all marketing agreements before they are signed.

And for those agents with existing MSAs, now is a good time to ensure that both parties can adequately justify the fee being paid for the service rendered. In fact, agents may want to ask their marketing partner to value the fees through an independent marketing expert, and that they do so in the future on a regular basis. Otherwise, the day may come when the payment no longer reflects the bargained for benefit.

Finally, agents should always ensure that existing and future marketing agreements are not a disguise for what is really an impermissible financial exchange for the referral business. The CFPB is watching closely.

For more information, see these RESPA do's and don'ts for MSAs: https://www.aaronline.com/wp-content/uploads/2015/01/RESPA-dos-and-donts-for-MSAs.pdf

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.

Find this article online at: https://www.aaronline.com/2015/01/marketing-services-agreements-what-agents-need-to-know/

Commissioner's Advisory No. 5 – CLOSING STATEMENT

RELEASED NOVEMBER 6, 2015 BY ADRE

This Advisory is offered as a guideline for the Designated Broker to determine the Closing Document that will be required in the Designated Broker's Closed Transaction file for at least five years from the date of the Closing of the transaction.

This Advisory is informational only and is not intended as legal advice.

Q: What is the Closing Document that will be required in the Designated Broker's Transaction file for at least five years from the date of the closing of a transaction?

A: A Closing Statement that conforms to statutory/rule requirements of the Arizona Revised Statutes, Title 32 and the Arizona Administrative Code, Title 4.

With the implementation of the Federal Government's Consumer Financial Protection Bureau TRID (CFPB-TRID) rule and its guidelines, the Arizona Department of Real Estate (ADRE) has received many questions from the real estate industry regarding the ADRE statutory and rule requirements for the Closing Statement.

Let's review what the Statutes and Rule indicate.

Definition of "Closing": "Closing" means the final step of a real estate transaction, such as when the consideration is paid, all documents relating to the transaction are executed and recorded, or the deed is delivered or placed in escrow. AAC R4-29-101.

Records to be retained by the Designated Broker: The records required by this section shall include copies of earnest money receipts, confirming that the earnest money has been handled in accordance with the transaction, closing statements showing all receipts, disbursements and adjustments, sales contracts and, if applicable, copies of employment agreements. ARS § 32-2151.01 (A); and

Sales transaction folders shall include: A complete copy of the sales contract, any escrow account receipt, any closing or settlement statement, and, if applicable, a copy of the escrow instructions, listing agreement, employment agreement and release of escrow monies. ARS § 32-2151.01 (F) (2) and also, AAC R4-28-802 (C) states, "Transaction Statements." In addition to the requirements of ARS § 32-2151.01 and 32-2174, the broker shall retain true copies of all receipts and disbursements, or copies of the executed and delivered escrow closing statements that evidence all receipts and disbursements in the transaction.

The CFPB-TRID Closing Disclosure (CD) form will not comply with the above, since it is only delivered to the Buyer/Borrower, and not the Seller, therefore, the CFPB-TRID Closing Disclosure (CD) form should not be held in the Designated Broker's sales transaction folder as the Closing Statement.

A final Closing Statement per the Arizona Statutes and Rule must be included in the Designated Brokers closed transaction file.

Commission Disbursements must be authorized by the Designated Broker, and a licensee cannot accept compensation as a licensee for the performance of real estate activity from any person other than the licensed broker. ARS § 32-2153 (A) (7).

Definition of "Compensation" means any fee, commission, salary, money or other valuable consideration for services rendered or to be rendered, as well as the promise of consideration whether contingent or not. ARS § 32-2101 (16).

What is Private Mortgage Insurance, How Does It Work and When Can I Remove It From My Loan?

BY SCOTT M. DRUCKER, ESQ.

Private Mortgage Insurance, often referred to as PMI, is a form of insurance that protects the lender in the event that the borrower stops making payments on their loan. More specifically, if the borrower defaults, the mortgage insurer reduces or eliminates the loss to the lender, meaning that the lender is the sole beneficiary of the policy.

Typically, lenders will require a borrower to purchase PMI if their down payment is less than 20% of the sales price or appraised value of the home. Even though PMI exists for the protection of the lender, it is the borrower that pays the premiums for this insurance policy.

So, what's in it for the borrower? The simple answer is that the borrower is able to obtain a loan and purchase a home for less than 20% down. As is evident, lenders take a risk whenever loaning large sums of money. The less the down payment, the greater the risk. Rather than simply refuse to approve loans with less than 20% down, PMI helps protect the lender, thereby incentivizing the lender to loan money even when the borrower makes a small down payment.

Because of the expense associated with Private Mortgage Insurance, which typically costs between 0.5% to 1% of the entire loan amount on an annual basis, borrowers are often eager to remove this financial obligation as soon as possible.

Pursuant to the Homeowner's Protection Act, borrowers have the right to request, in writing, that the lender cancel the PMI once the principal balance of the mortgage falls to 80% of the value of the home. This date should be provided to the borrower in writing on a PMI disclosure form at the time the mortgage is secured.

Regardless, an increase in the home's value from the time it was initially appraised may enable the borrower to more quickly cancel their PMI obligation. Borrowers may therefore choose to obtain a more recent appraisal of the home to prove to the lender that the home's loan-to-value ratio is 80% or lower.

Even if a borrower fails to ask the lender to cancel the PMI, the lender is required by law to automatically do so once the borrower pays down the mortgage to 78% of the principal. However, the borrower must be current with their monthly payments before any lender is obligated to cancel the mortgage insurance.

To calculate the loan-to-value ratio, all the borrower need do is divide the current loan balance by the value of the home. For example, if a borrower owes $195,000 on a home valued at $250,000, the loan to value ratio would be 78%, meaning that the lender should terminate the PMI. ($195,000 / $250,000 = 78%)

Finally, it is worth noting that PMI is called "private" because it pertains only to private companies, not government agencies or public mortgage lenders. Public programs, such as VA and FHA, have their own mortgage insurance which is run differently and managed internally. One notable difference between PMI and the mortgage insurance attached to many VA and FHA loans is that the latter never expires. In other words, borrowers will continue paying mortgage insurance on VA and FHA loans even after the loan-to-value ratio falls below 80%.

Bottom line, a 20% down payment may prove a difficult hurdle for many consumers, especially young, first time buyers. PMI allows borrowers to overcome this hurdle, but at a cost. Fortunately, that cost is temporary.

Find this article online at:
http://blog.aaronline.com/2015/10/what-is-private-mortgage-insurance-how-does-it-work-and-when-can-i-remove-it-from-my-loan/

CHANGES IN 2015 FORMS AND TRANSLATIONS

Forms New/Revised:
- HOA Addendum – February 2015
- Residential Resale Real Estate Purchase Contract – September 2015
- Pre-Qualification Form – September 2015
- Loan Status Update – September 2015
- Vacant Land/Lot Purchase Contract – September 2015

Minor Changes to Contracts/Forms:
- Short Sale Addendum to the Residential Resale Purchase Contract – September 2015
- "AS IS" Addendum – September 2015

View Sample Forms: https://www.aaronline.com/manage-risk/sample-forms/

Public/Open Fillable Forms:
The forms below are fillable PDFs.
- HOA Condominium Addendum February 2015
- Loan Status Update (LSU) Form September 2015
- Pre-Qualification Form September 2015

View Fillable Forms: https://www.aaronline.com/manage-risk/legal-articles/fillable-forms/

Transactional Document Updated:
- Critical Date List – October 2015
  Two versions of the Critical Date List are available:
  Adobe PDF
  Microsoft Word

View Critical Date List: https://www.aaronline.com/2015/10/critical-date-list-october-2015/

AAR Spanish Translations (Additions, New or Revised):
- HOA Addendum – February 2015
- Residential Resale Real Estate Purchase Contract – September 2015
- Pre-Qualification Form – September 2015
- Loan Status Update – September 2015
- Vacant Land/Lot Purchase Contract – September 2015
- Short Sale Addendum to the Residential Resale Purchase Contract – September 2015
- "AS IS" Addendum – September 2015

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

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

For More Information

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

ARIZONA association of REALTORS®

Get Answers Today!

www.aaronline.com/legal-hotline

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LEGAL HOTLINE

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.

Uniform Commercial Code (UCC) Does Not Apply To Real Estate Contracts

FACTS: The buyer and seller executed an AAR Residential Resale Real Estate Purchase Contract. On page 9, the buyer signed his name, and then wrote "without prejudice and cited to UCC section 1-308." Prior to close of escrow, the buyer decided he didn't want to complete the purchase of the house, and elected to cancel. The buyer claims he has a right to cancel because he cited the UCC, section 1-308.

ISSUE: Can a buyer cancel before close of escrow because he cited UCC §1-308?

ANSWER: Generally, the UCC applies to all contracts involving the sale of goods. Under the UCC, "goods" are defined as "all things that are moveable." It excludes all real estate, and anything attached to the land. The term "goods" also excludes services, such as real estate brokerage services.

In this case, it appears that the buyer has probably misunderstood how and when the UCC can be invoked. Citing the UCC in a real estate sales contract is not appropriate and would likely have no effect.

Purchase Contract Should Address Solar Panels

FACTS: The property owner contracted for the installation of solar panels, which are owned by the solar company and subject to a 20-year lease. Subsequently, the owner accepted a purchase offer and the parties have executed a Residential Resale Real Estate Purchase Contract without reference to the solar panels or solar lease. Now, the buyer has agreed to assume the lease obligations, but has demanded a $6,000.00 reduction to the purchase price as consideration.

ISSUE: Can a buyer demand a price reduction in exchange for assuming a solar lease? Also, if the buyer does not assume the lease, will the seller remain obligated to make the lease payments?

ANSWER: See Discussion.

DISCUSSION: Although the terms of solar leases vary, they generally provide the solar leasing company with discretion to accept or reject an assumption of the lease by a subsequent purchaser. If the solar leasing company agrees to an assumption, the seller will generally no longer be bound by the lease terms, and the buyer is certainly within his or her rights to request a price concession in exchange for the lease assumption. On the other hand, if the leasing company rejects an assumption or if the buyer refuses to assume the lease, the seller of the property may remain liable for the monthly payments for the duration of the lease term. Please note that the buyer's credit rating is a significant factor in the solar leasing company's determination of whether to accept a lease assumption. It is also important for the parties to carefully review the lease terms for transfer fees, pre-payment penalties, and other provisions which may affect their respective rights and obligations.

AAR Buyer Contingency Addendum Does Not Change Inspection Period

FACTS: The buyer and seller entered into an AAR Residential Resale Real Estate Purchase Contract (Contract). As an attachment to the Contract, a Buyer Contingency Addendum was executed. After the tenth day, the listing agent notifies the selling agent that the inspection period has ended.

ISSUE: Does the inspection period begin the day after contract formation, even when a Buyer Contingency Addendum is used by the buyer?

ANSWER: Yes.

DISCUSSION: The Buyer Contingency Addendum provides notice to the seller that the buyer needs time to sell her house before purchasing a house. Or, the addendum can be used to disclose to the seller that the buyer's offer is contingent on the closing of his/her property before he/she can proceed with the purchase of seller's property.

The Buyer Contingency Addendum does not address the inspection period. If the buyer wishes to delay the start of the inspection period until he/she is able to present Accepted Offer documents to the seller (Buyer Contingency Addendum lines 7-33), then the buyer's agent should indicate this preference on page 7 of the Contract.

Recall that the seller, within five (5) days of receipt of the Accepted Offer documents, may cancel the Contract.

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/2015/03/Legal-Hotline-Access-Process-2015-03-31-fillable.pdf

BROWSE MORE LEGAL HOTLINE TOPICS ONLINE
www.aaronline.com/manage-risk/legal-hotline

Therefore, the buyer should indicate his/her desire to commence with the inspection period on the sixth day after the Accepted Offer documents have been presented to the seller, or upon written notice by the seller with intent to move forward before five (5) days has expired.

Check Do-Not-Call Registry Before Calling FSBO

FACTS: An agent wants to call a seller who is listing their property as a for sale by owner (FSBO). The reason for the call is to inquire as to whether the seller would like to retain the agent to list the property for sale.

ISSUE: Does the agent have to check the National Do-Not-Call Registry before calling the FSBO in an effort to obtain the listing?

ANSWER: Yes.

DISCUSSION: In this case, the call would be made for the purpose of encouraging the seller to retain the agent's services. Such a solicitation falls under the jurisdiction of Federal no-call regulations and the agent should therefore check the registry before placing the call. If the seller is registered on the Do-Not-Call Registry, the REALTOR® would be prohibited from placing a phone call to solicit the listing.

Consider Exceptions to the National Do-Not-Call Registry

FACTS: A little over one year ago, the agent worked with a seller in an effort to secure a buyer for the seller's home. Due to declining prices in the neighborhood, the seller wanted to cancel the listing and wait for the market to improve. The agent agreed. Now, over a year later, the market has improved and the agent would like to contact the seller to determine whether the seller would again like to list their home for sale. However, the residential telephone number for the seller is registered on the National Do-Not-Call Registry.

ISSUE: Despite the fact that the seller's phone number is registered on the National Do-Not-Call Registry, can the agent call the seller for the purpose of soliciting business?

ANSWER: See Discussion.

DISCUSSION: Exceptions exist to the rules prohibiting telephone solicitations to buyers or sellers whose phone numbers are on the National Do-Not-Call Registry. An exemption applicable to this situation allows solicitors to call consumers with whom they have an "established business relationship." This includes clients and customers and extends for up to 18 months after the end of the transaction. However, the exception would terminate if the consumer asks that the agent not call them anymore.

Inactive Licensee Required to Disclose Status in Advertising

ISSUE: The seller of the home has an inactive real estate license. The seller wants to advertise the home for sale as "for sale by owner" ("FSBO"). Does the seller have to disclose in the FSBO advertising that the seller is an inactive real estate licensee?

ANSWER: Yes. A.A.C. R4-28-502 (B) requires that a real estate licensee advertising a FSBO home has to disclose the real estate licensee's status. The only reason for this rule is to let the public know that the seller of the home has a sophisticated real estate background. Although the real estate licensee's status currently may be inactive, the real estate licensee has acquired a sophisticated real estate background. Therefore, an inactive real estate licensee must disclose in any advertising of the home the status of an inactive licensee.

Seller Must Provide Access To Confirm Repairs Have Been Made

FACTS: A buyer and seller enter into a Residential Resale Real Estate Purchase Contract (the "Contract"). After the inspection period, the seller asks the listing agent to remove the lockbox. Now, three days prior to close of escrow, the seller is refusing access to the property, so that the buyer can perform a final walk through.

ISSUE: Can a seller refuse access to a property for a final walk through?

ANSWER: See Discussion.

DISCUSSION: Pursuant to Section 6m of the Contract, lines 265 – 268, the Seller grants Buyer and Buyer's inspector(s) reasonable access to conduct walkthrough(s) of the Premises for the purpose of satisfying Buyer that any corrections or repairs agreed to by the Seller have been completed, warranted items are in working condition and that the Premises is in substantially the same condition as of the date of Contract acceptance.

Here, the Seller is obligated by the Contract to provide the →

Buyer access to the Premises. Buyer gave the Seller notice several days in advance asking for access to confirm that repairs had been completed and to confirm that the Premises was in substantially the same condition as of the date of contract acceptance.

A Non-Military Job Relocation Typically Does Not Excuse A Parties' Performance Of A Real Estate Contract

FACTS: The broker represents the buyer of a new-build home from a developer. The buyer executed the purchase contract and has deposited $10,000 of earnest money. Recently, the buyer was informed that he must relocate for work outside of the state; the buyer works in a highly-specialized medical field and job opportunities are limited.

At this point, the buyer will no longer be able to qualify for financing as the subject property would not be a primary residence. The purchase contract does contain a financing contingency. However, that provision has lapsed.

ISSUE: Can the buyer cancel the contract and recover the earnest money deposit under the circumstances?

ANSWER: Probably not. Ultimately, the buyer's right to cancel the purchase contract and recover the earnest money deposit based on a non-military job relocation must be derived from the language of the contract. In this case, the broker is unable to identify any provision of the contract that would afford the buyer a cancellation right based on relocation for work. Accordingly, the buyer's earnest money deposit will be forfeited upon cancellation of the contract, and there may be other remedies available to the developer including pursuit of a breach of contract claim.

Please note, however, that the buyer may attempt to negotiate the return of some, or all, of the earnest money deposit. If the value of the property has increased since the execution of the purchase contract, the developer may be amenable to a mutual cancellation of the contract in order to re-market the property for a higher price.

RESPA Is Violated If Title Company Pays Brokerage For Each Transaction Closed

ISSUE: ABC title company has approached brokerage regarding entering into a marketing services agreement (MSA) with ABC. The MSA provides that ABC will pay brokerage X amount for every transaction closed with ABC. Is this type of agreement RESPA compliant?

ANSWER: No.

DISCUSSION: Although MSAs are permitted under RESPA, it is critical that the agreement comply with the Consumer Financial Protection Bureau's (CFPB) interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). In order to comply with RESPA, brokerage must actually perform marketing services and the payment for those services must represent the fair market value of the services rendered. Under this scenario, the brokerage would not be compliant with RESPA because the compensation is based on transactions closed.

Note: Brokerages using MSAs should consult with independent legal counsel familiar with RESPA prior to entering into any such agreement.

Residential Landlord May Evict a Tenant for Growing Marijuana

FACTS: Broker, as a property manager, represents the landlord of a luxury residence. During a property visit, the broker discovers that the tenant, who is not represented by a real estate agent, is cultivating 12 marijuana plants inside the residence. Tenant was appropriately qualified for the tenancy and is not delinquent or otherwise in breach of the lease agreement.

ISSUE: What is the appropriate course of action for the broker? Also, what rights and remedies does the landlord have?

ANSWER: See Discussion.

DISCUSSION: The broker should immediately notify the landlord of the tenant's cultivation of marijuana on the leased premises.

The landlord's rights and remedies are not as clear. This response assumes that the tenant is properly approved as a medical marijuana cardholder through the Arizona Department of Health Services. If the tenant is not a cardholder, the answer is simple—the landlord can immediately evict the tenant and pursue an accelerated eviction proceeding if the tenant refuses to vacate the property. By engaging in "drug-related criminal activity," which would include the unlawful possession or cultivation of marijuana, the tenant would be in violation of lines 160-164 of the AAR standard-form Residential Lease Agreement. The Residential Lease Agreement specifies that such activity permits the immediate termination of the tenancy. Similarly, Arizona's Residential Landlord Tenant Act provides for the immediate termination of a tenancy and an accelerated eviction process as a result of the tenant's unlawful possession of a controlled substance. A.R.S. §§ 33-1368(A)(2), 33-1377. Marijuana is classified as a controlled substance in Arizona. See A.R.S. § 36-2512.

If the tenant is a cardholder, that fact alone does not permit eviction. Pursuant to A.R.S. § 36-2813, a landlord cannot refuse to lease a property, or evict a tenant, based solely on the individual's status as a medical marijuana cardholder. Furthermore, if an approved dispensary is not located within 25 miles of the property, a cardholder is permitted to personally cultivate up to 12 plants.

On the other hand, the Arizona Revised Statutes do not protect

a tenant's cultivation of marijuana in a rental property. See A.R.S. § 36-2814(A)(2). Accordingly, while a tenant cannot be evicted solely because of his or her status as a cardholder, there is no prohibition against eviction on the basis of cultivation of marijuana in the leased premises. Therefore, absent new legislation or regulations to the contrary, a landlord may evict a tenant for the cultivation of marijuana on the leased premises, even where the tenant is a cardholder.

To conclude, a property manager who discovers the cultivation of marijuana on the leased premises should immediately notify the landlord. In turn, the landlord has the right to pursue eviction at his or her discretion based on the specific facts and circumstances. Given the intricacies of the law, however, we recommend that the landlord be advised to hire counsel to pursue the eviction proceeding in the event the tenant refuses to vacate the premises.

Referral Fees May Be Paid To Out Of State Brokers Provided They Are Licensed In Their Home State

FACTS: An Arizona agent received a referral from someone who represented himself to be a licensed agent in the State of California. Upon further investigation, the Arizona licensee discovered that the California referral source did not have a valid real estate license at the time of the referral.

ISSUE: May an Arizona broker pay a referral to the California referral source?

ANSWER: No.

DISCUSSION: An Arizona broker may pay a referral to an out-of-state broker only if that broker is licensed in the state of their residence. Here, because the referral source was not licensed at the time of the referral, the Arizona broker may not pay the referral fee.

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

ABOUT THE AUTHOR

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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.

A Simple Solution to Solar Lease Liability

BY SCOTT M. DRUCKER, ESQ.

Residential solar power is increasing in popularity and an attractive option to many homeowners throughout Arizona. While REALTORS® often express concern about potential liability associated with transactions involving leased solar systems, ***ensuring that a copy of the solar lease is attached to the Residential Seller's Property Disclosure Statement (SPDS)*** can decrease the potential liability of all parties involved.

Solar panels may boost a home's value, but leased solar systems can present challenges when an owner decides to sell their home. Among those challenges is a buyer's:

1. willingness to undertake an additional financial obligation;

2. ability to assume the solar lease, presuming that the lease is even transferable; and

3. understanding of the terms of the lease.

To mitigate potential liability, disclosure and due diligence are needed. In order to satisfy their disclosure obligations, sellers must convey information to buyers regarding the solar system, including whether the system is leased and not owned. Likewise, in order to satisfy their own due diligence obligations, buyers are advised to learn as much information as possible about the solar system, including the terms of the solar lease and how it can be transferred. Unfortunately, in the event that the buyer or seller fails to meet their obligations, disputes often arise.

Lines 181-189 of the SPDS address alternate power systems serving the property, including a leased solar system. Should the seller indicate on the SPDS that the property is served by a leased system of this nature, they are asked to provide the name and phone number of the leasing company, and attach a copy of the lease. By following this directive, everyone in the transaction is better protected.

In the event that the solar lease accompanies the SPDS, it would likely prove difficult for a buyer to successfully assert a non-disclosure claim against the seller or REALTORS® pertaining to this leased alternate power system. Similarly, receiving a copy of the solar lease would largely prohibit a buyer from claiming that information was withheld from them or that they lacked the pertinent facts needed to make an informed decision about purchasing the home and assuming the lease.

While solar leases can present obstacles to a successful closing, attaching the solar lease to the SPDS is a simple solution to reduce liability and it can make all the difference.

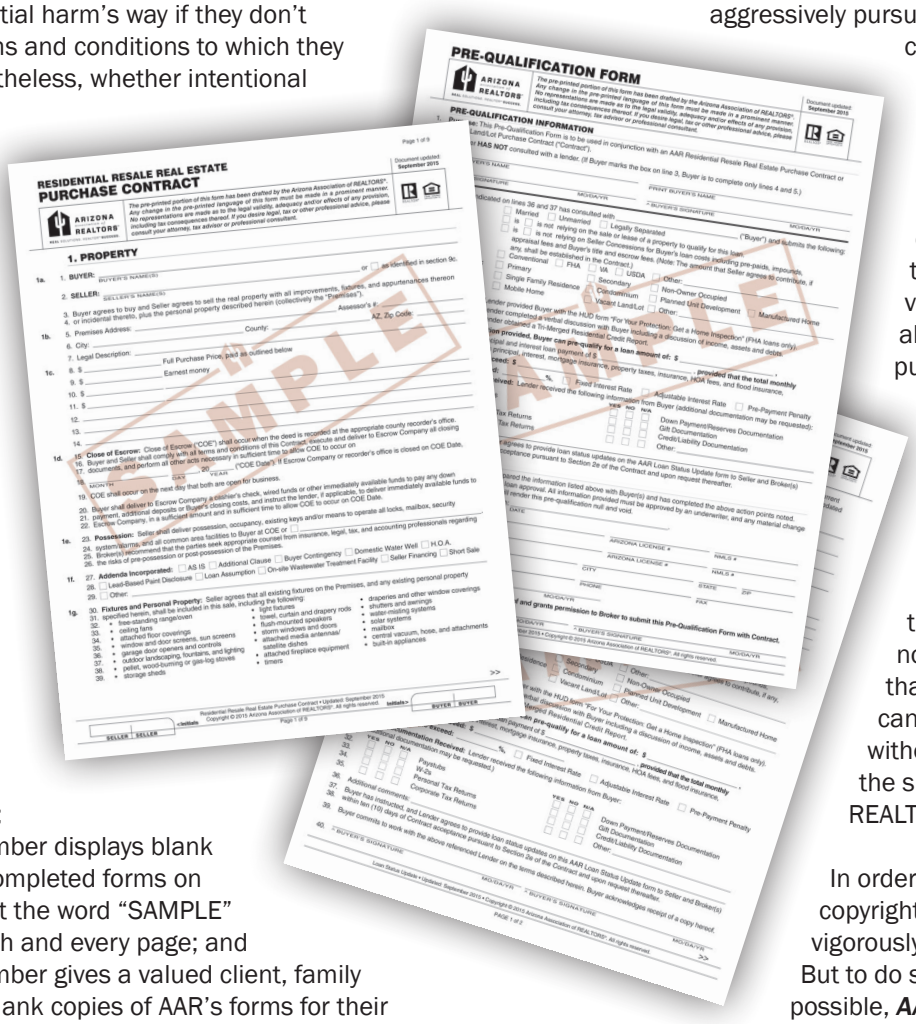
This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

Find this article online at:
www.aaronline.com/2015/09/a-simple-solution-to-solar-lease-liability/

Help Protect the Value of Being a REALTOR®

BY NIKKI SALGAT, ESQ.

The Arizona Association of REALTORS® (AAR) holds the copyright and exclusive right to AAR branded forms. Protection of this copyright is of critical importance to all REALTORS®. As explained by 2015 Risk Management Committee Chair, Martha Appel, "If a member of the public desires to use an AAR form, we want them to hire a REALTOR® who has the knowledge and understanding of that form. If the public can independently access and use AAR forms, the value of being a REALTOR® is undermined and the public puts themselves in potential harm's way if they don't understand the terms and conditions to which they have agreed." Nonetheless, whether intentional or by mistake, unauthorized use of federally protected AAR forms does happen.



Impermissible use of AAR forms typically occurs when: (1) a non-member copies, distributes and/or utilizes blank forms without AAR's permission; (2) a non-member removes the AAR branding and changes a few words throughout the form in an effort to make it their own; (3) a REALTOR® member displays blank copies of partially completed forms on their website without the word "SAMPLE" stamped across each and every page; and (4) a REALTOR® member gives a valued client, family member, or friend blank copies of AAR's forms for their personal use. Additionally, another impermissible use of AAR forms, which does not involve the general public, occurs when brokers display blank copies of the forms on their internal platforms for their agents' use. Under each of these circumstances, the unauthorized user has violated federal copyright laws.

A copyright violation is clear when the form displays AAR branding and is distributed to, or utilized by, an unauthorized user. Although not as clear, a violation again occurs when AAR branding has been removed and the offender has changed words throughout the form. In such situations, Arizona law provides that the applicable standard is whether the two works are "substantially similar." See Scentsy, Inc. v. B.R. Chase, LLC., 942 F.Supp.2d 1045, 1052 (9th Cir. 2013). Pursuant to this standard, even if a court does not deem the offender's actions "direct copying," AAR would still establish a violation by proving that the offender: (1) had access to sample AAR forms via the internet; and (2) the offender's forms are "substantially similar" to those of AAR.

The creation and development of AAR forms involves countless volunteer and staff hours. AAR therefore aggressively pursues and protects its copyrighted forms. Moreover, the forms are one of the most utilized REALTOR® benefits and are a way in which REALTORS® can distinguish themselves to demonstrate added value. In other words, although the general public may not always know the difference between a "REALTOR®" and a "real estate agent," AAR forms are a great way for REALTORS® to start a conversation with potential clients to set themselves apart from non-REALTORS®. But if that member of the public can access blank AAR forms without utilizing a REALTOR®, the significance of being a REALTOR® is diminished.

In order to protect AAR's copyrights, AAR will continue to vigorously pursue all offenders. But to do so as effectively as possible, ***AAR needs your help and asks that you report to AAR all copyright infringements of AAR forms.*** By working together, we can protect the value of being a REALTOR®.

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.

Find this article online at:
https://www.aaronline.com/2015/10/help-protect-the-value-of-being-a-realtor/

CRPM

CERTIFIED RESIDENTIAL PROPERTY MANAGER

Arizona Association of REALTORS® (AAR) is proud to announce Certified Residential Property Manager (CRPM) – AAR's newest certification program dedicated to property management. CRPM includes property management classes that you can use for your real estate license renewal. This program was developed and designed to hone your knowledge and skills in topics that relate to your day to day business as a property manager.

Find out more about CRPM at: https://www.aaronline.com/increase-knowledge/crpm/
For a list of upcoming CRPM classes, visit: https://www.aaronline.com/calendar/