

Arizona Association of REALTORS®



Claims and Remedies

rCRMS COURSE LIST

REQUIREMENTS FOR CERTIFICATION:

- Must take ALL 3 Core Courses
 - Must take 1 Contract Course
 - Must take 1 Elective Course
-

CORE COURSES: (must take ALL 3 of the following one day courses):

Agency, Employment and the Standard of Care *(3hrs Agency, 3hrs Commissioner's Standards)*

Explore agency and employment agreements, duties, and learn how to comply with the standard of care in the industry.

Disclosure & Due Diligence *(6hrs Disclosure)*

Explore how to fulfill the disclosure obligations in a real estate transaction and the due diligence responsibilities of the parties.

Essential Skills for a Successful Closing *(6hrs Real Estate Legal Issues)*

Explore the complexities of handling escrow, title and financing issues in a real estate transaction.

CONTRACT COURSES: (must take 1 of the following two day courses)

Mastering the Commercial Transaction *(6hrs Contract Law, 3hrs Disclosure, 3 Real Estate Legal Issues)*

Master the complexities of the commercial real estate transaction and business brokerage transaction from offer to closing, including drafting the AAR Commercial Real Estate Contract and related addenda.

Mastering the Land Transaction *(9hrs Contract Law, 3hrs Real Estate Issues)*

Master the complexities of the vacant land real estate transaction from offer to closing, including drafting the AAR Vacant Land/Lot Purchase Contract and the most common addenda.

Mastering the Residential Resale Transaction *(3hrs Disclosure, 9hrs Contract Law)*

Master the complexities of the residential resale real estate transaction from offer to

closing, including drafting the AAR Residential Resale Real Estate Purchase Contract and related addenda.

ELECTIVE COURSES: (must take 1 of the following one day courses):

Advertising, Marketing & Misrepresentation: Risk and Regulation Examine advertising and marketing principles, the rules and regulations governing these activities and how to avoid misrepresentation in a real estate transaction.

Claims, Litigation and Remedies (3-legal issues/3-disclosure)
Explore the elements of common real estate claims and litigation, the available remedies, claims management, and dispute resolution.

Federal Legal Issues (3-legal Issues/3-fair housing)
Examine how best to comply with the federal laws that impact a real estate transaction such as: fair housing, RESPA, and antitrust.

Leasing Essentials (*3hrs Contract Law, 3hrs Real Estate Legal Issues*)
Master the essential elements of real estate leasing, including landlord/tenant laws, property management and a broker's responsibility in this specialty

Short Sales, REO's & Foreclosures (*3hrs Contract Law, 3hrs Real Estate Legal Issues*)
Short sales and foreclosures are on the rise. Because these transactions are likely to make up a large percentage of your business, it is important to understand the risks inherent in these situations. By familiarizing yourself with the problems that can and do occur in these transactions, you can develop strategies to reduce risks for the clients, salespersons and brokers involved.

TABLE OF CONTENTS

- Course Introduction7
- Unit 1:9**
 - Introduction to Claims in Real Estate Transactions.....9
 - Unit 1, Segment 1: Introduction10
 - Learning Objectives10
 - Unit 1, Segment 2: Basic Risk Management Techniques.....11
 - Unit 1, Segment 3: Claims Defined12
 - Claims12
- Unit 2:13**
 - Common Claims13
 - Unit 2, Segment 1: Introduction to Common Claims14
 - Learning Objectives14
 - Unit 2, Segment 2: Claims Based on Property Conditions15
 - Unit 2, Segment 3: Claims Based on Transaction Issues.....16
 - Unit 2, Segment 4: Breach of Contract.....17
 - Common Remedies for Breach of Contract18
 - Scenarios Regarding Breach of Contract.....20
- Unit 3:23**
 - Claims Against Brokers or Agents.....23
 - Unit 3, Segment 1: Potential Claims Against Brokers or Agents24
 - Learning Objectives24
 - Remedies.....25
 - Unit 3, Segment 2: Risk Reduction Tips.....26
 - Errors and Omissions Insurance.....29
 - Unit 3, Segment 3: Scenarios.....32
- Unit 4:33**
 - Licensees Against Clients Claims33
 - Unit 4, Segment 1: Potential Claims Against Clients34
 - Learning Objectives34
 - Remedies.....36

| | |
|--|-----------|
| Unit 5: | 37 |
| Licensee Against Licensee Claims | 37 |
| Unit 5, Segment 1: Licensee Against Licensee Claims | 38 |
| Learning Objectives | 38 |
| Remedies..... | 40 |
| Unit 6: | 42 |
| Forums and Consequences | 42 |
| Unit 6, Segment 1: Forums and Consequences..... | 43 |
| Learning Objectives | 43 |
| Small Claims Court | 45 |
| Justice Court..... | 45 |
| Superior Court..... | 45 |
| State and Local REALTOR® Associations | 46 |
| Arizona Department of Real Estate (ADRE) | 47 |
| Unit 6, Segment 2: ADRE and Complaints..... | 48 |
| Process Details..... | 50 |
| ADRE and Real Estate Recovery Fund | 52 |
| ADRE and Civil Litigation..... | 52 |
| Unit 6, Segment 3: Mediation | 54 |
| Unit 6, Segment 4: Arbitration | 58 |
| Arbitration and REALTORS®..... | 60 |
| Unit 7: | 62 |
| Unit 7, Segment 1: Introduction..... | 63 |
| Learning Objectives | 63 |
| Unit 7, Segment 2: Boundary Disputes | 64 |
| Boundary by Acquiescence | 64 |
| Encroachments..... | 64 |
| Adverse Possession/Prescriptive Easements..... | 65 |
| Quiet Title Action..... | 66 |
| Unit 7, Segment 3: Trees and Vegetation Across Boundaries | 69 |
| Unit 7, Segment 4: Listing of a Home Built by an Owner Builder | 70 |
| Unit 7, Segment 5: Homestead Exemption | 73 |
| Unit 7, Segment 6: Lis Pendens..... | 75 |

References and Additional Resources77
Appendix.....79

Course Introduction

This course is a detailed look at common claims and real estate issues along with remedies and risk management tips that may occur in real estate transactions. This course specifically addresses Arizona state laws, but also looks at how the NAR Code of Ethics applies as well. This course allows students to gain a clear understanding of how claims happen, are pursued and resolved, and apply that understanding to minimize risk in their real estate practice. Sections of the text in this course were taken directly from the book *Arizona Real Estate: A Professional's Guide to Law and Practice* by Michelle K. Lind, General Counsel to the Arizona Association of REALTORS®. Other sources used are annotated.

Course Learning Objectives

Upon completion of this course, students will be able to:

- Identify four risk management techniques
- Define claim
- Identify the most common claims that may arise in an Arizona real estate transaction
- Identify claims based on transaction issues
- Describe ways to decrease the occurrence of common property condition claims
- Explain breach of contract
- Relate common remedies for breach of contract
- Explain various claims against brokers or agents
- Describe possible risk reduction steps for claims against brokers or agents
- Explain the value of errors and omissions insurance

- Relate how licensees may need to explain contract obligations to a client
- Relate the Code of Ethics to REALTOR® against REALTOR® claims
- Apply the concepts of Pathways to Professionalism to business practices to reduce risk
- List the potential results of claims
- Explain the appropriate venue for various claims
- Relate the difference between ADRE and REALTOR® organization functions with regard to claims
- Describe the ADRE investigative and enforcement process
- Define and differentiate between mediation and arbitration
- Explain common land and title issues affecting residential real estate transactions
- Identify the risks associated with the listing of a home built by an owner builder
- Explain the Homestead Exemption
- Define *lis pendens*

Unit 1:
Introduction to
Claims in
Real Estate Transactions

Unit 1, Segment 1: Introduction

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Identify four risk management techniques
- Define a claim

*****End Unit 1, Segment 1*****

Unit 1, Segment 2: Basic Risk Management Techniques

Real estate agents and brokers must exercise risk management techniques to protect their businesses.

Agents or brokers should consider any risk in terms of options and decide whether it is better to:

Transfer the risk *by*

Retain the risk

Avoid the risk

Control the risk

Group Activity

Identify at least three ways to illustrate each of the four techniques

T _____

R _____

A _____

C _____

*****End Unit 1, Segment 2*****

Unit 1, Segment3: Claims Defined

Claims

Claims are defined as:

- An allegation
- To assert or maintain as a fact

Claims are more than just an expression of dissatisfaction. Claims are more formal and may involve further action--even litigation--to resolve.

Practice Tip: Do not let another party's dissatisfaction turn into a claim. Try to work with the client or consumer to resolve issues amicably and reasonably so that litigation isn't necessary.

*****End Unit 1, Segment 3*****

Unit 2:

Common

Claims

Unit 2, Segment 1: Introduction to Common Claims

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Identify claims based on transaction issues
- Describe ways to decrease the occurrence of common property condition claims
- Explain breach of contract
- Relate common remedies for breach of contract

Introductory Illustration

Follow the directions of the instructor.

1. *Name some common claims or issues that arise during or after a transaction.*
2. *Who dealt with these claims or issues? The buyer – the seller – the licensee?*
3. *How/could they have been handled better?*

Who May File Claims

Buyers and sellers may file claims against one another. Licensees may file claims against each other or their clients.

Claims can be filed by clients against agents or brokers based on the agent's actions or non-actions or the broker's actions or non-actions. Depending on the nature of the complaint or claim, a broker may be held liable for the actions or non-actions of his or her agent.

*****End Unit 2, Segment 1*****

Unit 2, Segment 2: Claims Based on Property Conditions

A majority of the claims against brokers and agents come from _____ and are mostly related to property conditions.

Some of the more common property condition claims involve _____ or _____ of the following:

- Water issues
- Permit/code/zoning issues
- Termites or termite damage
- Sewer/septic issues
- Electrical problems
- Roof leaks

Arizona Real Estate: A Professional's Guide to Law and Practice

Practice Tip: Through communication and education regarding the process, work with a seller to ensure that they are open and honest about the material facts that may affect the sale of the property. If the agent or broker is aware of undisclosed, material defects, he or she may be at risk.

Risk Reduction Tips

- Ensure that the seller has recently and accurately completed a Seller's Property Disclosure Statement (SPDS).
- Consider recommending to clients (either buyer or seller) to purchase a home warranty.

*****End Unit 2, Segment 2*****

Unit 2, Segment 3: Claims Based on Transaction Issues

Not all claims involve property conditions; some are transaction-related. Transaction-related complaints against licensees include (but are not limited to):

- Disagreements over what was included in the sale and what was not
- _____ disputes
- Problems with _____
- _____ problems
- Pre-possession & _____ agreement disputes

*****End Unit 2, Segment 3*****

Unit 2, Segment 4: Breach of Contract

One common claim that may arise with regard to a real estate transaction is breach of contract.

Breach of contract is, in essence, a _____
_____ .

A breach of contract is a nonperformance of a _____ duty and a violation of any of the terms or conditions of a contract without legal cause.

An _____ breach is when a party communicates that they will not perform a contractual obligation before the time the performance is due.

Cure Period

The Arizona Association of REALTORS® (AAR) Residential Purchase Contract provides for a Cure Period, where a party to the transaction is given an opportunity to cure a _____ or potential breach of the contract. Michelle Lind, in *Arizona Real Estate: A Professional's Guide to Law and Practice*, states

If a party fails to comply with any provision of the contract, the other party must deliver a notice to the non-complying party specifying the non-compliance before declaring a breach. If the non-compliance is not cured within three days after delivery of the notice (cure period), the failure to comply becomes a breach of contract.

The cure provision only applies when a party does or does not do something that would have otherwise been an immediate breach of contract. The cure

notice provides a second chance to fix a problem before it becomes a breach – the cure notice does not address what happens when there is a breach. . . . The cure period does not apply to a contingency.

Common Remedies for Breach of Contract

Parties to contracts have options for remedies for breach of contract. The options often depend on which party is in breach.

Rescission/Cancellation

A contract can be rescinded or canceled for the following reasons:

- _____ A failure to perform that permits the other party of the contract to either compel performance or collect damages because of the breach.
- _____ A false statement of fact made by one party to another.
- _____ An intentional deception made for personal gain.

To justify a cancellation, the breach must relate to a _____ provision such as the ability to close the transaction, and is generally not warranted for a breach of a _____ contract revision that can be rectified by monetary damages.

Risk Reduction Tips:

All AAR contracts include cancellation as an available remedy for breach of contract. However, a cancellation is not always a remedy. Parties must justify the cancellation of the contract.

Any party threatening cancellation of a contract over the objections of the other party should be referred to legal counsel.

Specific Performance

Specific performance is when a court orders a party to perform a specific act, usually what is stated in a contract.

- Specific performance may be an available remedy for the refusal to complete the purchase or sale of real estate.
- Specific performance may apply if the land is viewed as unique and when an award of damages is considered an inadequate remedy to the situation.

Before a repudiates the contract, the buyer is not required to tender performance before commencing with a specific performance action.

Damages may be awarded instead of specific performance when the specific performance is considered inadequate.

Damages

Damages are generally monetary compensation that may be recovered in court for the loss suffered by the injured party due to the other party's breach of contract. An award of damages is intended to put the injured (non-breaching) party in the position he or she had if the contract had not been breached.

Liquidated Damages

- Liquidated damages are a specific sum of money that has been agreed upon by all parties as the amount of damages to be recovered for breach of contract.
- Liquidated damages serve as an economical alternative to the costly and

lengthy litigation involved in a breach of contract action.

- Many contracts contain damages or liquidated damages clauses. When liquidated damages are specified in a contract, the contract generally controls.

All AAR contracts contain a liquidated damages clause.

Earnest money is designated as the liquidated damage amount in AAR contracts. If there is an unreasonably large amount of earnest money at issue, the court may refuse to enforce the liquidated damages clause.

Scenarios Regarding Breach of Contract

Follow the instructions of the presenter. Read and answer the questions for the scenarios that follow.

All of the scenarios have been excerpted and adapted from the *Arizona REALTOR® or Arizona REALTOR® Digest* publication.

Scenario 1

Tom and Karen were in the process of buying Joe and Mary's home. After the inspection period expired, Hurricane Helene blew in and damaged a large palm tree in Joe and Mary's backyard. Tom and Karen's landscaper reviewed the damage and told them that the palm tree is now potentially a danger to them and their family. Joe and Mary refuse to repair or replace this dangerous palm tree.

Arizona REALTOR®, August 2010

Are Joe and Mary breaching the contract?

Can Tom and Karen cancel the contract even though the inspection period has expired?

Scenario 2

Nevin and Kathy are buying Holly and Jake's home, using the Arizona Association of REALTORS® Residential Resale Real Estate Purchase Contract. Holly and Jake were underwater on their mortgage and had to sell using a short sale. The lender has approved the short sale, and all contingencies have been removed. Holly and Jake will receive absolutely no monies at the closing scheduled in two weeks. Nevin and Kathy just learned that Holly and Jake removed some of the fixtures from the home, including sinks, toilets and the evaporative cooler on the roof, and they no longer want the home.

Arizona REALTOR® Digest October 2009

Did Holly and Jake breach the contract?

Can Nevin and Kathy cancel the contract now, or do they have to wait until close of escrow?

Scenario 3

Harry is buying Phyllis' house using the Arizona Association of REALTORS® Residential Resale Real Estate Purchase Contract. Harry approved of Phyllis' home during the inspection period and qualified for financing. However, Harry refused to close the transaction because the home had depreciated in value during the escrow period. Harry is willing to forfeit the \$5,000 earnest money for the failure to close the transaction if Phyllis will let him out of the contract.

Arizona REALTOR® December 2009

Is Phyllis required to accept Harry's \$5,000 earnest money for his breach of contract?

Scenario 4

Valeria owns a rental property in a condominium complex. She leases the unit to Francesca. Under the

lease agreement, Valeria is required to pay the monthly Home Owner Association (HOA) fees, but she hasn't done so for several months. Now the HOA has restricted Francesca and her family from the use of the swimming pool and community center.

Arizona REALTOR® Magazine June 2011

If Francesca terminates the lease, can Valeria sue her for breach of contract?

Scenario 5

Anton is moving from Chicago to Phoenix and has entered into an agreement to buy a home. Just three weeks prior to the close of escrow, Anton sends a letter to Marta, the seller, telling her that he will not be moving and will not be closing on the house. He is also demanding the return of the earnest money. Marta also wants the earnest money – but she is lucky enough to have found another buyer and wants to execute a contract with this new family as soon as possible.

Arizona REALTOR® Digest March 2007

Did Anton breach the contract?

Does Marta have to wait an additional three weeks before entering into a contract with the second family for the purchase of the home?

*****End Unit 2, Segment 4*****

Unit 3:
Claims
Against Brokers
or Agents

Unit 3, Segment 1: Potential Claims Against Brokers or Agents

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Explain various claims against brokers or agents
- Describe possible risk reduction steps for claims against brokers or agents
- Explain the value of errors and omissions insurance

Additional claims against brokers or agents that may arise and be alleged include the following:

Breach of fiduciary duty

- Professional negligence
- Failure to disclose
- Innocent misrepresentation
- Negligent misrepresentation
- Intentional misrepresentation
- Breach of contract
- Violation of real estate statutes
- Fraud
- Consumer fraud

...

.

Unit 3, Segment 2: Risk Reduction Tips

The following are some basic tips to potentially reduce the risk for claims.



The disclosures, advice, and counsel required of the agent or broker depend on information.

- What is the nature and _____ of the property, *Is the property new? Is it in good condition?*
- Have you read and understood the purchase contract and the related forms?
- What is the _____ level and _____ of the _____ ?
- Is your information accurate?

Educate the Client

- Review the _____ of the transaction.
- Use client questions to _____ and _____.
- Give buyers the tools they need to obtain information .
- Insist on inspections and walkthroughs
- Review all forms with clients.
 - Contract
 - Covenants, Conditions, and Restrictions (CC&R's)
 - Title Report
 - Public Reports

Communicate

- communicate with the client
- Avoid shortcuts
- Handle offers properly and get them to your clients as soon as is reasonable
- Think before you speak
- Identify your source for any information you provide
- Return calls
- Provide updates

- Contact the client shortly after closing
- Handle complaints promptly
- Follow through

Disclose and Document

- Practice within your area of expertise *If you are not an expert – disclose and refer to someone who is.*
- Suspicious condition
- Assist seller client with disclosures
- Assist buyer clients with due diligence and a thorough review of the seller's disclosure documents

When in doubt, disclose .

- Document the transaction

Buyer Representation in Real Estate offers the following additional suggestions:

- Ensure that all parties understand the nature of the agency relationships that are implicit or explicit.
- Pay careful attention to details, especially as a buyer's agent:
 - Home inspection and required negotiations resulting from the inspection
 - Environmental issues and inspections
 - Appraisal issues
 - Survey results
 - Title problems

- Inform clients about their obligations *including what needs to be done and by when.*
- Prior to closing, offer the client a review of documentation, requirements, etc. This applies particularly to buyer's agents.
- Establish a standard closing system *and stay organized.*
- Provide clients with checklists *so they can follow along with the process, identify tasks and required documentation, and meet deadlines.*

Activity

Identify at least five specific things that could go into a checklist to provide to clients.

| Checklist for Buyers | Checklist for Sellers |
|--------------------------|--------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

Errors and Omissions Insurance

To minimize financial risk due to the potential for liability, real estate brokers and agents should purchase errors and omissions insurance (commonly referred to as E&O).

E&O insurance is similar to medical and legal malpractice insurance. It covers liability for

- Property management
- Listing or selling

- Estimating market value
- Counseling clients
- Referrals

E&O policies have deductibles, limits of coverage, and exclusions. E&O policies commonly do not protect licensees from lawsuits arising from the following:

- Criminal acts
- Civil rights violations
- Antitrust violations
- Securities
- Physical injury to person or property
- Advertising injury
- Commission disputes
- Criminal acts
- Punitive damages
- Family/personal transactions
- Fair housing/discrimination
- Activities other than real estate duties

Most E&O policies define a “claim” as a written demand for money or services alleging an error, omission, or negligent act. If a buyer or seller makes such a demand, the agent or broker should do the following:

- Notify the designated broker or manager, who will:
 - Notify the E&O carrier in writing
 - Obtain a claim number
- Cooperate with carrier and attorney
 - Although the attorney is paid by the insurance company, the attorney represents the broker.

Arizona Real Estate: A Professional's Guide to Law and Practice

Broker Risk Reduction Tip

Check with your E&O insurance carrier about possible discounts for education.

More information on E&O is available online at www.realtor.org/library/library/fg701 or by scanning the

Code below.



Any questions?

*****End Unit 3, Segment 2*****

Unit 3, Segment 3: Scenarios

You Decide

Follow the instructions of the presenter. Be prepared to answer the questions and explain your answers.



Scenario 1

Going by what you just heard, did the Respondent Lisa (Larry) violate any rules or laws?

If so, which one(s)?

What could Lisa (Larry) have done differently to prevent or minimize the risk of this claim/complaint being filed?

Scenario 2

Going by what you just heard, did the Respondent Bob (Bobbi) violate any rules or laws?

If so, which one(s)?

What could Bob (Bobbi) have done differently to prevent or minimize the risk of this claim/complaint being filed?

*****End Unit 3, Segment 3*****

Unit 4:
Licensees
Against
Clients Claims

Unit 4, Segment 1: Potential Claims Against Clients

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Relate how licensees may need to explain contract obligations to a client.

Clients are not without obligations to their real estate licensees and the licensees are not without rights.

Real estate agents' or brokers' claims against clients primarily involve breach of contract or commission disputes.

Risk Reduction Tip

Ensure that all employment agreements with clients are in writing. *For example, the AAR Buyer-Broker Exclusive Employment Agreement or a local REALTOR® association's Listing Agreement.*

Scenarios

Scenario 1

Barry is a wealthy investor who is working with Lisa, the listing broker. During the term of the listing agreement, Barry loses title to a residential investment property because of a foreclosure sale. The listing agreement provided that Lisa was entitled to a commission if this property was "transferred or conveyed."

Is Lisa entitled to a commission if a foreclosure sale occurs during the term of the listing agreement?

Adapted from Arizona REALTOR® Digest October 2007

Scenario 2

Shirley wanted to sell her 160 acres of land. She told Marlin, the broker, that she would pay a 2% commission if he found a buyer for the property. Marlin found a buyer, and in the contract between Shirley and the buyer, the seller agreed to pay a 2% commission to Marlin. The transaction closed. Shirley refuses to pay the 2% commission to Marlin, however, because she says there is no written listing agreement as required by *A.R.S. §32-2151.02* because material terms such as inception and expiration dates are not specified.

Is Marlin entitled to the 2% commission, even though there is no written listing agreement?

Adapted from Arizona REALTOR® Digest November 2006

Scenario 3

Margot, the broker, is working with her friend Bonita, to help Bonita find a new house. Because they are such good friends, Margot didn't ask Bonita to sign an employment agreement. She knew she could trust Bonita. Together they have looked at numerous homes over the course of several weeks. Margot showed Bonita one home, which was not in the multiple-listing service. After Bonita got home from seeing this house, she called her brother-in-law – Guillermo – who is also a licensed real estate broker. Bonita directed Guillermo to write an offer on this home and the transaction closed.

Is Margot entitled to a commission from the buyer?

Adapted from Arizona REALTOR® Digest November 2008

How is this different from Scenario 2?

Assume Margot and Guillermo are both REALTORS®.

Does the REALTOR® Code of Ethics address this issue?

Remedies

- Depending on the nature of the claim, and the nature of the relationship between the broker/agent and the client, the broker/agent could file a civil suit.
- Mediation or arbitration might also be required – depending on the contract.

*****End Unit 4, Segment 1*****

Unit 5:
Licensee
Against Licensee
Claims

Unit 5, Segment 1: Licensee Against Licensee Claims

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Relate the Code of Ethics to REALTOR® versus REALTOR® claims
- Apply the concepts of Pathways to Professionalism to business practices to reduce risk

Disputes can occur between sales licensees or between sales licensee and broker licensee. As long as one of the parties in question is a REALTOR®, the matter is usually handled through arbitration (as per Article 17).

Articles of the REALTOR® Code of Ethics emphasize, cooperation disclosure and respect as key to avoiding licensee complaints: several of the Articles overlap when making this point.

Article 3: Cooperate with other real estate professionals to advance client's best interests.

Article 4: When buying or selling, make your position in the transaction or interest known.

Article 5: Disclose present or contemplated interest in any property to all parties.

Article 12: Present a true picture in advertising and other public representations.

Article 15: Ensure that your comments about other real estate professionals are truthful and not misleading.

Article 16: Respect the agency relationship and other exclusive relationships recognized by law that other Realtors have with their clients.

The National Association of REALTORS® also developed a list of guidelines that demonstrate

professionalism and courtesy called “Pathways to Professionalism.”

- Follow the “Golden Rule” do unto others as you would have them do unto you.
- _____ if you are delayed or must cancel an appointment or showing.
- If a prospective buyer decides not to view an occupied home, promptly _____ the situation to the listing broker or the occupant.
- _____ with all parties in a timely fashion.
- Encourage the clients/customers of other brokers to direct questions to their agent or representative.
- Be aware of and respect cultural differences.
- Be aware of – and meet – all deadlines.
- Promise only what you can deliver – and keep your promises.
- Identify your _____ and professional status in all contacts with clients and other REALTORS®.
- Respond to other associates’ calls, faxes, and e-mails promptly and courteously.
- Be aware that large electronic files with attachments or lengthy faxes may be a burden on recipients.
- Notify the listing broker if there appears to be _____ on the listing.
- _____ important information about a property, including the presence of pets; security systems; and whether sellers will be present during the showing.
- Show _____ , _____ and _____ to other real estate professionals.
- Avoid the inappropriate use of endearments or other denigrating language.
- Do not prospect at other REALTORS® open houses or similar events.

- _____ Carefully replace keys in the lockbox after showings.
- Real estate is a reputation business. What you do today may affect your reputation – and business – for years to come.

“Pathways to Professionalism”

Compliments of the National Association of REALTORS®

Scenarios

Scenario 1

Charlie is the listing broker for a 20-acre parcel of land. Before he can enter the listing into the multiple-listing service, Patrice, a buyer’s broker, produces a buyer for the land. Charlie verbally agrees to pay Patrice a 2% commission. Is this verbal agreement enforceable?

Arizona REALTORS® Digest May 2005

Scenario 2

Reconsider the scenario with Margot, the broker, and her friend Bonita, the buyer. After viewing several properties with Margot, Bonita found one she liked and had her brother-in-law, Guillermo, write an offer on it and the transaction closed. It was previously determined that Margot probably wasn’t entitled to a commission from Bonita, because they did not have a written employment agreement. It was also decided that Article 9 of the REALTOR® Code of Ethics applied (if Margot is a REALTOR®) and Margot should have gotten the representation agreement in writing.

Thinking about the relationship between Margot and Guillermo, not between Margot and Bonita, is there any circumstance under which a written agreement is not required?

Assuming Margot and Guillermo are both REALTORS®, is there any action Margot can take against Guillermo?

Remedies

- Licensees can file claims of misdeeds by other licensees with ADRE – or can potentially file civil suits – depending on the nature of the claim and the injury.
- REALTORS® can file claims of misdeeds that violate the REALTOR® Code of Ethics with their local REALTOR® association or the Arizona Association of REALTORS®.

Any questions?

*****End Unit 5, Segment 1*****

Unit 6:
Forums
and
Consequences

Unit 6, Segment 1: Forums and Consequences

Learning Objectives

At the conclusion of this Unit, participants will be able:

- List the potential results of claims
- Explain the appropriate venue for various claims
- Relate the difference between ADRE and REALTOR® organization functions with regard to claims
- Describe the ADRE investigative and enforcement process
- Differentiate and explain Buyer/Seller mediation (DRS), Public/REALTOR® or REALTOR/REALTOR® mediation and arbitration

Claims against brokers or agents, may be filed in a variety of forums, depending on the nature of the claim and the amount of the claim.

Licensee claims against buyers or sellers, or buyers' and sellers' claims against each other may also be filed in a variety of venue.

Venues include the following:

- Small Claims Court
 - Justice Court
 - Superior Court
- Attorney General's office
- State and Local REALTOR® Associations
 - ADRE *Only regarding alleged violations of real estate statutes and rules by licensees*

Potential Results of Claims

| Claim Against Non-Licensee | Claim Against Broker or Agent | Claim Against REALTOR® |
|----------------------------|--|---|
| Specific performance | Same | Same |
| Actual damages | Same | Same |
| Punitive damages | Same | Same |
| Attorney's fees and costs | Same | Same |
| Court Costs | Same | Same |
| | Forfeiture of commission for breach of fiduciary duty, regardless of damages | Same |
| | Criminal penalties | Same |
| | Loss of license | Same |
| | Education requirement imposed by ADRE | Same |
| | Monetary penalties imposed by ADRE | Same |
| | | Education requirements imposed by REALTOR® organization |

| | | |
|--|--|---|
| | | |
| | | Monetary penalties, imposed by REALTOR® |
| | | Loss of membership in REALTOR® organization |

Small Claims Court

Small Claims Courts of the Justice Court are for those cases that involve \$2,500 or less for resolution.

- The procedures are simple enough that an individual can represent himself or herself.
- Lawyers are generally not allowed and a case is heard by a judge or hearing officer.
- The decision is final and there are no rights for an appeal.

Justice Court

Justice Courts handle cases if the amount, exclusive of interest, costs, and attorney fees is less than \$10,000. Lawyers may represent their clients in Justice Court proceedings.

Justice Courts have jurisdiction to hear the following:

- Misdemeanor violations
- Criminal and civil traffic violations
- Civil lawsuits up to \$10,000.00
- _____
- Orders of protection in domestic violence cases
- Injunctions prohibiting harassment

Superior Court

If the claim exceeds \$10,000, the claim must be filed in the Superior Court to resolve the dispute. To file such a lawsuit, the complaining or injured party should probably use an attorney.

Article VI § 14 of the Arizona Constitution provides the superior court with jurisdiction over the following cases:

- Cases and proceedings in which exclusive jurisdiction is not vested by law in another court
- Equity cases that involve title to or possession of real property or the legality of any tax, assessment, toll or municipal ordinance
- Other cases in which the value of property in question is \$1,000 or more, exclusive of interest and costs
- *Criminal cases amounting to a felony, and misdemeanor cases not otherwise provided for by law*
- Forcible entry and detainer actions (evictions of renters)
- Proceedings in insolvency *However, bankruptcy is handled in federal court*
- Actions to prevent or stop nuisances
- *Matters of probate (wills, estates)*
- *Dissolution or annulment of marriages (divorces)*
- *Naturalization and the issuance of appropriate documents for these events*
- Special cases and proceedings not otherwise provided for, and such other jurisdiction as may be provided by law.

State and Local REALTOR® Associations

For REALTORS®, ethics violations or arbitration requests are filed with the local and state associations of REALTORS®.

If a REALTOR® is found “guilty” of an alleged violation, the result may be Association-imposed sanctions as outlined in the *Code of Ethics and Arbitration Manual*, ranging from education requirements and monetary penalties to loss of membership, depending on the severity of the claim and findings.

5 possible actions:

- Letter of warning
- Letter of reprimand
- Educational hours
- Appropriate and reasonable fine not to exceed \$5,000

- Member is placed on probation not less than 30 days and not more than 1 year
- Membership suspended 30 days – 1 year
- Expulsion 1-3 year
- Suspension or termination of MLS

Arizona Department of Real Estate (ADRE)

This is the licensing entity for the state and agents and for claims involving violations by brokers of real estate statutes and Commissioner's Rules. For additional information on the ADRE, scan the code below or go to <http://www.re.state.az.us/Default.aspx>.



If a broker or agent is found in violation, the result may be:

- ADRE sanctions ranging from civil penalties and consent orders, to loss of license depending on the severity of the claim and findings

Discussion

What is the difference between the ADRE and REALTOR® association in terms of the types of claims addressed?

*****End Unit 6, Segment 1*****

Unit 6, Segment 2: ADRE and Complaints

The Arizona Department of Real Estate (ADRE) reports the following statistics for complaints:

| Fiscal Year | Advertising | Education | Licensing | Property Mgmt |
|--|-------------|-----------|-----------|---------------|
| FY 2011 (as of June 22, 2011 email) | 19 | 3 | 569 | 62 |
| FY 2010 | 13 | 5 | 675 | 57 |
| FY 2009 | 58 | 4 | 846 | 92 |
| FY 2008 | 87 | 12 | 1010 | 95 |
| FY 2007 | 114 | 12 | 4084 | 84 |

Investigations and Development Services. Arizona Department of Real Estate

The ADRE investigates violations of the real estate statutes and Commissioner's Rules by licensed real estate brokers and salespeople.

The majority of complaints involve one or more of the following:

- Breach of fiduciary duty
- Dishonest dealings
- Disclosure issues
- Unlicensed activity
- Other state and rule violations

The department does **not** investigate the following:

- Landlord/tenant disputes
- Construction defects

- Ethics violations *An action that may be unethical is not necessarily illegal. Consumers are directed by the ADRE to contact the Arizona Association of REALTORS® at www.aaronline.com/Disputes or by scanning the code below.*



- Homeowners Association violations
- Covenants, Conditions, and Restrictions (CC&R) violations
- Loan, Interest Rate, or Escrow problems
- Title Insurance Issues
- Homeowners' Insurance
- Escrow money issues
- Commission disputes between licensees

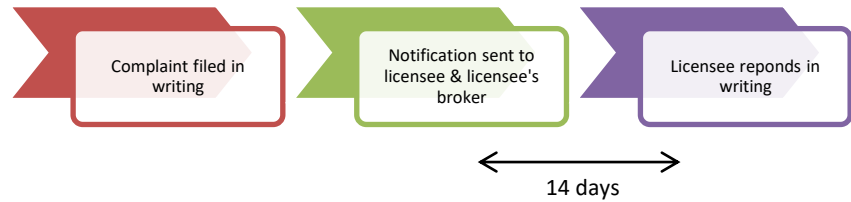
A.R.S. §32-2108 requires complaints filed with the ADRE to be in writing and signed by the complainant _____ . The complaint must allege conduct that violated ADRE laws or rules.

To begin an investigation, the Department determines two things:

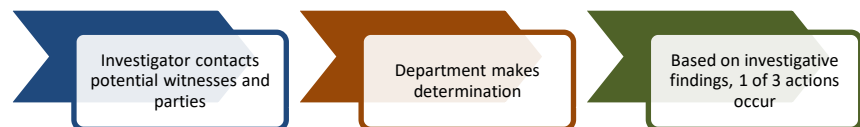
1. Does the complaint relate to possible violations of real estate laws or rules?

2. Are the people or companies involved under the Department's jurisdiction?

Process Details

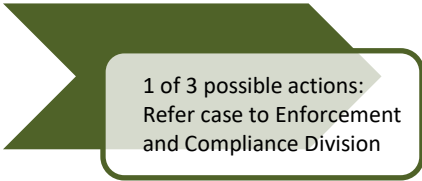


1. After a complaint is filed, it is reviewed by an investigator assigned to the complaint.
2. A copy of the complaint is sent to each licensee involved (and the licensee's broker) with a request for written response.
3. The licensee has 14 days to respond in writing. The licensee's response should be a full response to the allegations made by the complainant, as well provide a complete copy of the transaction file.



4. The investigator contacts any other witnesses involved.
5. The investigator may contact the party submitting the complaint for additional information.
6. After the information is reviewed, the ADRE determines if there's enough evidence to support disciplinary action.
7. Administrative sanctions are not pursued unless there's a preponderance of evidence.
8. One of the following decisions is made:

- Close the file without action
- Close the case with a non-disciplinary letter of concern
- Refer the case to the Enforcement and Compliance Division for possible disciplinary action.



1 of 3 possible actions:
Refer case to Enforcement
and Compliance Division

- If the Real Estate Auditing and Investigation Division forwards the case to the Enforcement and Compliance Division for review, Enforcement and Compliance reviews the case to determine if there is sufficient evidence to pursue disciplinary action. If not, the case may be closed without action.
- If there is indication of a violation, but it is minor or technical in nature, the Department may issue a non-disciplinary Letter of Concern. A Letter of Concern remains in the file and may be considered when determining the appropriate outcome in any future similar complaint.
- When Enforcement and Compliance finds the evidence is sufficient to support discipline, it attempts to negotiate a settlement via a Consent Order with the licensee. If an agreement is reached, the Department and the licensee sign the Consent Order and it becomes effective immediately. There is no appeal of a Consent Order, since the respondent licensee agrees to it.
- If a Consent Order cannot be negotiated, or the violation is so severe that the Department will only accept suspension or revocation of the license, it refers the case to the Attorney General's Office which:

- (a) Prepares a Notice of Hearing and Complaint, which is sent to the licensee. The document identifies the statutes or rules the licensee has allegedly violated, and sets a date and time for hearing.
- (b) An administrative law judge hears the matter in accordance with the Administrative Procedures Act. After the hearing, the administrative law judge prepares and sends to the Commissioner a recommended Order.
- (c) The Commissioner may adopt, modify or reject the order and issues a Commissioner's Final Order. That order may be appealed to the Superior Court.

Frequently Asked Questions

9. Possible penalties include:

- _____
- _____
- _____
- _____
- _____

ADRE and Real Estate Recovery Fund

A.R.S. §32-2186 requires the commissioner to establish and maintain a real estate recovery fund for the benefit of any person aggrieved by any act, representation, transaction or conduct of a licensed real estate broker that violates the statute or rules. The recovery fund pays for actual and direct out-of-pocket losses to the injured party directly arising out of the real estate transaction, including reasonable attorney fees and court costs. The fund's liability shall not exceed: (1) \$30,000 for each transaction, regardless of the number of persons, brokers, or parcels of real estate involved; (2) \$90,000 for each licensee.

ADRE and Civil Litigation

According to ADRE *Substantive Policy Statement 2005.07*,

A Complainant's filing of a civil suit has no bearing on whether the Department will pursue an alleged violation of a statute or rule within the Department's jurisdiction. The Department shall commit the appropriate resources to investigate possible violations.

The Department monitors and regulates real estate licensees, but does not determine a licensee's civil liability to third parties. A finding by the Department that a violation warranting administrative action did or did not occur, is not dispositive of liability and does not create any presumption regarding whether or not civil liability exists.

The Department's investigations shall not be utilized for the purpose of circumventing the Arizona Rules of Civil Procedure or as a means of discovery of evidence for use in civil litigation. The Department will not intentionally place itself in the position of providing discovery and building a prima facie case for a Complainant, only to have the Complainant use the Department's investigative file as evidence in a civil suit. It is not the Department's role to assist a Complainant to develop a case that will assist in the Complainant pursuing damages.

The Department shall not delay an investigation to await the outcome of a civil court proceeding. Such a delay may discourage or financially inhibit a Complainant's pursuit of a civil cause of action. Such a delay might also encourage a licensee to assert the Department's inaction as an argument in the licensee's favor.

*****End Unit 6, Segment 2*****

Unit 6, Segment3: Mediation

An alternative to litigation or filing a complaint with ADRE may be requested through a REALTOR® association or a REALTOR® association is alternative dispute resolution programs

- Many purchase contracts and employment agreements contain alternative dispute resolution clauses.
- All AAR contracts require the parties to mediate any dispute before taking further action. The AAR Residential Purchase Contract requires buyer/seller mediation, or Dispute Resolution System (DRS) and defaults to binding arbitration, unless one of the parties opts out.

Practice Tip:

Licensees using other contracts or standard forms should review the contracts for potential alternative dispute resolution language.

Examples of alternative dispute resolution include mediation and arbitration.

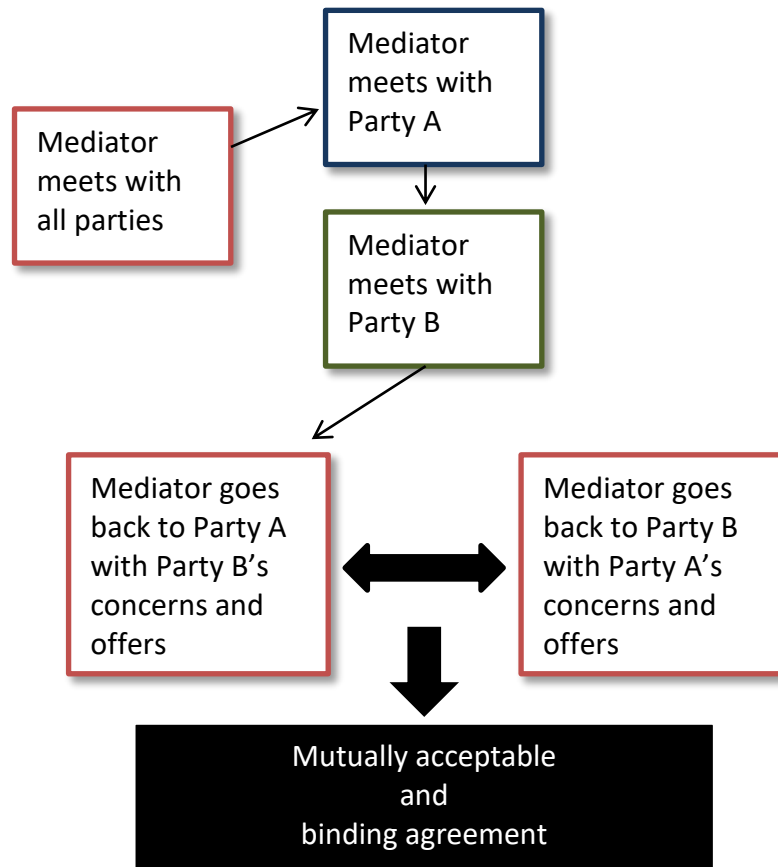
Michelle Lind, in *Arizona Real Estate: A Professional's Guide to Law and Practice*, provides information on mediation, as noted in the following paragraphs:

- Mediation is a process in which the parties meet with an impartial person who helps to resolve the dispute informally and confidentially.
- Mediators cannot impose binding decisions.
- The parties must agree and sign an agreement before any settlement reached is binding.

Under Arizona law, an agreement in a written contract to submit a dispute or claim to mediation is valid and enforceable. If one party files a lawsuit without offering to mediate, the court will either dismiss the claim as premature or “stay” the litigation pending mediation. If a party refuses to mediate, it could be construed as bad faith or breach of contract.

At times, the buyers and sellers are reluctant to mediate. The parties may think that mediation is just a waste of time or will be used only for gathering evidence in support of the complaining party's claim. Some of these concerns are a result of a lack of understanding of the mediation process.

Steps in Mediation



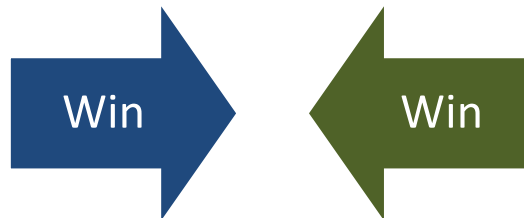
In mediation, there is a neutral party, the mediator, who attempts to assist the parties to negotiate a mutually acceptable solution to the dispute.

The mediator helps to realistically evaluate the merits of the claim or defense and help the parties evaluate the risks of litigation. Mediators can often provide a creative solution not always possible in court.

During mediation, all parties (with or without attorneys) meet in the same room and each side make an opening statement. Each side states their claim or defense, evidence and their desired outcome.

The parties are then separated to discuss their position in detail. The mediator works with both sides and helps each party evaluate the strengths and weakness of his or her position. The mediator then engages in shuttle diplomacy conveying each side's concerns, positions, offers, and counter-offers. Everything told to the mediator in confidence should be kept confidential.

The mediator's goal is to achieve a mutually acceptable and binding agreement between the parties.



The Arizona Rules of Evidence preclude the introduction of evidence of settlement negotiations in a trial for the purpose of proving liability, the validity of a claim, or its amount. Offers made during mediation should not be allowed as evidence in any trial or hearing regarding the matter.

Mediation is less expensive and less time consuming than litigation. The fees are typically split between the parties and most disputes resolved in two and a half to three hours.

Agreeing does not mean agreeing to settle, but just means the parties are trying to settle without going to court. The parties do not give up any right to pursue other legal remedies if mediation is not successful.

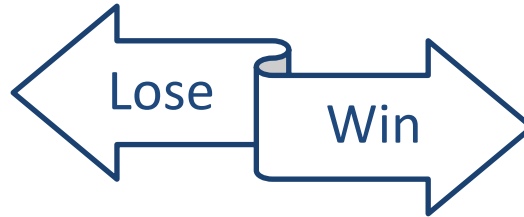
For transactions involving the AAR Residential Resale Real Estate Purchase Contract, if mediation is unsuccessful, the unresolved dispute or claim must be submitted for binding arbitration.

The Attorney General's office (www.azag.gov) as well as AAR provides mediation services. Some local REALTOR® associations may also provide this service.

*****End Unit 6, Segment 3*****

Unit 6, Segment 4: Arbitration

Arbitration is similar to litigation in the court system. In arbitration, an arbitrator hears evidence and testimony and makes a decision of who wins and who loses.



Arbitration can be binding or nonbinding.

- If the parties agree that the arbitration is binding, the decision cannot be appealed using the court system.
- If the arbitration is non-binding, the decision can be appealed.

In the AAR Residential Purchase Contract:

If mediation does not resolve the dispute, it must be submitted to binding arbitration unless:

- Either party opts out within 30 days after the conclusion of the mediation conference.
- If opting out, written notice must be provided to the other party.

If neither party opts out:

- All the parties must agree on an arbitrator
 - If the parties cannot agree on an arbitrator, the dispute must be submitted to the Arbitration Association of America in accordance with the Arbitration Rules for the Real Estate Industry, available at www.adr.org/sp.asp?id=22011 or by scanning the code below:



- All parties must cooperate in the scheduling of the meeting

The decision of the arbitrator is final and non-appealable.

Exclusions

There are exclusions from the contractual requirement for mediation and arbitration, including but not limited to:

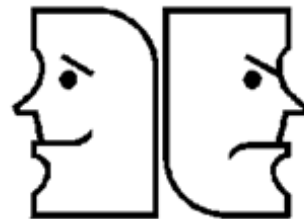
- Any action brought in Small Claims Court
- Lis Pendens
- Foreclosures (judicial or non-judicial) or other actions or proceedings to enforce a deed of trust, mortgage, or agreement for sale
- Filing or enforcement of mechanic's lien
- Any matter that is within jurisdiction of probate court

“The filing of a judicial action to record a *lis pendens* or order of attachment, receivership, injunction, or other provisional remedies is not a waiver of the obligation to submit the claim to alternative dispute resolution, or a breach of the duty to mediate or arbitrate.”

Arizona Law: A Professional's Guide to Law and Practice

Arbitration Scenario

Both Marcie, the seller, and Gary, the buyer, are claiming the \$25,000 earnest money in a failed transaction. Mediation under lines 286-294 of the AAR contract was unsuccessful. Although Marcie wants now to arbitrate the dispute of the \$25,000 earnest money, Gary is opposed to arbitration.



Can Gary file a lawsuit for the \$25,000 earnest money, or is he required to arbitrate this \$25,000 earnest money dispute with Marcie?

Arbitration and REALTORS®

REALTORS® are required, as a duty of membership in the National Association of REALTORS®, to submit disputes to binding arbitration. Details, including procedures, are specified in the *NAR Code of Ethics and Arbitration Manual (CEAM)*.

According to Part 10 of the *CEAM*, brokers are obligated to arbitrate “entitlement to commissions and compensation in cooperative transactions that arise out of the business relationships between REALTORS® and between REALTORS® and their clients and customers . . .”

Article 17 of the *NAR Code of Ethics* provides:

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board,

provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award.
(Amended 1/01)

The duty to arbitrate encompasses contractual as well as related non-contractual issues or questions, as specified in Standard of Practice 17-4.

Risk Reduction Tip

Go to www.realtor.org and review the information available about mediation and arbitration.

*****End Unit 6, Segment 4*****

Unit 7:
Other Real Estate Issues

Unit 7, Segment 1: Introduction

Learning Objectives

At the conclusion of this Unit, participants will be able to:

- Explain common land and title issues affecting residential real estate transactions
- Identify the risks associated with the listing of a home built by an owner builder
- Explain the Homestead Exemption
- Define *lis pendens*

*****End Unit 7, Segment 1*****

Unit 7, Segment 2: Boundary Disputes

Although real estate brokers and agents may not become directly involved in boundary disputes, boundary dispute issues may present during a title search.

Boundary by Acquiescence

Boundary by acquiescence was defined by the Arizona Court of Appeals in 2003. To establish the doctrine of boundary by acquiescence, the party asserting the claim must prove:

- Occupation or possession of property up to a clearly defined line.
- Mutual acquiescence by the adjoining landowners in that line as the dividing line between their properties
- Continued acquiescence for 10 years .A.R.S. §12-526 (A). See also *Mealey v. Arndt*, 206 Ariz. 218 76 P.3d 892 (App. 2003)

Arizona Real Estate Law: A Professional's Guide to Law and Practice

Encroachments

Encroachments occur when a building, fence, or driveway extends over a legal property boundary.

- Encroachments are usually identified by a physical inspection or a property survey.
- If a structure encroaches on a neighbor's property, the neighbor may be able to recover damages or demand the removal of the building.
- Encroachments that exceed the state's prescriptive easement/adverse possession rule (ten years) may result in adverse possession or easement by prescription.

Adverse Possession/Prescriptive Easements

Adverse possession is a form of involuntary alienation and "is the process by which the possession and use of

property can mature into title.” It is also known as title by prescription where someone who uses a property may eventually gain a higher interest in the property than the actual owner who does not use it.

Real Estate Principles

Each state has specific requirements to establish adverse possession, but there are usually basic requirements. Possession of the land must be:

1. Open and notorious *Obvious to anyone*
2. Continuous and uninterrupted for a specific period of time *For a period of time governed by state-specific regulations*
3. Hostile *Without owner’s permission*
4. Adverse *To true owner’s possession; true owner is excluded from possession*

Arizona Specifics

According to *Arizona Real Estate: A Professional’s Guide to Law and Practice*:

Adverse possession is based on the hostile possession of land and results in the acquisition of fee title to the land. *A.R.S. §12-521(A)(1)* defines adverse possession as “an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.”

To acquire title by adverse possession, a person must demonstrate that the person had exclusive possession over the property for a total of 10 years. *Overson V. Cowley, 136 Ariz. 60, 664P2d 210 (App. 1982) and Ammer v. Arizona*

Water Company, 169 Ariz.
205, 818 P2.d 190 (App
1991), A.R.S. §12-521 (A)
and 12-526 (A).

Risk Reduction Tip

Adverse possession may be a covered risk under an owner's title insurance policy.

Prescriptive Easement Scenarios

Phil and Erika's home is located in Arizona, which has a ten-year prescriptive period. For the past twelve years, Phil and Erika's neighbor, Emile, has driven across Phil and Erika's front yard to reach his garage from a better angle.

Adapted from Real Estate Principles

Does this constitute an adverse possession/prescriptive easement?

Why or why not?

Phil and Erika's other neighbor, Josh, has occasionally done the same thing over the past three years.

Does this constitute an adverse possession/prescriptive easement?

Why or why not?

Generally, speaking, a person claiming rights by adverse possession or prescriptive may be required to file a quiet title action to obtain title to the property at issue if there is a dispute.

Quiet Title Action

A quiet title action is a lawsuit to settle a dispute about who owns a parcel of property (for example in an adverse possession claim).

In a quiet title action, the court decides the question of property ownership.

According to *A.R.S. §12-1101(A)*, a quiet title action may be brought by anyone having or claiming an interest in a parcel of real property against any person who claims an adverse interest.

According to *A.R.S. §12-1103 (B)*, before filing a quiet title action, the party asserting the claim should send the adverse party a quit claim deed along with \$5 (or a larger sum to encourage the party to relinquish the claim) and request that the adverse party execute the quit claim deed. If the adverse party does not execute the quit claim deed, the party asserting the claim may recover the attorney's fees incurred in the quiet title action if the party prevails. The purpose of this requirement is to avoid needless litigation. *See also Mariposa Development Co. v. Stoddard, 147 Ariz. 561, 711 P.2d 1234 (App. 1985) where the appellants were awarded attorney's fees due to unnecessary litigation.*

Example:

John is selling his property and has found a potential buyer for it. During the title search process, a gap in the title is discovered where the public records can't identify who owned the property for several years.

John files a quiet title action in the county court where the defendants are all persons who have a potential interest in the property. The unidentified owner/owners are included as defendants.

John asks the court to declare his title valid, thereby "quieting title" to the property and enabling him to sell it as planned – as long as no one appears to contest John's title.

Assuming no one contests John's title, the buyer is now able to rely on the court's decision and continue with the sale.

Real Estate Principles

Risk Reduction Tip

A quiet title action may need to take place if there is a dispute concerning ownership of land. If title is not clear, it will jeopardize a successful settlement.

*****End Unit 7, Segment 2*****

Unit 7, Segment 3: Trees and Vegetation Across Boundaries

Sometimes the roots of plants and trees can cross the boundaries of property and cause damage.

In *Cannon v. Dunn*, 145 Ariz. 115, 700 P.2d 502 (App. 1985)

- Roots of a eucalyptus tree in the adjoining landowner's yard invaded the subsurface of the neighbor's land.
- Neighbor sued for trespass or the abatement of the nuisance—asked the court for an injunction and damages.
- Court denied the request because no actual damage was sustained.
- Court stated that a landowner who sustains injury may without notice, cut off the offending branches or roots at the property line.
- If some "actual and sensible or substantial damage is sustained-the injured property owner may maintain an action in trespass and an action for injunctive relief to abate the nuisance.

*****End Unit 7, Segment 3*****

Unit 7, Segment 4: Listing of a Home Built by an Owner Builder

Brokers and agents might want to consider the risk before taking a listing of a home built by an owner builder.

According to *A.R.S. §32-1151*, it is unlawful for any person to act in the capacity of a contract or without a contractor's license. However, under the owner-builder exception:

- Property owners who build or improve their own property or do the work themselves with employees or licensed contractors
 - Need not be licensed if the structure is intended for occupancy solely by the owner and not intended for sale or rent.

Proof of sale or rent or the offering of such within one year after completion is prima facie evidence that such project was undertaken for the purpose of sale or rent. *A.R.S. §32-1121 (A) (5)*

- This one-year "safe harbor" can be rebutted by a change in circumstance.
- The fact should be disclosed in writing to potential buyers.

Scenarios

Scenario 1

After retirement, a husband and wife built a new home in northern Arizona. The husband and wife were not licensed contractors. Four months after the home was completed, the husband died. The wife now wants to move back to Phoenix to be closer to her family.

Arizona REALTOR® Digest August 2004

Can the wife list and sell the home?

Scenario 2

Paul is the chief information officer for a firm whose hobby is carpentry. He has owned a lot near Flagstaff for a while and decides to build a house on it. Although he is not a licensed contractor, he does the construction himself. Immediately after Paul completes the construction, he contacts a real estate broker to list the newly constructed house.

Arizona REALTOR® Digest December 2006

Can the broker list the house for sale even if it was built by Paul, an unlicensed contractor?

Risk Reduction Tips

- A listing broker should advise an owner-builder wishing to list a property within that one-year timeframe to seek legal counsel regarding potential liability.
- The buyer's broker should advise a buyer in writing to have the property thoroughly inspected by a licensed contractor or other knowledgeable professional.
- Do not list the home unless the seller discloses his or her status as an unlicensed contractor to potential buyers.

Any questions?

*****End Unit 7, Segment 4*****

Unit 7, Segment 5: Homestead Exemption

Short sales and sales of property in foreclosure present risks for real estate agents and brokers, as well as their clients.

Sellers of such properties may ask questions about the Homestead Exemption and how it affects the proceeds of the sale.

Real estate practitioners should have an understanding of the exemption but should not put themselves at risk by providing information the client may rely on when making a decision. A referral to a qualified professional helps reduce that risk.

The Homestead Exemption is created by A.R.S. §33-1101 *et. seq.*

- Exempts a single family home, condominium, co-op, or mobile home in which the person resides from attachment, execution, and forced sale due to a non-consensual judgment or lien, up to \$150,000 in value or equity.

- Consensual liens (liens the homeowner allows to be recorded against the home) are NOT affected by the homestead exemption.
Consensual liens include:
 - Mortgage
 - Deed of trust

- A mortgage or deed of trust encumbering the homestead may be foreclosed for nonpayment and the homestead exemption will not protect the homeowner.

- Homestead exemption only prevents certain creditors from taking the first \$150,000 of equity in a person's home to satisfy a debt.

- A person can voluntarily waive the protection by signing a declaration of waiver and recording the waiver in the county in which the home is located. A.R.S. §33-1104 (B)

Scenario

Gary, the seller, has judgment liens recorded against his home. The Homestead Exemption has protected him from the judgment liens, and he will not close the transaction if the judgment liens will have to be paid from his proceeds of the sale.

From Arizona Digest, June 2003, Vol. 25, No. 6

Does the homestead exemption protect the Gary's proceeds of sale?

Risk Reduction Tip

If a seller asks questions about how the Homestead Exemption will potentially affect the proceeds of the sale of his or her home, direct them to an appropriate professional such as a lawyer or accountant.

Any questions?

*****End Unit 7, Segment 5*****

Unit 7, Segment 6: LisPendens

As one of the tips in an earlier unit, it was noted that real estate agents and brokers, working with buyers in particular, should educate their clients. One specific area to consider is how the title process works and what might turn up or go wrong.

One thing that might turn up is a lis pendens.

Lis pendens: A suit is pending and is a document that is recorded against real property to give notice that title of the property is the subject of a lawsuit

For example, a lender records a lis pendens on a property in foreclosure. This action notifies others that a legal action affecting the property is pending.

Brokers and agents need to be aware that a *lis pendens* is NOT authorized in a commission dispute. See A.R.S. §12-1191 (A) and *Tucson Estates, Inc. v. Superior Ct.*, 151 Ariz. 600, 729 P.2d 954 (App. 1986)

If a *lis pendens* is filed in a lawsuit that does not affect title, then it is groundless.

One example is Richey v. Western Pacific Dev. Corp. 140 Ariz. 597, 684 P.2d 169 (App. 1984).

In this case,

- *A broker sued to collect \$8,000 real estate commission and recorded a lis pendens on the property that had been sold.*
- *Defendant counterclaimed for damages pursuant to A.R.S. §33-420*
- *The defendant was awarded \$1,000 statutory damages plus attorneys' fees because this was a commission dispute.*

Scenarios

Scenario 1

David, the buyer, has cancelled the transaction and is demanding the return of the \$10,000 earnest money. David is also stating that if the \$10,000 earnest money

is not returned to him, he will record a *lis pendens* to prevent a sale of the property by Jessica, the seller, to another buyer.

Arizona REALTOR® Digest December 2005

Can David record a *lis pendens*?

Why or why not?

Scenario 2

Alexis and Mike are selling their house, and it is scheduled to close on August 31. Although Angela, the buyer, qualified for the loan, the lender was not able to fund the loan on August 31. Alexis and Mike delivered a notice of cancellation to the title company the next day, and the title company released Angela's earnest money to Alexis and Mike. Angela is extremely upset because of the loss of the earnest money, and is threatening to file a lawsuit against Alexis and Mike. In addition, Angela is threatening to record a notice of *lis pendens* to prevent Alexis and Mike from selling the home to another buyer.

Arizona REALTOR® Digest February 2005

Can Angela record a notice of *lis pendens* if she files a lawsuit for the return of the earnest money?

Why or why not?

Any questions?

*****End Unit 7, Segment 6*****

References and Additional Resources

“Arizona Case Law.”

Loislaw.<<http://loislaw.com/advsrny/doclink.htm?alias=AZCASE&cite=1+Ariz.+App.+244>>

Arizona Real Estate Law Book. Charlottesville: Matthew Bender & Company, 2008. Print.

Brouthers, Dianna Wilson, and Roger Turcotte. *Buyer Representation in Real Estate*. Chicago: Dearborn Real Estate Education, 2006. Print.

“Frequently Asked Questions-Investigations Division. *AZ.gov Arizona’s Official Website*. Arizona Department of Real Estate. Web. (10/09).<<http://www.re.state.az.us/Inv/InvFags.aspx>>

Galaty, Fillmore W., Wellington J. Allaway, and Robert C. Kyle. *Modern Real Estate Practice*. La Crosse, WI: DF Institute, 2010. Print.

“Investigation Process, The.” Arizona Department of Real Estate. Print. <<http://www.re.state.az.us>>

Lind, K. Michelle. *Arizona Real Estate: a Professional's Guide to Law and Practice*. Phoenix, Ariz.: Arizona Association of REALTORS®, 2006. Print.

“Liquidated Damages and Penalties.” *lexinter.net*.<http://www.lexinter.net/LOTWVers4/liquidated_damages_and_penalties.htm>

“Liquidated Damages.” *Wikipedia, the free encyclopedia*. 24 Nov. 2010. <http://en.wikipedia.org/wiki/Liquidated_damages> Ref. “Liquidated Damages” <<http://law.jrank.org/pages/8310/Liquidated-Damages.html>> retrieved 7 Apr. 2009 *American Law Encyclopedia*.

“Misrepresentation” *Wikipedia, the free encyclopedia*. 24 Nov. 2010. <<http://en.wikipedia.org/wiki/Misrepresentation>>

“Oldenburger v. Del E. Webb Dev. Co., 765 P. 2d 531-Ariz: Court of Appeals, Div. 1, Depart. A 1988.” *Google scholar*.<http://scholar.google.com/scholar_case?case=5036889241093696507&q+Oldenburger+...>

Real Estate Principles. Bellevue, WA: Rockwell Pub., 2006. Print.

“Specific Performance” *Wikipedia, the free encyclopedia*. 10 Nov. 2010.
<http://en.wikipedia.org/wiki/Specific_performance>

Steward, Jan. “Mediation 101: This Alternative to Arbitration Makes Room for Negotiation.” *Arizona REALTOR Magazine*, Arizona Association of REALTORS. Web. <<http://www.aaronline.com/AZR/2010/November/mediation-101.aspx>>

Appendix

Residential Resale Real Estate Purchase Contract

Buyer-Broker Exclusive Employment Agreement

ADRE Buyer Advisory

ADRE “The Investigation Process”

AAR Dispute Resolution System (DRS) Mediation/Arbitration

Buyer-Seller Information Packet and Forms

Arizona's Top Ten Real Estate Claims in 2014

An informal survey of 20 of the largest Brokers in Arizona, Legal Hotline attorneys and E&O carriers indicates that the top ten real estate related claims in Arizona are:

- (1) **Roof leaks**
- (2) **Landlord/tenant claims involving property manager**
 - (a) **security deposits disputes**
 - (b) **allegations that the property manager failed to adequately protect the landlord's interests**
- (3) **Septic/sewer issues**
 - (a) **failure to properly identify whether the property is serviced by sewer or septic**
 - (b) **septic tank defects discovered after close of escrow**
- (4) **Undisclosed HOA fees and transfer requirements**
- (5) **Boundary disputes**
- (6) **Plumbing Leaks**
- (7) **Mold**
- (8) **Soils/Settlement**
- (9) **HVAC not functioning properly**
- (10) **Zoning issues**

