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QUARTERLY

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REVISED BUYER CONTINGENCY ADDENDUM

BUYER ADVISORY – UPDATED OCTOBER 2018

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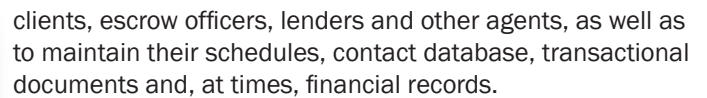
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BY SCOTT DRUCKER, ARIZONA REALTORS® GENERAL COUNSEL



Since just about anyone that uses technology faces cyber risk, real estate brokerages are not immune from privacy breaches and cyber attacks.

To protect their interests in the event of cybercrime, more and more brokerages are exploring cyber insurance policies that are designed to help a business mitigate its risk of loss in the event of an attack, data breach, or network security failure. Like any business insurance, cyber insurance coverage varies greatly by insurer and policy. As a result, the task of securing cyber insurance can prove daunting.

Arizona REALTORS® has therefore drafted [A Brokerage's Guide to Cyber Insurance](#) to assist brokerages navigate the process of securing cyber insurance by providing insight into why cyber insurance may prove necessary, the different types of policies that exist and what they may and may not cover, as well as to help with the application process.

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.

To conduct business in the digital age, real estate practitioners rely on computers, mobile devices, transaction management systems and web apps to communicate with

Revised Buyer Contingency Addendum

BY SCOTT DRUCKER, ARIZONA REALTORS® GENERAL COUNSEL

On October 1, 2018, the Arizona REALTORS® state association released for use by all members a revised [Buyer Contingency Addendum](#).¹ Thanks to a dedicated workgroup² chaired by Martha Appel, the form has been simplified and it is anticipated that REALTORS® will now find it easier to guide their clients through these complex transactions.

As was previously the case, via the Buyer Contingency Addendum, the underlying purchase contract will be contingent upon one of the following two scenarios:

1. Buyer accepting an offer to purchase his or her real property; or
2. Closing of the buyer's property that is already under contract.

However, the timelines for action by both parties have, in many instances, been shortened and the date of Contract acceptance for all applicable Contract time periods has been clarified.

These are just a few of the changes made to the Addendum and REALTORS® are encouraged to closely review the below list of Frequently Asked Questions (FAQs), which contain answers and pertinent analysis.

BUYER CONTINGENCY FAQs

Q1. Is it just me or is the Buyer Contingency Addendum a complicated form?

A1. It's not just you. Although only two pages in length, the Buyer Contingency Addendum addresses a complicated contingency and is therefore complex in nature and must be carefully reviewed whenever it is used.

Q2. Under what circumstances would Buyer mark the box on line 7 of the Buyer Contingency Addendum?

A2. If the parties select the option identified on line 7 of the Buyer Contingency Addendum, the underlying Purchase Contract shall be contingent upon Buyer accepting an offer to purchase his or her real property and delivery of the Accepted Offer Documents to Seller within three days or ____ days of receipt, or by an agreed upon date to be identified on line 10, whichever occurs first.

Q3. Under what circumstances would Buyer mark the box on line 49 of the Buyer Contingency Addendum?

A3. If the parties select the option identified on line 49 of the Buyer Contingency Addendum, the underlying Purchase Contract shall be contingent upon the closing of Buyer's property by an agreed upon date to be identified on line

53. In order to select this option, Buyer must already be in possession of an Accepted Offer.

Q4. Would there ever be an instance in which the box on line 7 of the Buyer Contingency Addendum is marked, as well as the box on line 49?

A4. No. Each box evidences a mutually exclusive contingency. The box on line 7 of the Buyer Contingency Addendum should be marked in the event that Buyer has not yet accepted an offer to purchase Buyer's property. Alternatively, the box on line 49 of the Buyer Contingency Addendum should be marked in the event that Buyer has already accepted an offer to purchase Buyer's property.

Q5. In the event that Buyer accepts an offer to purchase Buyer's real property ("Accepted Offer"), lines 12-14 and line 52 of the Buyer Contingency Addendum require Buyer to deliver to Seller the Accepted Offer Documents described on lines 68-72. In doing so, can Buyer redact portions of the Accepted Offer Documents?

A5. Yes. There may be information contained in the Accepted Offer Documents that is not material to Seller and which may be deemed confidential. Any such information can be redacted by Buyer prior to conveying the Accepted Offer Documents to Seller.

Q6. Lines 18-19 of the Buyer Contingency Addendum allow Seller the opportunity to review the Accepted Offer Documents once provided by Buyer and cancel the Purchase Contract if the Accepted Offer Documents do not meet with Seller's approval. Why?

A6. Although Buyer has accepted an offer on Buyer's Property and conveyed the Accepted Offer Documents to Seller, it does not mean that the Accepted Offer Documents will meet with Seller's approval. For example, the Accepted Offer Documents may show that the offer to purchase Buyer's Property is contingent on the sale of a parcel of raw land that has already been on the market for over one year and appears to be overpriced. If based on these facts, Seller deems Buyer's Accepted Offer weak and unlikely to successfully close escrow, Seller is granted the opportunity to cancel the Purchase Contract at which point the Earnest Money shall be released to Buyer.

NOTE: When Seller is evaluating Buyer's Accepted Offer and deciding whether to proceed or cancel the Purchase Contract, Seller should keep in mind that a duty of good faith and fair dealing is implied in every contract.

Q7. If Seller elects to cancel the Purchase Contract within three days after receipt of the Accepted Offer Documents, how does Seller effectuate this cancellation?

A7. To cancel the Purchase Contract, Seller should deliver Notice to Buyer as that term is defined on lines 424-427 of the Purchase Contract. If Seller does not cancel the Purchase Contract within three days after receipt of the Accepted Offer Documents, the Purchase Contract will remain in full force and effect and become contingent upon the closing of Buyer's Property by the date set forth on line 21 of the Buyer Contingency Addendum.

Q8. The box on line 7 of the Buyer Contingency Addendum is marked. What happens if Buyer accepts an offer to purchase Buyer's Property, but Buyer's Accepted Offer cancels?

A8. Even if Seller approves of the Accepted Offer Documents, it is possible that the sale of Buyer's Property will fail. Should that occur, Buyer must provide notice to Seller of Buyer's receipt of cancellation within three days, along with evidence of that cancellation. Buyer's notice to Seller shall also state Buyer's election to either: (1) immediately cancel the Purchase Contract and recover the earnest money deposit; or (2) proceed with the Purchase Contract by removing the buyer contingency.

Q9. The box on line 7 of the Buyer Contingency Addendum is marked. Before Buyer has accepted an offer to purchase Buyer's Property, Seller accepts a Back-Up Contract. What happens now?

A9. Under the first contingency option, Seller has the right to accept another offer in back-up position before Buyer has delivered to Seller the Accepted Offer Documents. Should that occur, Seller may deliver notice to Buyer informing Buyer of the back-up contract. Upon receipt of Seller's notice, Buyer shall have three days or _____ days to deliver to Seller a written notice removing the buyer contingency. If Buyer decides not to waive the buyer contingency, the Purchase Contract shall be deemed cancelled with the earnest money deposit released to Buyer.

Q10. When completing the Buyer Contingency Addendum, Buyer is asked to identify on line 21 the date by which close of escrow on the sale of Buyer's Property must occur. However, at the time Buyer completes the Buyer Contingency Addendum, they have not yet received an offer to purchase their home. How then does Buyer select a date to put on line 21?

A10. When Buyer submits a Purchase Contract to Seller, line 24 of the Purchase Contract requires a date for close of escrow. Buyer should therefore put a date on line 21 of the Buyer Contingency Addendum that will provide Buyer with ample time to close escrow on the date set forth on line 24 of the Purchase Contract.

Q11. Pursuant to lines 22-23 of the Buyer Contingency Addendum, if the pending sale of Buyer's Property does not close escrow by the date set forth on line 21, the Purchase Contract shall be deemed cancelled. Why is a cure period notice not required before the Purchase Contract terminates?

A11. The Cure Period Notice applies to a potential breach of contract, not to an unfulfilled contingency. For example, the appraisal contingency and financing contingency contained in the Purchase Contract are not subject to a Cure Period Notice. In this case, if the pending sale of Buyer's Property does not close escrow by the date set forth on line 21, an unfulfilled contingency exists which terminates the Purchase Contract without the need for a Cure Period Notice.

NOTE: If the parties wish to extend the date set forth on line 21 of the Buyer Contingency Addendum they should do so by way of an Addendum to the Purchase Contract.

Q12. Under the first contingency option, lines 42-47 of the Buyer Contingency Addendum now allow the parties to specify when the Purchase Contract time periods will commence. Why was this added?

A12. When using the first contingency option in the February 2014 version of the Buyer Contingency Addendum, parties

would on occasion have a difference of opinion as to whether the Purchase Contract timelines would begin upon execution of the Purchase Contract or upon Seller's approval of Buyer's Accepted Offer Documents. Lines 44-47 of the Buyer Contingency Addendum will remove any ambiguity in this regard and allow the parties to mutually agree upon the date of Purchase Contract acceptance for purposes of all applicable Purchase Contract time periods, excluding opening of escrow and deposit of Earnest Money.

Q13. Buyer and Seller sign a Buyer Contingency Addendum to evidence that Buyer's purchase is contingent upon the closing of Buyer's Property, for which Buyer has already accepted an offer. The box on line 49 is therefore marked. In this case, should Buyer and Seller initial line 48 of the Buyer Contingency Addendum?

A13. No. Buyer and Seller should initial line 48 of the Buyer Contingency Addendum only if the box on line 7 of the Buyer Contingency Addendum is marked. Similarly, Buyer and Seller should initial line 66 of the Buyer Contingency Addendum only if the box on line 49 of the Buyer Contingency Addendum is marked.

Q14. The box on line 49 of the Buyer Contingency Addendum is marked. What happens if Buyer's Accepted Offer cancels?

A14. Should Buyer's Accepted Offer cancel, Buyer must provide notice to Seller of Buyer's receipt of cancellation within three days, along with evidence of that cancellation. Buyer's notice to Seller shall additionally state Buyer's election to either: (1) immediately cancel the Purchase Contract and recover the earnest money deposit; or (2) proceed with the Purchase Contract by removing the buyer contingency.

Q15. The parties have marked the box on line 49 of the Buyer Contingency Addendum. Although the sale of Buyer's Property is moving along nicely, it appears that close of escrow may be slightly delayed to allow a repair item to be

completed. Can the parties extend the date set forth on line 53 of the Buyer Contingency Addendum?

A15. Yes. If the pending sale of Buyer's Property does not close escrow by the date set forth on line 53 of the Buyer Contingency Addendum, the Purchase Contract shall be deemed cancelled. However, the parties can mutually agree to extend this date by way of an Addendum to the Purchase Contract.

Q16. Buyer has accepted an offer to purchase Buyer's property and the underlying Purchase Contract is contingent upon the successful close of escrow of that transaction. How can Seller stay apprised of the status of the sale of Buyer's property?

A16. Pursuant to line 60 of the Buyer Contingency Addendum, upon Seller's request, Buyer is obligated to provide Seller with a written update regarding the status of the sale of Buyer's Property. Should Buyer fail to provide such an update, Seller may issue a Cure Period Notice as set forth on lines 73-75 of the Buyer Contingency Addendum.

¹See redline edits [here](#).

²Martha Appel would like to thank the following individuals that served on the Workgroup: Beth Adams, K.C. Cyga, Deb Fisher, Torey Gannon, Clark Jones, Marge Lindsay, Laurie McDonnell, John Mijac, Lisa Paffrath, as well as Arizona REALTORS® staff members Jamilla Brandt, Scott Drucker, Nikki Salgat and Jan Steward.

About the Author

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.

Buyer Advisory – Updated October 2018



Revisions as of October 2018 (English Edition and Spanish Edition available [CLICK HERE](#)):

Pg. 7, Topic #7 – Water/Well Issues

The verbiage in this section was replaced to inform the public that not all properties are served by municipal water systems. Additionally, the language was revised to encourage the

public to investigate the availability and quality of the water to the property, as well as the water provider. A link to the Arizona Corporation Commission's website was included for a list of Arizona's water companies.

To receive email notices when the Buyer Advisory is updated, log into [aaronline.com](#) and select "My Account," at the top right of the home page, then under Manage Website Subscriptions – Special Topics, select Buyer Advisory and Frequency (daily or weekly).

Content and website addresses (links) within the Buyer Advisory were up-to-date at the time of posting but may change periodically without notice. If you find a link that is broken, please email Jan Steward (jansteward@aaronline.com) with the details.

Cybersecurity for Agents, Buyers and Sellers

On October 17, Arizona REALTORS® 2018 President Lori Doerfler hosted the Facebook Live event “Cybersecurity for Agents, Buyers and Sellers” with guests John “Titleman” Lotardo, director of operations for Commonwealth Land Title Insurance Company and FBI Special Agent Paul Schaaf. Below are some highlights.

Part I: Cyber Attacks & Insurance

Lori: According to a 2017 auditor’s report, 50 percent of real estate businesses said they were not adequately prepared to prevent a cyber attack. In 2018, 68 percent of CEOs feel a cyberattack is only a matter of time. **What sort of cyberattacks effect the real estate industry?**

John: They’re targeting folks who are touching or handling money—whether it’s coming to a title company, from a bank, or from a consumer.

A buyer is supposed to deposit money for their home. They get wiring instructions from the title company and it says, *here is all the wiring information*. Closer to closing, they get the information (that) the wiring instructions have changed. Then the buyer fails to verify and they just go by this email or that communication. Lo and behold! It’s a fictitious email from the bad guys... and so (the buyer wires) it to the wrong place and the title company never sees it and the money is gone.

We always talk about verifying the wires or inquire before you wire. That’s a kind of a tagline we use, “inquire before you wire”. Call, talk to the title company, talk to a verified source that these are the real instructions.

Lori: If they’ve already wired the funds, what happens?

Paul: If it’s actually going to a foreign bank, we can usually stop it within 48 hours, but that’s from the time it was sent out. If it’s going to a domestic bank, we have to contact the bank and it’s really the person who sent the wire who needs to try to reverse that transaction at their bank. Time is not on their side.

We see a lot of these transactions occur during the holidays — when people have their guard down. We see the criminals start going after wire transfers of businesses, maybe their cyber security people are out on break. Thanksgiving is a big one because most banks around the world are *not* closed on Thanksgiving.

People go, “Oh, maybe I did do something wrong on

Wednesday, I’ll deal with it Monday.” It’s already gone. Like I said, we try to stop it...Kill Chain ([Financial Fraud Kill Chain](#) or FFKC) with FINCen ([Financial Crimes Enforcement Network](#))... to get that money back. We’re about 75 percent successful within the first 48 hours, if it’s from a domestic bank to a foreign bank.

The FFKC can only be implemented if the fraudulent wire transfer meets the following criteria:

- the wire transfer is \$50,000 or above;
- the wire transfer is international;
- a [SWIFT](#) recall notice has been initiated; and
- the wire transfer has occurred within the last 72 hours.

Lori: What about cyber insurance?

Paul: I would encourage cyber insurance, but it’s like anything—check it out, shop around. Breaches of companies can be expensive and it’s better to protect against them. The average record costs you about 141 dollars. So, if you have ten thousand clients, multiply that by 141 and that’s what you’re actually protecting. If all those records go out the door, that could be what you’re liable for (\$1.4M). Arizona REALTOR® members may access the state association’s cyber insurance guide [here](#).

Part II: Detection & Prevention

Lori: How can you tell whether a sender’s email account was “spoofed”?

Paul: That can be very difficult. The bad guys will pick a domain that is similar. So, if you have anything in your name like “Mortgage Insurance” and there’s an “M” in the domain, (bad guys) might put an “R” and an “N” [mortgage company]. You are not going to see that because your eyes want to see the M.

You can actually use a domain that somebody has to send an email with a “reply to” that’s basically the bad guy, but it’s hidden by the headers. What is the email asking, is it out of the norm?

John: Emails can easily be spoofed. So when you see an email that has new wire instructions on it, don’t call that phone number — because that number is probably spoofed too.

Lori: Hover your mouse over the sent email address...

Paul: It might show you what their true address is (or) copy it, put it into your email and see if that’s the address it’s



supposed to be going to. Sometimes copy-and-paste can break that chain.

A lot of people use free email accounts. It's not even monitored by someone in a brokerage, it's just a Gmail account. How good is your security, are you using ([2-step verification](#)) on it? Are you changing your password?

Lori: How often should one change their password?

Paul: Change your password like you change your toothbrush. The dentist says every month. Some companies set the policy every 90 days, but you should change it. I've seen viruses get on computers and they corrected the problem, but nobody ever changed the passwords. I've seen malicious code steal a password and that computer still has that same password on it.

Lori: What about biometric verification?

Paul: Biometric verification is basically a [body measurement], but realize that it's putting it on your computer in a hash value and its codes. If the codes are on the computer (and your computer is compromised, I can get that biometric and I can simulate it. Realize that when you're doing a biometric, it's storing some record of that fingerprint on the computer — that's the value of the hacker would want to try to use. If you are adding more things...like a retina scan, dual or multi-factor authentication using another password...I think

that's a lot safer than just the basic lock on a house. You want a deadbolt, an alarm, all the things that you would add that makes it a lot harder. And the bad guys would have to move on to somebody else.

Lori: Are cloud applications safer than local servers?

Paul: All a cloud environment is, is basically somebody else's data center. Sometimes they provide more security than on a local server. It's all a matter of the standards that are out there for the cloud provider. Some companies, they move to the cloud and are actually getting more protection than on their own server and at a cheaper price.

Lori: What else should we know to help safeguard our consumers and REALTORS®?

Paul: Good computer or IT "hygiene". REALTORS® wash their cars and they need to treat their computer the same way. Take it to a professional periodically...once a year...make sure it's updated, has virus scanning on it.

Lori: Arizona REALTORS® has a member benefit that allows them to contact a [Tech Helpline](#) for anything that they need to do like that. Thank you John, Paul. I really appreciate your time.

Portions of this transcript may have been edited for clarity.



For “As-Is” Transactions, Leave the Purchase Contract “As-Is”

BY SCOTT DRUCKER, ARIZONA REALTORS® GENERAL COUNSEL

For some reason, it is becoming increasingly common for sellers to expressly state in Section 8a of the Residential Resale Real Estate Purchase Contract (Residential Purchase Contract) that the Premises will be conveyed in “as-is” condition.

In February 2017, the Residential Purchase Contract revised Section 5a to express that the Premises are being sold in its “present physical condition as of the date of contract acceptance.” In other words, what you see is what you get. This change eliminated the need for the Arizona REALTORS® As-Is Addendum as well as the need for parties to specify in Section 8a that the Premises will be conveyed “as-is.” While parties may include additional terms in Section 8a, writing in that the Premises will be sold “as-is” accomplishes nothing.

It should also be remembered that regardless of whether Section 8a of the Residential Purchase Contract specifies that the Premises will be sold in “as-is” condition, buyers may still request repairs. As stated in Section 5a, buyers and sellers “may, but are not obligated to, engage in negotiations for repairs/improvements to the Premises.” The Arizona REALTORS® Buyer’s Inspection Notice and Seller’s Response form remains available for this purpose.

Additionally, “as-is” in no way excuses a seller’s disclosure obligations. Even in an “as-is” transaction, sellers must still disclose known facts materially affecting the value of the property that are not readily observable and are not known to the buyer. *Hill v. Jones*, 151 Ariz. 81, 725 P.2d 1115 (App. 1986).

While drafting contracts, it is best to avoid redundant and thus superfluous terms. When parties attempt to restate the same proposition in a number of different ways, it becomes increasingly likely that the provisions will actually contradict one another. For this reason, the best course of action when conveying a property “as-is,” is to leave the Residential Purchase Contract “as-is.”

About the Author

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.



Don't Add Confusion to an Addendum

BY NIKKI SALGAT, ESQ.

The purpose of an addendum is to include additional terms and conditions to a contract. More specifically, an addendum may accomplish the following: (1) provide further explanation to the terms in the contract; (2) modify existing terms in the contract; or (3) present new considerations to the contract.

While an addendum should only affect those items addressed in the addendum, an ambiguous addendum may lead to a variety of problems such as creating loopholes or unintended consequences. Additionally, a poorly drafted addendum may fail to take into consideration other issues surrounding the new or modified terms. These problems may lead to potential liability for the drafter. Accordingly, real estate agents should strive to clearly and concisely draft addendums.

Drafting an Addendum

If an addendum is properly drafted, the parties' rights and obligations are clear to anyone that reads the addendum. Put differently, the addendum does not create questions as to what the parties intend to occur. As a result, this enables agents to manage their clients' expectations and the transaction to progress smoothly.

When drafting an addendum make sure to do the following:

- Refer the addendum back to the original contract and specify the effective date of the addendum;
- Confirm the new verbiage does not already exist in the contract as adding verbiage will supersede the pre-printed portion of the contract;
- Be as specific as possible by referencing parts of the contract that are changing, what the changes are and when the changes are to occur (if necessary); and
- Make sure all parties sign the addendum.

Good practices for drafting addendums are:

- Have a third-party read the addendum to see if they understand what the parties are agreeing to;
- Look for loopholes—read the addendum as if you are on the other side and trying to get out of the contract;
- If there are multiple addenda, re-draft the addenda into one addendum; and
- Consider consulting an attorney.

Arizona REALTORS® Offers Pre-Printed Addendums

Don't reinvent the wheel! Arizona REALTORS® offers addendums that address many different incidents in a transaction. One addendum that addresses many common transactional occurrences is the Additional Clause Addendum (ACA). More specifically, the ACA considers the following: (1) back-up contracts; (2) signature of absent buyer; (3) relocation; (4) cash sale; (5) non-refundable earnest money; (6) appraisal waiver; (7) surveyed property; (8) tax-deferred exchange; and (9) water rights. Because these are common occurrences, a real estate agent does not need to draft an addendum. Rather, the agent can use the pre-printed form

which thereby lessens the agent's chances of drafting an ambiguous addendum.

Alternatively, if the real estate agent does not want to use the ACA in its entirety, the agent can utilize that portion of the ACA that is specific to their transaction by lifting the verbiage from the ACA and drafting it into a separate addendum. Not only can this same technique be used with the ACA, but it can also be used with verbiage from other pre-printed Arizona REALTORS® addendums. However, the agent should be cautious to make sure the agent is utilizing the verbiage correctly and may want to have their broker review the verbiage before the addendum is signed by the parties.

All Interested Parties Should Receive a Copy

Addendums are invaluable if properly drafted/used and submitted to the appropriate parties. In determining who the appropriate parties are, you should consider who the interested parties are by who the addendum directly affects. For the most part, the interested parties tend to be the buyer, seller and their agents, the Title Company, escrow, the lender (if any) and appraiser. Because these parties are usually directly involved in the transaction, they should receive a copy of any addenda incorporated into the contract.

About the Author

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

Can You Change That Contract?

BY LESLEY WALKER, DEPUTY GENERAL COUNSEL WITH THE NATIONAL ASSOCIATION OF REALTORS®

It's easier than you'd expect to get tangled in the unauthorized practice of law.

In a 2017 Wyoming case, a real estate agent was found to have engaged in the unauthorized practice of law for merely removing inapplicable provisions of a state association's form. As evidenced in this case, and depending on state law, even minor modifications to a form agreement may constitute the unauthorized practice of law.

What exactly constitutes the unauthorized practice of law varies from state to state. Some states even have specific statutes governing what actions real estate agents may undertake during transactions. It's crucial for real estate professionals to be familiar with their state's laws, and applicable rules and regulations, in order to avoid crossing the line.

And beyond state law, Article 13 of the REALTORS® Code of Ethics prohibits the unauthorized practice of law and specifically requires NAR members to recommend using legal counsel when the interests of any party to the transaction require it. REALTORS® should be aware of this ethical obligation when navigating their way through this issue.

Protect yourself by incorporating a few key practices into your business. These practices will help you avoid inadvertently participating in the un-authorized practice of law and ending up with either an ethics violation or a lawsuit.

Don't Draft, Edit, or Interpret

First, never create your own legal agreements for clients. Instead, use the form agreements provided by state and local REALTOR® associations. These forms are often provided as a member benefit, such as through NAR's partnership with [zipLogix](#).

Second, even when using a form agreement, be sure to avoid editing the agreement in a substantive way. Limit your editing to filling in nonlegal, factual provisions of the agreement, such as names, dates, locations, and party descriptions.

Should a transaction require edits beyond just filling in factual information, refer clients to a real estate attorney. This is not only your ethical obligation as a REALTOR® but taking any substantive edits upon yourself could constitute the unauthorized practice of law. If changes are required, you may be able to tap into resources available through your broker. It's possible a broker may already have had frequently requested clauses or provisions drafted by legal counsel, which may be useful in certain cases.

Third, don't charge a fee for preparing any of the legal agreements or forms. Numerous states have found that preparing legal documents constitutes the unauthorized practice of law.

And finally, don't try to interpret legal contract language. The policy reasons behind the unauthorized practice of law are clear. Prior to providing legal advice, individuals must meet a number of requirements, including graduating from law school, passing the state bar exam, and obtaining a license to practice law. These requirements ensure that only people with sufficient knowledge and skills may represent the public in legal matters.

Protecting You—and Your Clients

As transactions become more complex, it's not uncommon for clients to ask real estate practitioners to interpret a contract. Resist the temptation. The best answer, and the ethical obligation under the Code of Ethics, is to direct clients to an attorney. There's a lot at stake: The unauthorized practice of law can result in fines, suspension, and even revocation of your license. Help your clients by recommending they consult an attorney in appropriate circumstances.

By following these tips, you're not only helping protect yourself against potential legal and ethical trouble but also best serving your clients by encouraging them to get the assistance of a legal expert for the advice they need to complete a successful transaction.



Real estate brokers and salespersons in Arizona are unique when compared to the rest of the nation. In Arizona, by constitutional amendment, real estate brokers and salespersons are authorized to engage in the limited practice of law by drafting the purchase contract and other documents incident to the transfer of real property.

Have you ever wondered why and how real estate brokers and salespersons in Arizona were granted this constitutional right? And how does this constitutional right affect your legal obligations? [CLICK HERE](#)

THERE'S NO BETTER WAY TO SET YOURSELF APART.



Join the Arizona REALTORS® Master of Real Estate Society (MRES) and have your passion for education and dedication to your business recognized. The MRES provides you with a marketing tool to show your clients you are a serious player in the real estate industry and have gone beyond the Arizona Department of Real Estate's mandatory continuing education requirements.

For more information visit <https://www.aaronline.com/increase-knowledge/masters-of-real-estate-society-mre/>

The application period for the 2019–2020 term is January 1, 2019 – March 1, 2019.



FREE SPEAKER BENEFITS!

Having a speaker at your office or association meetings is a great way to grow your audience. Hearing a different voice and seeing a different face often generates enthusiasm and spontaneity at a meeting.

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Nikki Salgat, Esq., Associate Counsel (nikkisalगत@aaronline.com)

Jan Steward, Risk Management Manager (jansteward@aaronline.com)

Carole Ridley, Professional Standards Administrator (caroleridley@aaronline.com)

Nick Catanesi, VP, Business Services & Technology (nickcatanesi@aaronline.com)

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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.

There Is No Standard Arizona REALTORS® Cancellation Form

FACTS: A buyer and seller entered into a Residential Purchase Contract. Based on seller's potential breach of contract, buyer issued a three-day Cure Period Notice. Seller is unable to cure prior to expiration of the three-day period and buyer now wishes to cancel.

ISSUE: What form should be used to cancel the contract?

ANSWER: See below.

DISCUSSION: Section 8l of the Residential Purchase Contract states in part that "A party who wishes to exercise the right of cancellation as allowed herein may cancel this Contract by delivering notice stating the reason for cancellation." The term "notice" is defined in Section 8m of the Residential Purchase Contract. There is no standard Arizona REALTORS® cancellation form, nor is there a standard Arizona REALTORS® notice form.

Buyer's agent, in compliance with Section 8m, should therefore draft a cancellation notice on a blank word document. Although not required by Section 8m, the best practice is to have the buyer sign the cancellation notice.

NOTE: When cancelling via the Buyer's Inspection Notice and Seller's Response form (BINSR), this notice requires a buyer's signature.

Handwritten Language Trumps Boilerplate Language

FACTS: Buyer and Seller executed a Residential Resale Real Estate Purchase Contract (Contract). In the Additional Terms and Conditions section of the Contract, the parties agreed to terms different than the boilerplate language contained in Section 2 of the Contract.

After execution of the Contract, Seller indicates that he will not comply with the provisions hand-written into the Additional Terms and Conditions section of the Contract. The basis for Seller's position is that the contract contains conflicting terms. Specifically, the provisions contained in the Additional Terms

and Conditions section of the Contract are different than the provisions contained in Section 2 of the Contract.

ISSUE: Is the seller required to perform as set forth in the Additional Terms and Conditions section of the Contract?

ANSWER: Yes.

DISCUSSION: The Arizona REALTORS® provides forms with what is known as "boilerplate" language. This means that the documents are pre-printed forms with standard language.

Under contract law, handwritten terms usually prevail over boilerplate language. As such, Seller is obligated to comply with the provisions hand-written into the Additional Terms and Conditions section of the Contract.

Dual Agency Is Prohibited If Ownership Interest Exists

FACTS: A licensee lists her house for sale. She decides to hold an open house to try and procure a buyer for the property.

ISSUE: Can a licensee hold an open house to procure a buyer for her own personal property?

ANSWER: See Discussion.

DISCUSSION: First, there is nothing that would preclude the licensee from holding an open house if the licensee is clear that she does not represent any buyer that enters the open house. An agency discussion should be held as soon as possible to clarify agency.

Dual agency imposes restrictions on the conduct of a licensee, such as not favoring one party over another, nor disclosing confidential information. See *Haymes v. Rogers*, 70 Ariz. 408, 222 P.2d 789 (1950). Ordinarily, dual agency is not a problem. In fact, dual agency is authorized by Arizona law with the written consent of both parties. See A.A.C. R4-28-1101(F). However, in some circumstances, dual agency and representation is improper. The Arizona Court of Appeals states that, while dual agency is permitted by Arizona law, judicial skepticism of this arrangement exists. See *Marmis v. Solot Co.*, 117 Ariz. 499, 503, 573 P.2d 899, 903 (App. 1977). →

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www.aaronline.com/wp-content/uploads/2016/02/Legal-Hotline-Memorandum-2016-02-11.pdf

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Here, the licensee should be aware that the law of agency prohibits dual agency when a licensee has ownership interest, as it violates a licensee's fiduciary duty to the client. The agent's ownership presents an unwaivable conflict, and the licensee cannot agree to represent herself, and the buyer, equally. For these reasons, an agent should not represent a buyer as a dual agent when the licensee has an ownership interest in the property being conveyed.

SPDS Waiver Does Not Eliminate Disclosure Obligations

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

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

ANSWER: Yes.

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

Multiple Counter-Offer Does Not Cancel Negotiations

FACTS: A Seller receives an offer from Buyers A, B, and C. Seller sends a Multiple Counter-Offer (Counter-Offer #1) to Buyers A, B, and C.

All buyers send a Counter-offer (Counter-Offer #2) to the Seller. The Seller sends a Counter-offer (Counter-Offer #3) to Buyers A, B, and C.

All buyers accept the Seller's final Counter-Offer #3.

The Seller now wishes to proceed with Buyer B, but does not want to sign line 43 of the Multiple Counter-Offer because the language on lines 40-42 reads in part: "Seller revokes all other counter offers by separate notice and agrees to sell the Premises to the Buyer subject to the terms and conditions contained herein." The Seller believes Counter-Offer #3 will be revoked if she signs line 43, and delivers the Multiple Counter-Offer to Buyer B.

ISSUE: Should the Seller sign line 43 of the Multiple Counter-Offer?

ANSWER: Yes.

DISCUSSION: The Seller must remember lines 7-11 of the Multiple Counter-Offer state: "Acceptance of this Multiple Counter Offer by Buyer shall not be binding unless and until it is subsequently finally accepted by Seller and the final acceptance is delivered per Section 8m of the Contract to the Buyer's Broker within the time specified ("Final Acceptance"). Until Final Acceptance, the parties understand that the Premises can be sold to someone else and/or either party may withdraw any offer/counter offer to buy or sell the Premises."

Lines 40-42 of the Multiple Counter-Offer refer to the negotiations between Seller and Buyers A and C. Therefore, Seller should sign line 43 and deliver the executed document to Buyer B.

Additionally, the Seller should send written notice to Buyers A and C that the Seller is withdrawing the Counter-offer and will not enter into a contract with them.

Request for Credit Still Improper Through a BINSR

FACTS: The Buyer and Seller executed the Arizona REALTORS® February 2017 Residential Purchase Contract. During the Inspection Period, the Buyer provided a BINSR to the Seller. In the BINSR, the Buyer asked for repairs and a \$1,200.00 credit to install a gas stub to an outdoor fire pit that the Seller had agreed to leave behind as personal property.

The Seller said yes to all repairs but said no to the credit.

The Buyer now wants to cancel the Contract.

ISSUE: Can a Buyer cancel the Contract if the Seller refuses to provide a credit requested on the BINSR?

ANSWER: No.

DISCUSSION: The February 2017 Contract states in Section 6i that "Prior to expiration of the Inspection Period, Buyer shall deliver to Seller a signed notice of any items disapproved. Arizona REALTORS® Buyer's Inspection Notice and Seller's Response form is available for this purpose."

Section 6j states the Buyer may disapprove of items and cancel the Contract immediately or provide the Seller an opportunity to correct the items disapproved. →

In this instance, the \$1,200.00 credit was an offer to amend the Contract, which the Seller did not accept.

Therefore, the Buyer cannot cancel and recover the earnest money based on the Seller declining Buyer's request for a credit.

Pre-Paid Rent Limited to One and One-Half Month's Rent Unless Tenant "Voluntarily" Pays More Pre-Paid Rent

ISSUE: The tenant is trying to rent a home for \$1,500 per month. The tenant has bad credit. The tenant has offered to pay \$6,000 at the time that the tenant moves into the home. The \$6,000 would be one month's security deposit plus three months' pre-paid rent. Can the landlord enter into this lease agreement with the tenant?

ANSWER: Yes. Although A.R.S. §33-1321 limits the amount of a security deposit that can be required by the landlord, including any pre-paid rent, to one and one-half month's rent, the tenant can "voluntarily" pay more than one and one-half month's rent. Therefore, the landlord and tenant can enter into a lease agreement with the tenant paying one month's security deposit and three months' pre-paid rent.

NOTE: This "voluntarily" language was an amendment to the original language in A.R.S. §33-1321 because of winter vacation rentals when the landlord generally requires the tenant to pay the entire three or four months' rent in advance.

Property Management Agreement Terminates Upon Death of Owner

ISSUE: Under the property management agreement for the rental of the owner's home, the property manager collects security deposits and rent from tenants. The owner of the home has now died. What is the property manager's responsibility regarding the rent and the security deposits of the tenants?

ANSWER: A property management agreement is a contract for personal services which terminates upon the death of the owner of the home. Upon termination of the property management agreement, the property manager is required to immediately contact the personal representative of the deceased owner's estate and provide any rental agreements, keys and other documents to the personal representative. See A.R.S. § 32-2173 (B)(1).

Cure Notice Can Be Dated Prior to Delivery Date

FACTS: Buyer and seller were under contract. Buyer failed to sign loan documents three days prior to close of escrow. Seller delivered a Cure Notice ("Notice") to buyer on Friday, which was the last day buyer could have signed loan documents without breach.

Buyer's agent notifies seller that the Notice was delivered a day early and was therefore not valid. Seller subsequently

issued the same Notice on Saturday, the following day.

ISSUE: Is the same Notice delivered on Saturday valid?

ANSWER: Yes.

DISCUSSION: A Cure Notice can be given the day immediately following the potential breach, or at any point thereafter, pursuant to sections 7a, 8h, and 8i. Therefore, although the Notice is dated from Friday, the same Notice can now be delivered on Saturday and be effective.

There is No Contract If Withdrawal of Counter Offer Occurs Before Delivery

FACTS: A counter offer was sent from the seller to the buyer. The buyer signed the counter offer and sent the acceptance by email at 10:16 a.m. The seller's email server received the accepted counter offer at 10:48 a.m.

The seller, not knowing that the buyer had already sent the email with acceptance of the counter offer, wanted to withdraw the counter offer. The listing agent sent an email to the buyer at 10:21 a.m. stating the counter offer was withdrawn. The buyer's email server received the notice of intent to withdraw the counter offer at 10:25 a.m.

ISSUE: Are the buyer and seller in a contract?

ANSWER: No.

DISCUSSION: Unless otherwise agreed, an electronic record is received (delivered) if the record: (1) enters a computer system that the recipient has designated or uses for the purpose of receiving such records, and the recipient is able to retrieve the record; or (2) is in a form capable of being processed by the recipient's computer system. The contract will be deemed received even if no individual is aware of its receipt. A.R.S. §44-7015(E).

Therefore, because the seller withdrew the counter offer before the seller received the signed counter offer, there is no contract.

ABOUT THE AUTHOR

Richard V. Mack



Richard V. Mack is a partner at [Manning and Kass](#), which provides the Arizona REALTORS® 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.

Window to the Law: How to Create a Social Media Policy

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2018 ADRE Interview: Social Media & Website Guidelines

During a recent interview, Arizona Department of Real Estate Commissioner Judy Lowe spoke with Arizona REALTORS® 2018 President Lori Doerfler. Highlights are available on [YouTube](#), below is a text excerpt.

Social Media & Website Guidelines

Lori Doerfler: What social media guidelines do you have for members?

Judy Lowe: There isn't anything written in the Law Book or the Rules about social media and advertising. However, all social media and online advertising must follow the statute and the rules that are written around advertising in general.

Facebook

Just as in all advertising, when you have a Facebook listing that you want to post, there are only two lines that must be "clear and prominent":

1. The employing broker's name, and
2. The name of the company.

Arizona REALTORS® CEO Michelle Lind and I went back and forth on this, and made a very clear statement:

If there is not room on the initial posting to put the employing broker's name, there can be a "one-click" to that listing that does include the employing broker's name.

Websites

When the statutes and the rules for advertising were written, there weren't many websites. Michelle and I declared, on behalf of who we represent, that the website must have:

The employing broker's name clear and prominent at the top of the page, *not just the homepage*, but every subsequent page on the website after the homepage.

Clear & Prominent

Clear and prominent is very hard to define, but I can tell you what it's not: **It's *not* the company logo in the bottom right hand corner and you need a magnifying glass to see it.** Maybe not quite as prominent as the real estate licensee's name, but just about as clear and prominent.

We need the consumer to know what company this individual works for. Where they can pick up the phone and call and talk to a designated broker about their real estate transaction.

Having the name of the employing broker "clear and prominent" on every piece of advertising and marketing is very, very important.

This interview has been edited for length and clarity.



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