

BROKER & MANAGER

QUARTERLY

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**ARIZONA
REALTORS®**



BROKER & MANAGER

THIRD QUARTER 2019 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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Do-Not-Call Registry Frequently Asked Questions

BY SCOTT DRUCKER, ESQ., ARIZONA REALTORS® GENERAL COUNSEL & ASSISTANT CEO

It has been widely publicized that a class action lawsuit has been filed against a large national brokerage for alleged violations of the Telephone Consumer Protection Act ("TCPA") and related regulations. According to the lawsuit, the brokerage continuously called the named Plaintiff to market its services in violation of the National Do-Not-Call provisions of the TCPA.

Because many REALTORS® engage in the business practice of "cold-calling" prospects, the Arizona REALTORS® has received questions from members seeking to comply with the law. Below is a collection of some of the questions that have been posed.

Q1. What is the National Do-Not-Call Registry?

A1. The registry is a compiled list of phone numbers from consumers who have registered their preference to limit the telemarketing calls they receive. Telemarketers are prohibited from calling registered phone numbers unless certain criteria are met.

Q2. Where can REALTORS® go to search the National Do-Not-Call Registry?

A2. A telemarketer can receive access to the database by registering on the FTC's website. Once registration is complete, the telemarketer will receive a unique identification/account number. Five area codes will be provided at no charge and additional ones will cost \$54 per area code, up to a maximum annual fee of \$14,850 for access to the entire National Do-Not-Call Registry.

Q3. If a brokerage registers for access to the National Do-Not-Call Registry, can the brokerage share its identification/account number with its agents?

A3. Yes. A brokerage can share with its agents the company's identification/account number, thereby allowing agents within the same brokerage the ability to access the registry using the same account.

Q4. Does placing one's phone number on the National Do-Not-Call Registry stop all unsolicited calls?

A4. No. Telemarketers are permitted to contact individuals on the National Do-Not-Call Registry if the parties have an "established business relationship." Relationships that meet this exception include: (i) consumers who have purchased, rented, or leased goods or services from the caller or engaged in a financial transaction with the caller within the 18 months immediately preceding the date of the telemarketing call; and (ii) consumers who inquire about or apply for a product or service offered by the specific caller within three months immediately preceding the date of the telemarketing call. However, if the recipient of the call instructs the telemarketer not to call them again, future contact cannot be made. Other types of calls that are permitted include political calls, charitable calls, debt collection calls, and surveys.

Q5. Are robocalls legal?

A5. A robocall is a phone call that plays a recorded message. In October 2013, the Federal Communications Commission →

(FCC) eliminated the established business relationship exception as applied to prerecorded telemarketing calls. As such, any robocall that is selling a product or service is illegal unless the recipient has given the caller written permission to contact them in that manner.

Q6. Does the TCPA allow REALTORS® to call a For Sale By Owner (FSBO) seller in their capacity as a buyer's representative who believes that their client may be interested in purchasing the FSBO property?

A6. Yes. Even if the FSBO seller is registered on the National Do-Not-Call Registry, the REALTOR® can call the seller because the call is not placed for the purpose of soliciting business from the seller. Therefore, provided that the call is limited to discussing their client's interest in the property, the call can be made.

Q7. Does the TCPA allow REALTORS® to call a FSBO seller in an effort to secure the listing?

A7. A call of this nature is placed in an attempt by the REALTOR® to market their services. Unless an "established business relationship" exists, the law prohibits the REALTOR® from initiating a call of this nature if the seller is registered on the National Do-Not-Call Registry. The same is true for calls a REALTOR® may place to an expired listing.

Q8. Can REALTORS® obtain phone numbers from lead generation companies and rely on the established business relationship shared between the consumer and the lead generation company?

A8. Telephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the

established business relationship exception because, while the consumer may have a relationship with the lead generator, they do not have an established business relationship with the REALTOR® who purchased the leads. Unless the consumer inquired into the services of a specified REALTOR®

or brokerage, or the lead generator made disclosures that would alert the consumer that they should expect telemarketing calls from the REALTOR® as a result of their communications with the lead generator, the REALTOR® cannot claim that they have a relationship with the consumer.

Q9. Can REALTORS® trust that lead generation companies will not provide them with phone numbers registered on the National Do-Not-Call Registry?

A9. Unfortunately, lead generators responsible for "call verified," "permission-based," or "opt-in" leads often fail to remove numbers listed on the National Do-Not-Call Registry. In several enforcement actions,

businesses that made telephone calls to consumers on the registry after acquiring the consumer's name from a lead generator ultimately paid civil penalties to settle charges that their calls violated the TCPA. To be safe, before using a list obtained from a lead generator, REALTORS® should access the National Do-Not-Call Registry and remove from the list all registered phone numbers.

If you are unsure of how any of the aforementioned laws and regulations impact your telemarketing activities, it is recommended that you consult with your attorney before taking any action.

About the Author

Scott M. Drucker, Esq., a licensed Arizona attorney, is General Counsel & Assistant CEO for the Arizona 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.



Homestead Exemption Provides Protection from Judgment Liens

BY NIKKI SALGAT, ESQ., ARIZONA REALTORS® ASSOCIATE COUNSEL

Under the Arizona homestead exemption, homeowners can exempt up to \$150,000 of equity in their homestead. Specifically, A.R.S. §33-1101 states:

- A. Any person the age of eighteen or over, married or single, who resides within the state may hold as a homestead exempt from attachment, execution and forced sale, not exceeding one hundred fifty thousand dollars in value, any one of the following:
1. The person's interest in real property in one compact body upon which exists a dwelling house in which the person resides.
 2. The person's interest in one condominium or cooperative in which the person resides.
 3. A mobile home in which the person resides.
 4. A mobile home in which the person resides plus the land upon which that mobile home is located.

Simply put, if a homeowner has \$150,000 or less in equity in their home, they do not have to worry about a creditor attaching a judgment or forcing the sale of their home. However, there are exceptions for some creditors such as the mortgagee, lienholder for labor or materials, and child support arrearages. See A.R.S. §33-1103.

Interestingly, in December 2018, the Arizona Court of Appeals ruled on a case where a judgment creditor tried to pursue the buyers of the debtors' home claiming that the recorded judgment attached to the home and therefore "runs with the land." The court, however, held that "because of the protection afforded by the homestead statutes, the Judgment never attached as a lien to the Home."

In this case, the debtors defaulted on a loan for an apartment complex and were later sued for breach of contract. Subsequently, the creditor obtained a default judgment which was recorded and thereafter timely renewed. Years later, the debtors defaulted on a loan secured by their home and they eventually sold that home by way of a short sale.

More than three years after the short sale, the creditor of the default judgment sued the buyers in the short sale, seeking declaratory relief and to quiet title, claiming that the creditor's judgment was an enforceable lien against the home even though it no longer belonged to the debtors.

The court explained that under A.R.S. §33-964(B), the general rule is that "a judgment lien does not attach to homestead property, and that homeowners hold their homestead property free and clear of judgment liens." The court also acknowledged that "once a lien has attached, it 'runs with the land.'" However, the court ultimately found that the creditor's judgment lien never attached to the home in the first place and therefore "the [prior owners] conveyed the Home free and clear of the Judgment."

Based on the above, you can rest assured that buyers will not have to worry about a prior homeowner's creditor trying to claim that a creditor's judgment is an enforceable lien against a new homeowner's property. Moreover, if a homeowner has \$150,000 or less in equity in their home, absent an exception to the homestead exemption, the homeowner does not have to worry about a creditor attaching a judgment or forcing the sale of their home.

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.



Using Arizona REALTORS® Forms? You Have Plenty of Options!

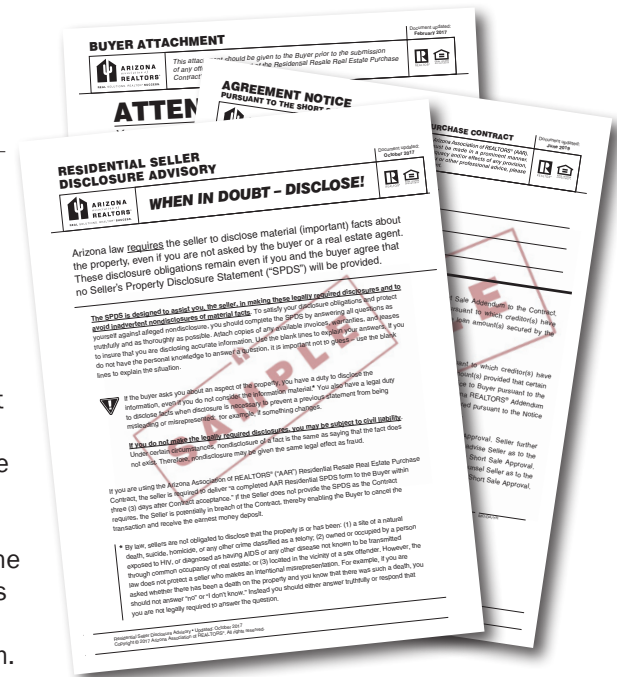
The Arizona REALTORS® has entered into Forms Licensing Agreements with TransactionDesk, zipForm, dotLoop, DocuSign, Skyslope and Brokermint. As such, these companies are able to provide state association forms, local REALTOR® association forms, and multiple listing service forms to all Arizona REALTORS® via their respective platforms. The Arizona REALTORS® provides TransactionDesk to its members free of charge and the National Association of REALTORS® provides zipForm Plus (Online) to all REALTORS® as part of their member benefits through the end of 2020. Please note that the zipForm Plus member benefit offered by NAR does not include zipForm Mobile or MLS Connect.

Both [TransactionDesk](#) and [zipForm Plus](#) can be accessed via the Arizona REALTORS® website. And for the sake of convenience, all Arizona REALTORS® can quickly access the forms provider(s) they utilize via the Association's [Single Sign-On dashboard](#).

If a member has questions about their use of zipForm, eSign or Single Sign-On, they are encouraged to contact the Arizona REALTORS® Business Services Support. The Arizona

REALTORS® support team is available weekdays from 8:00 to 5:00 and can be reached at (480) 304-8930, toll free at (866) 833-7357, or via email using the email address support@aaronline.com.

If a member is in need of TransactionDesk support, they can contact TransactionDesk 24 hours a day, seven days a week, at (800) 668-8768 or email TDsupport@lwwolf.com. In the event that a member encounters a problem with the use of Arizona forms within TransactionDesk, they can report those issues using the email address td@aaronline.com.



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.

Arizona REALTORS® has a variety of staff that is available for office and association meetings. **Did I say free?** Yep, just another of Arizona REALTORS® member benefits.

Contact us:

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TransactionDesk®: How Do I?

How do I update my user information, such as email address, phone numbers or company information on my TransactionDesk® account?

TransactionDesk® gets your user information from your NRDS account. If your NRDS information is incorrect, please contact your local association as your local controls your records. Once they update your information, it will update with NRDS, Arizona REALTORS®, and TransactionDesk®. **Please note:** It may take 24 hours for the changes to reflect on TransactionDesk®.

How do I add an email signature to my account?

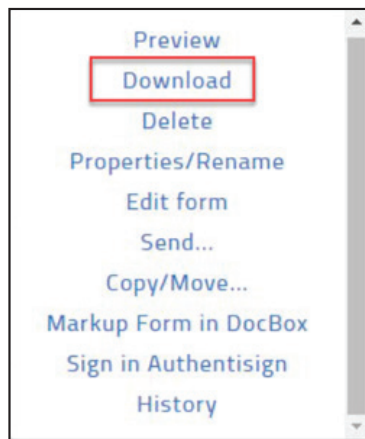
Navigate to Settings > Preferences. Click Email Signature if you need to add a personalized email signature to any emails that you send directly from the system. Type the email signature in the Email Signature field and click Update to save the signature.

How do I add company branding to my emails?

Click **Branding** if you need to add branding information to your profile, such as a personalized fax-back cover sheet, email banner, personal profile photo, or company logo. Click the photo area to locate the needed photo in your device's file manager and upload it to the system.

How do I download a form from TransactionDesk®?

- Locate the form you need to download.
- Click More Options. The more options menu opens.
- Click Download. The form is downloaded to a specified location on your computer as a pdf file.



How do I remove the fax cover sheet from my transactions on TransactionDesk®?

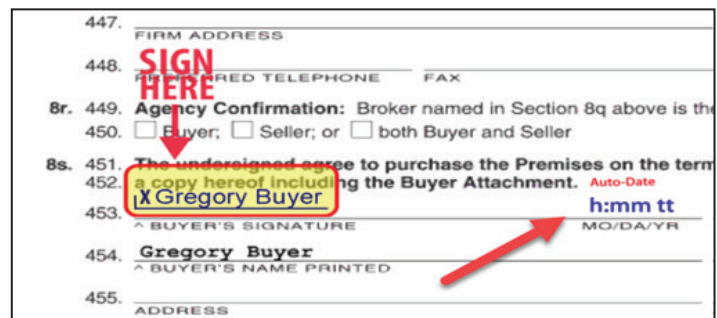
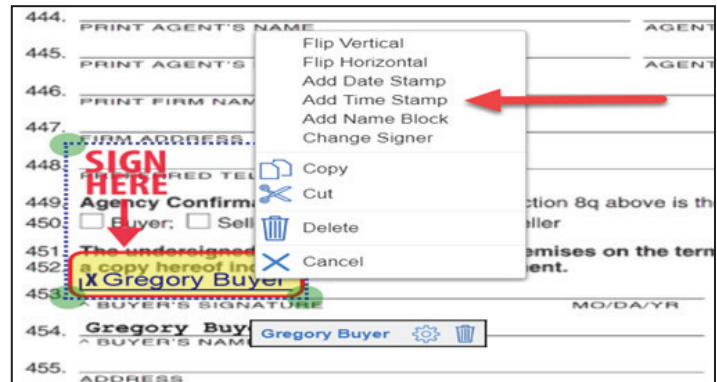
Navigate to Setup > Program Settings. Click Transaction Settings. Uncheck the box next to "Create Cover Sheet." When you have finished making changes to the transaction settings, click Update.

How do I add a general contact to my TransactionDesk® account?

Navigate to Contacts. Click Add. Click Create Contact. The Contact window opens on the General Tab. In the Contact section, type information about the contact in the available fields, such as their name and email. When you are finished adding information to your contact, click Save. The contact is saved and added to the list of contacts.

How do I add a "time stamp" when setting up a document for signature using Authentisign?

Right click on a signature or initial box to access the menu for that item. The menu options allow you to add a Time Stamp.



You can click and drag the time stamp to any location on the document.

How do I create a Transaction Templates on Transaction Desk?

Navigate to Setup. Select Transaction Templates and Click Add. The Create Transaction Template page appears.

1. In the Name field, give the template a meaningful name, such as Residential Listings.
2. Use the Type dropdown to select the type of transactions this template should be used for.
3. Optional: In the Description field, enter a description for the template.
4. Click Save. The Transaction Template page appears.
5. To add the forms that are typically required for this type of transaction, in the Forms section, click +.
6. Locate and select (check) the forms. Click Add. Any transactions created from this template have the forms attached automatically.

Business Services Support

Available weekdays from 8:00AM to 5:00PM.

Phone: (480)304-8930 | Toll Free: (866)833-7357

Email: support@aaronline.com

Fact vs. Fiction—What’s True Regarding TransactionDesk®?

BY SCOTT DRUCKER, ESQ., ARIZONA REALTORS® GENERAL COUNSEL & ASSISTANT CEO

Former politician and diplomat, Daniel Patrick Moynihan, once said “Everyone is entitled to his own opinion, but not to his own facts.”

However, with the advent of social media, the line between fact and opinion seems to blur. This trend can prove perilous as it leads to misinformation. So, let’s separate fact from fiction and debunk some of the myths regarding TransactionDesk®.

CLAIM: The decision to provide TransactionDesk® as a member benefit was made by “someone sitting in their Ivory Tower” and not by practicing agents and brokers.

REALITY: FICTION. All decisions of this nature are made by members, not staff. In this case, the Business Services & Technology (BS&T) Committee, which is comprised entirely of REALTORS®, evaluated a number of different forms providers largely as a result of member complaints about the current forms provider. A Forms Provider Replacement Workgroup, consisting of 32 practicing REALTORS®, was then formed to consider the recommendations of the BS&T Committee. After being approved by the Executive Committee, also made up of REALTORS®, a TransactionDesk® beta group of 35 experienced agents and brokers from across the state was formed to test the system.

CLAIM: Arizona REALTORS® elected to provide TransactionDesk® as a member benefit because “it was millions cheaper” and the decision was “clearly about saving money not on usage.”

REALITY: FICTION. This claim fails to account for the fact that zipForm Plus is provided to all REALTORS® as a National Association of REALTORS® member benefit. As a result, in 2019 the Arizona REALTORS® pays only for zipForm® Mobile, and MLS Connect, both of which are provided to its members as a free benefit. Currently, the Arizona REALTORS® pays roughly the same amount for the entire TransactionDesk® platform as it paid just for zipForm® Mobile and zipForm® Standard. In other words, monetarily it’s a break-even proposition but now Arizona REALTORS® members get far more bang for the buck. Furthermore, the members that made the decision to offer TransactionDesk® did so based solely on the merits of the platform.

CLAIM: TransactionDesk® is not a widely used and proven forms platform.

REALITY: FICTION. Lone Wolf Technologies, the company that offers TransactionDesk® and that has acquired zipLogix, services over 1.4 million agents, 20,000 offices, and 1,000 MLSs and Associations in the U.S. and Canada. More than 125 million forms and 23 million signings are created on their platforms every year.



CLAIM: zipForm is going away at the end of 2019.

REALITY: FICTION. NAR has been very clear that it will continue to offer zipForm Plus as a member benefit through the end of 2020. Just recently, the Arizona REALTORS® entered into an agreement with zipForm® pursuant to which it can license the association’s forms and

make the most recent versions available to members via their platform. While the Arizona REALTORS® had been negotiating this Agreement with zipForm® for many months, an official announcement could not be made until the Agreement was signed and the deal finalized.

CLAIM: The Arizona REALTORS® is deciding which forms provider members must use.

REALITY: FICTION. The Arizona REALTORS® has entered into Forms Licensing Agreements with TransactionDesk®, zipForm®, dotLoop, DocuSign, Skyslope, and Brokermint. As such, these companies are able to provide state association forms, local REALTOR® association forms, and multiple listing service forms to all Arizona REALTORS® via their respective platforms. If a member is unhappy with one forms provider, they have many others to choose from.

CLAIM: Even though I’m a member, I didn’t get a say on whether TransactionDesk® should be offered as a member benefit.

REALITY: FICTION. As mentioned above, the decision to offer TransactionDesk was made exclusively by members. All Arizona REALTORS® are eligible to serve on committees that make decisions such as this and committee meetings are open to members. →

CLAIM: TransactionDesk® does not contain a feature akin to MLS Connect.

REALITY: FICTION. TransactionDesk® utilizes a feature named Import Data. Much like MLS Connect, Import Data allows users to import MLS data directly onto their forms.

CLAIM: Arizona REALTORS® instructed TransactionDesk® “to have lots of additional space for the agent to type in and have it appear on the form version as if these words/characters are on the form,” but when printing or saving have “the last few lines of text disappear.”

REALITY: FICTION. As many REALTORS® have noted on-line, this is obviously a false statement as the Arizona REALTORS® does not instruct its form providers to delete text that a REALTOR® writes on a form.

CLAIM: TransactionDesk® is more complicated than zipForm®.

REALITY: This is a matter of opinion so it's neither fact nor fiction. With that said, the large number of members that tested and evaluated TransactionDesk® found it intuitive and easy to use. The same is true with other associations across the country that have made the decision to provide TransactionDesk® as a member benefit. While change can be difficult, if members take advantage of the many educational offerings that are available, the Arizona REALTORS® is confident that members will find the platform beneficial.

About the Author

Scott M. Drucker, Esq., a licensed Arizona attorney, is General Counsel & Assistant CEO for the Arizona 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.

Wire Fraud Advisory Updated

BY NIKKI SALGAT, ESQ., ARIZONA REALTORS® ASSOCIATE COUNSEL

Last year, Arizona REALTORS® made the Wire Fraud Advisory available for brokers so that a uniform document could be utilized to advise clients of wire fraud and its potentially devastating consequences.

While the intent of the advisory was for brokers to use with clients, there are instances in which the advisory has been utilized with an unrepresented party so as to caution that party of the risks associated with wire fraud. Because of this, the Wire Fraud Advisory has been revised at the bottom of the form where the undersigned acknowledges receipt of the advisory. More specifically, the previous version of the advisory contained a line for the “Client” to write their name and date. This has been revised and now contains two lines – one for the “Name” of the person signing the document and one for the “Signature” and date of the person signing the document.

The reason for this change is because “Client” suggests that agency has been established with the person signing the advisory. However, when a person is not represented by a broker, Arizona REALTORS® did not want the appearance of an agency relationship with the unrepresented party.

Additionally, a new link for the Consumer Financial Protection Bureau has been added to the online resources in the Wire Fraud Advisory. This new link brings the person to a blog article titled “Mortgage Closing Scams: How to protect yourself and your closing funds.”



The Wire Fraud Advisory is updated in all of Arizona REALTORS® forms provider platforms. You may also find the newly updated Wire Fraud Advisory in PDF and Word format on Arizona REALTORS® website (<https://www.aaronline.com/wire-transfer-fraud/>).

About the Author

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Ombudsmen Advice – How to Avoid a Consumer Complaint

At the Arizona REALTORS®, members volunteer to serve as trained ombudsmen, acting as an intermediary charged with communicating the concerns of one party to the other over the phone in an effort to restore a positive relationship. Thanks to the hard work of these volunteer ombudsmen, countless disputes have been resolved before they could potentially result in the filing of a formal complaint.

In 2010, Arizona REALTORS® surveyed a number of its volunteer ombudsmen asking them to comment, based on the calls they field, how REALTORS® can best avoid a consumer complaint. The insightful feedback received can be found at <https://www.aaronline.com/2010/08/28/five-ways-to-avoid-a-consumer-complaint/>.

Now, nearly ten years later, the Arizona REALTORS® thought it would be beneficial to again survey a select few ombudsmen and ask the following question: **As an ombudsman, what advice would you give to your fellow REALTORS® to help them proactively avoid a consumer complaint?** The answers identified below reflect the unique insight Arizona REALTOR® ombudsmen obtain while fielding questions from the public regarding the services REALTORS® provide in their transactions.

“Listen’ to your client and the parties involved in your transaction. Often the misunderstandings and problems come up because no one explained the process, or no one took the time to listen to their concerns and frustrations. If we can remain objective and not react defensively most of the issues can be resolved without a complaint being filed.”
— Marge Lindsay, CRB, CRS, GRI

“Advice I have given agents is not to forget that some folks have not sold or purchased property in a long time so don’t presume they know the process. Go over details with them, including listing agreements. Most importantly, send or call with updates. Real estate is still about ‘relationships’ even though our industry has moved to a rapid electronic pace. Clients want to be part of the process and feel valued.”
— Carol Pinciari, rCRMS

“Maintain strong communication with your clients and ask up-front how frequently and by what method they prefer to receive information and updates. Listen carefully to their verbal communications, take notes and summarize at the end to ensure you are on the same page. Always follow up in writing and proof your email, text or letter for accuracy... a simple error can change the entire meaning of your message.

Stay current on real estate practices, industry risks and technology! Keep the interests of your client as your primary goal. Negotiate transactions in a professional and cordial manner. A good rapport with the other parties’ agent paves the way for a smooth transaction and a win for your client.”
— Lisa Suarez, CRS, CRPM

“Communication is at the center of it all. We should treat our clients like the Google map directions lady. That is to say, always let the client know what the next direction will be as soon as you completed the last direction. Then, you give advanced notice of the next direction. As you get closer you review the steps (and get any questions out of the way), so when you need to execute you are ready.”
— Barrie Herr, ABR, CNE, TRC, GREEN



Proactively take advantage of the Ombudsman program when appropriate. “Ombudsmen know what they are doing and how to make the program work. The techniques are simple. They work. The results show that. When REALTORS® and the public know about the Ombudsman program and avail themselves of it, the results are excellent because they are aware of the alternatives – problems evolve into formal complaints, hearings, other persons (panels) making the decisions for the disputants, one-winner, one-loser, fines, etc. Not a good gamble.”

— Mike Steward, GRI, CCIM

“Communication is the main factor! Ask your client how they want you to communicate (text, email, phone) and how often.”
— Clark Jones, CDPE, CRB, CRS, e-Pro, GRI, MRP, REDM, REO specialist, RSPS, SRS

As you can see, three major themes were mentioned: (1) communication; (2) preparation; and (3) proactively taking advantage of the ombudsman program when an issue arises that you are having a difficult time independently resolving.

Finally, in the event that a consumer contacts an Arizona REALTORS® ombudsman seeking assistance regarding a transaction in which you are involved, Lisa Suarez recommends that you be open to the process and agree to work towards a solution by understanding the party’s perceptions. Lisa added, “If possible, communicate directly with the Respondent in a friendly, approachable manner without a defensive position. Listen carefully to the details of their concerns without interruption as this elevates their opinion of their value to you. The resolution may be simple or you may need to get creative. Embrace the mindset that it is not always as important to be right as to do the right thing.”

Independent Contractor or Employee? How to Ensure Your Agents and Assistants are Properly Classified.

BY ART BOURQUE, ESQ., BOURQUE LAW FIRM, P.C.

Special Guest Column – Part 1

"If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is an ass — an idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience — by experience." Charles Dickens, Oliver Twist (1838)

You do not want to be Mr. Bumble. Bumble did not know the law. As a result, he was held responsible for someone else's misconduct. With no real argument to make, he famously protested: "the law is an ass."

Little has changed since Bumble bungled in 1838: have you ever spoken with anyone who has lost in court or been churned-up by the legal system? I thought so. You've likely been told to "stay out" because it is often unfair and always expensive. This is good advice. The best way to stay out of court is to understand the law *at the outset* — when organizing your business and hiring agents and employees. You will sleep well and know that you have minimized the risk of a lawsuit or government audit.

This is the first of three articles as to whether your agents and assistants are independent contractors or employees — because the distinction has significant legal consequences. Each article will test your wits through several true/false questions. This first article introduces classification challenges facing brokers and agents.

Without further ado, here we go:

1. Employers have the right to control the manner in which employees work, whereas those who retain independent contractors may only direct results, not the manner in which the result is accomplished.
☐ True ☐ False
2. Degree of over control of working condition is the main factor courts look at in deciding whether a worker has been properly classified as an independent contractor.
☐ True ☐ False
3. An employing broker can exercise reasonable supervision of its agents' activities without turning them into employees but exercising control over agents converts them to employees.
☐ True ☐ False

Let's see how you did. Nos. 1 and 2 are true — employers have the right to control the manner in which employees work. Contrast this with an independent contractor, for example a painter or plumber: when you hire such a person you are directing results, you are not controlling the manner in which their job is accomplished.

No. 3 is false. Arizona Department of Real Estate (ADRE) regulations require that "[a]n employing broker must exercise reasonable supervision *and control* over the activities of sales persons." Seemingly this would make *all* agents employees because we learned in Nos. 1 and 2 that if a company controls its workers the workers are employees, not independent contractors. But this is not the case. Arizona law requires a degree of control over agents, but still allows agents to be classified as independent contractors.

How can you reconcile this seeming contraction in the law to properly classify your agents and assistants? By threading the needle as follows: (1) you must have a written policy that states the details of your supervision and control over agents as required by the ADRE and (2) you should have independent contractor agreements with your agents that identify the areas you do not control.

In sum, to comply with ADRE rules and maintain agents' independent contractor status, a broker must supervise and control where required and stop there. Brokers risk converting independent contractors into employees with each aspect of control they exert above and beyond that required by ADRE rules or applicable statutes.

Part 2 of this series: Independent Contractor or Employee: How to Structure Broker Relationship with Agents and Staff
<https://www.aaronline.com/2019/07/12/45262/>

And, for more information, read: Independent Contractors or Employees: Assistants, Transaction Coordinators and Administrator by Nikki Salgat, Esq., Arizona REALTORS® Associate Counsel. <https://www.aaronline.com/2015/08/21/independent-contractors-or-employees-assistants-transaction-coordinators-and-administrators/>



Art Bourque

Bourque Law Firm, P.C. is focused on helping businesses, human resource professionals, and individuals succeed. Art Bourque is an AV rated attorney who has been practicing employment law, commercial litigation, and tort litigation for 27 years. A Dean's List member each semester of law school and moot court winner for best oral argument in his law class, Mr. Bourque has continued to excel as a professional with a simple formula: working hard. <http://bourquelaw.com/Attorneys.html>

Understanding Pool Barrier Laws

BY K. MICHELLE LIND, ESQ., ARIZONA REALTORS® CEO

Because of the number of drownings and near-drownings in Arizona, most of which involve small children, the State of Arizona and most counties and cities within the state have enacted swimming pool barrier laws. Generally, these laws require that all affected swimming pools (or certain other contained bodies of water) be protected by an enclosure surrounding the pool area, or by another barrier, that meets specific requirements.

Pool barrier laws require that a swimming pool be completely enclosed by a fence to restrict access to the swimming pool from adjoining property. These laws also require that certain barriers be installed to restrict easy access from the home to the swimming pool. Pool barrier laws contain specific requirements regarding the height and type of fences, gates and doors from the home leading directly to the swimming pool and regarding windows that face the swimming pool. Arizona REALTORS® encourages home buyers to be aware of pool barrier laws prior to purchasing a home with an existing pool, erecting pool barriers, altering, repairing or replacing pool barriers and building a pool. Here are a few commonly asked questions regarding swimming pool barrier laws.

I'm ready to make an offer on a house with a pool. What information should I receive?

Arizona REALTORS® Residential Resale Real Estate Purchase Contract, used in most resale home transactions, includes a "Notice to Buyer of Swimming Pool Barrier Regulations," in which the buyer and seller acknowledge the existence of state laws as well as possible county and municipal laws, and the buyer agrees to investigate and comply with these laws. The seller is required by law to give the buyer a copy of the pool safety notice from the Arizona Department of Health Services.

The contract also requires the buyer be given a Seller's Property Disclosure Statement, which discloses any known code violations on the property.

The house I want to buy has a fence around the pool, but it doesn't meet code. Who is responsible for bringing it up to code and how long do we have?

The Arizona REALTORS® Purchase Contract states: "During the Inspection Period, Buyer agrees to investigate all applicable state, county, and municipal swimming pool barrier regulations and agrees to comply with and pay all costs of compliance with said regulations prior to occupying the Premises, unless otherwise agreed in writing." Check city and county ordinances for their specific requirements.

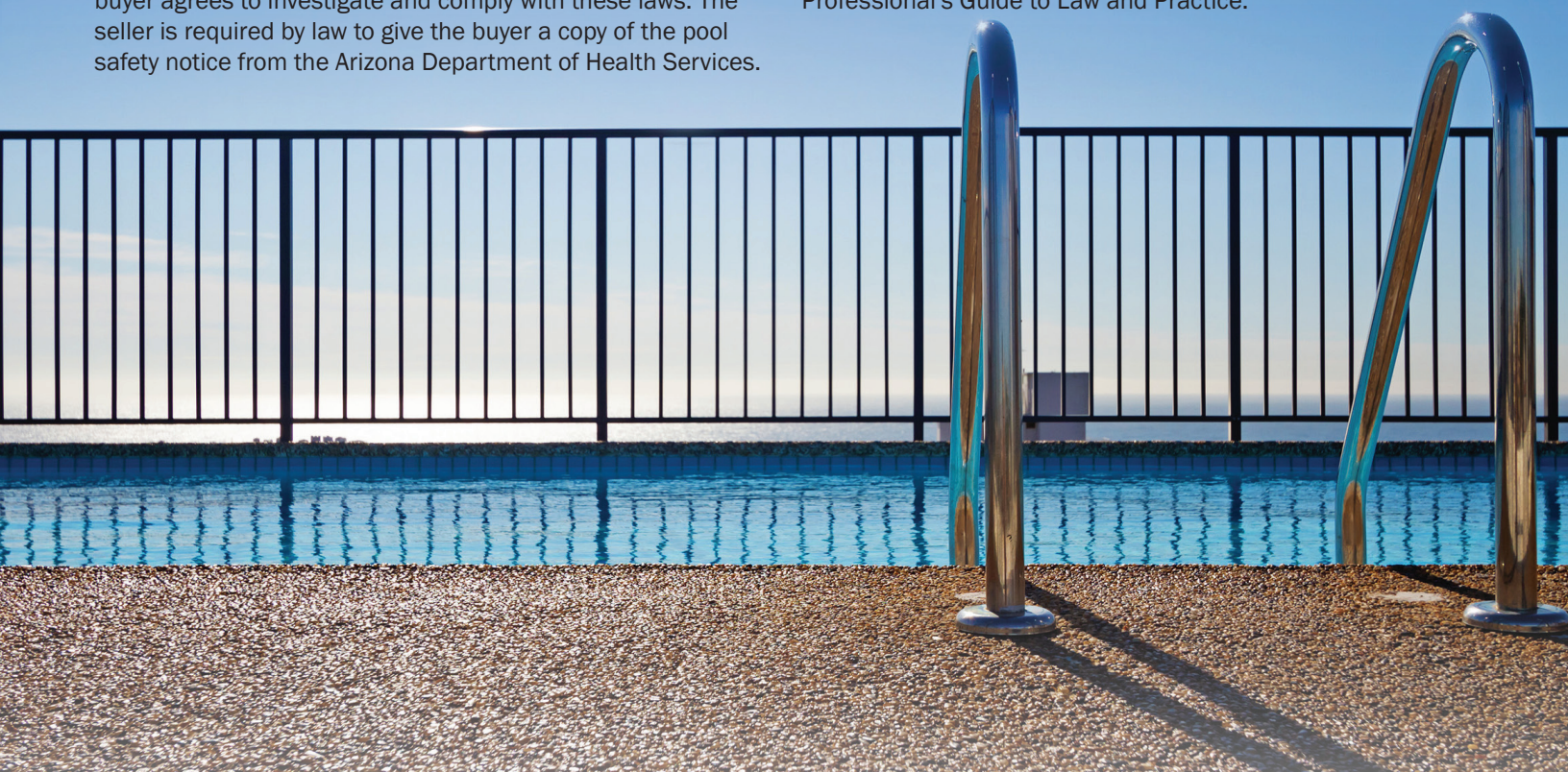
We have an above-ground pool in our backyard, so we don't have to worry about pool barrier laws, do we?

Above-ground pools are covered by the same state legal requirements for an enclosure around the pool. The pool must be at least four feet high with a wall that is not climbable and steps or ladders that are locking or removable. Again, check city or county ordinances for different requirements.

Pool Barriers Flyer (<http://blog.aaronline.com/wp-content/uploads/2019/06/18/Pool-Barriers-Flyer-April-2019.pdf>)

About the Author

K. Michelle Lind, CEO of Arizona REALTORS®, is also an attorney, State Bar of Arizona board certified real estate specialist, and the author of Arizona Real Estate: A Professional's Guide to Law and Practice.



Mary Lee Greason Excellence in Professional Standards Award

Arizona REALTORS® is proud to announce the formation of a new award that will recognize a past or current Arizona REALTORS® Professional Standards Committee member who exhibits a passion for professional standards through exceptional service, commitment, preparation, and leadership.

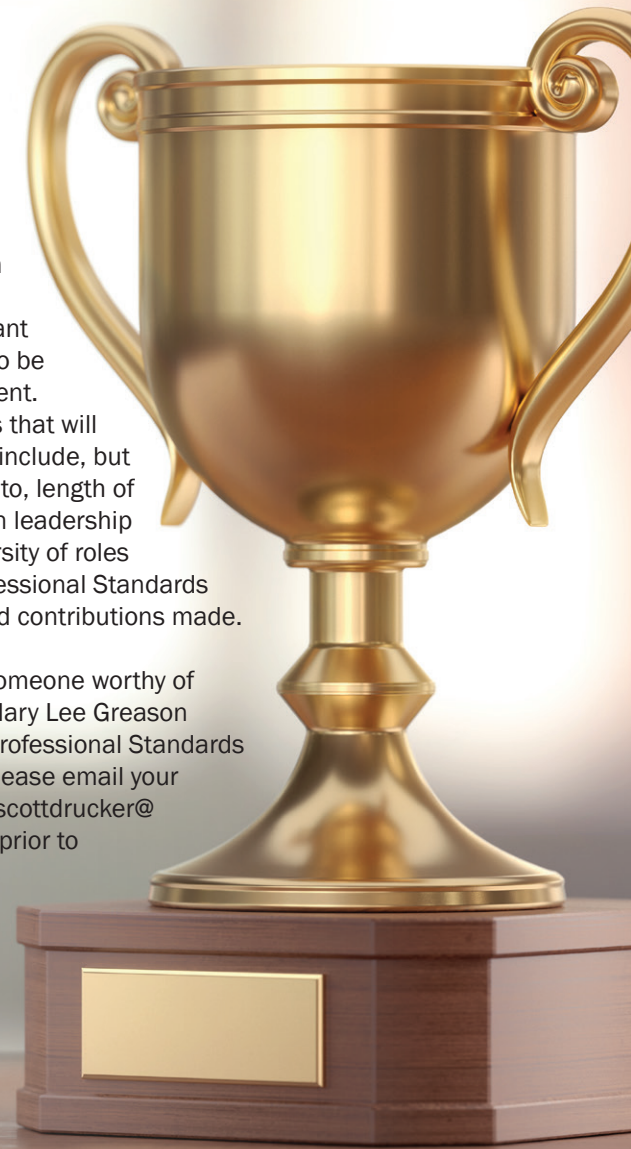
The award is named in honor of Mary Lee Greason, an Arizona REALTOR® who in addition to being an outstanding instructor, served for many years on both the Tucson Professional Standards Committee and the Arizona REALTORS® Professional Standards Committee.

Arizona REALTORS® do not apply for this award. Instead, nominations must be submitted by a REALTOR® association or by an individual Arizona REALTOR®. Recipients of the award will be jointly selected by the current Chairs of both the Professional Standards Committee and the Risk Management Committee. The award is not required to be presented on an annual basis. Rather, the award will be presented only when a deserving individual is nominated and approved. There can be no more than one recipient in a calendar year.

All nominations must be submitted no later than November 1st, with the award being presented at the following year's annual Arizona REALTORS® Professional Standards Workshop. No specific form is required to be used to nominate an Arizona

REALTOR® for this award, but the nomination should explain why the applicant is considered to be a worthy recipient. Specific factors that will be considered include, but are not limited to, length of service, roles in leadership positions, diversity of roles within the Professional Standards Committee, and contributions made.

Do you know someone worthy of receiving the Mary Lee Greason Excellence in Professional Standards Award? If so, please email your nomination to scottdrucker@aaronline.com prior to November 1st.



Commercial Listing Platforms

NAR has partnered with two commercial listing platforms. These platforms offer commercial members the opportunity to expose their listings to a nationwide audience and search properties available across the country. Having integrated with RPR, they also enable NAR's commercial members to streamline, manage and grow their business.

Learn more by watching the video:

<https://youtu.be/OuKohdmLyE>



The Down Low with Judy Lowe: Nicknames

In the first of five videos, Arizona REALTORS® President D. Patrick Lewis talks with Department of Real Estate Commissioner Judy Lowe. In the first installment, they talk about this year's new law passed by the legislature to allow the use of Arizona REALTORS® nicknames on marketing materials.

Click Here:

<https://www.youtube.com/watch?v=JxvLmP3kngk&feature=youtu.be>



REALTOR® Broker Summit

Save the Date! The 2020 Broker Summit will be held March 31 to April 1 at the Loews Hollywood Hotel in Hollywood, CA. The REALTOR® Broker Summit offers an incredible two days of learning, exclusive insights, and networking opportunities. Stay on the cutting edge by discovering new technologies and business strategies from industry leaders.

<https://www.nar.realtor/events/realtor-broker-summit>



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- * As a member benefit for Designated REALTORS® (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
- * To answer legally related questions about the many diversified areas of today's real estate industry.

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provided by
the attorneys at
Manning & Kass

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

Primary access to the
Hotline is for Designated
Brokers, who may also give
access to one REALTOR® or
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The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

Q&As are not "black and white," so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Disposition of Earnest Money When Seller Deprives Buyer of Ability to Obtain Financing

FACTS: The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract. At the time of the contract, the property was vacant. However, the day after the seller signed the contract, he entered into a lease for the property with a tenant. The buyer's prequalification form provided that the property would be their primary residence and owner occupied. Ultimately, the buyer's loan was denied because with a tenant in place the property could not be owner occupied. Seller has demanded that the earnest money deposit be delivered to him.

ISSUE: Is the buyer entitled to return of his earnest money deposit?

ANSWER: Yes.

DISCUSSION: Section 2(c) of the contract provides that the buyer is entitled to "a return of the earnest money if the loan denial is provided." Here, the loan was denied because the seller entered into a lease with a tenant, thereby precluding the buyer from closing on the property as owner occupied. The buyer is therefore entitled to a return of the earnest money.

Out of State Agent May Not Represent a Party in an Arizona Real Estate Transaction

FACTS: A real estate agent from Texas submitted an offer on a property listed by an Arizona agent. The Texas agent purports to "represent" the buyer per the terms of the transaction documents and in his discussions with the listing agent. The Texas agent claims that under the Arizona "reciprocity" laws he can represent the buyer in the Arizona transaction because he holds a license in Texas.

ISSUE: May the Texas agent represent the buyer in the Arizona transaction?

ANSWER: See discussion.

DISCUSSION: The Arizona professional reciprocity statute, A.R.S. § 32-4302, was amended this year to allow reciprocity, however, it is not automatic. In other words, just because a

person is licensed in another state, it does not give them the ability to practice real estate in Arizona.

Rather, a person duly licensed in another state may apply for an Arizona license provided they meet certain criteria, including establishing residency, taking the state specific portion of the real estate examination at the Commissioner's discretion, passing a background check (verifying that their license is in good standing in their previous state), obtaining a fingerprint clearance card, and paying licensing fees.

Without an Arizona Real Estate license, the Texas agent may not represent a buyer in an Arizona real estate transaction.

Landlord's Remedies Limited Under the Servicemembers Civil Relief Act (SCRA)

FACTS: The tenant of the residential property is a military reservist. The tenant recently received notice that he is going to be called up to active duty and serve in the Middle East for approximately eight months. When the tenant leaves for the Middle East, there will be approximately six months remaining on the lease.

ISSUE: May the landlord bring a claim against the tenant and maintain the security deposit because the tenant will not be able to honor the full term of the lease?

ANSWER: No.

DISCUSSION: The SCRA provides that if a tenant is deployed for a period of over 90 days, the tenant may terminate the rental agreement by written notice to the landlord. Provided the tenant pays the rent through the term of his occupancy, the landlord may not retain the security deposit based on a failure to pay nor pursue the tenant for rent due for the remainder of the lease.

Note: The SCRA is also addressed in the Residential Lease Agreement.



Have you signed up for the Legal Hotline?

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

FIND OUT HOW BROKERS CAN ACCESS THE LEGAL HOTLINE

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

BROWSE MORE LEGAL HOTLINE TOPICS ONLINE

www.aaronline.com/manage-risk/legal-hotline

Agent May Not Pursue a Commission Claim Without Broker's Consent

FACTS: At the seller's request, the listing agent agreed to cancel the listing. The parties signed written documents affecting this cancellation. Within a week after the cancellation, the seller entered into a contract with a buyer to purchase the property. The agent believes that the cancellation was accomplished in bad faith by the seller and wants to pursue a commission. The agent's broker, however, refuses to pursue the listing commission because of the language in the cancellation document and out of concern that a lawsuit pursuing the commission will result in a counterclaim for negligence against the agent and brokerage firm.

ISSUE: May the agent pursue the commission without the broker's consent?

ANSWER: No.

DISCUSSION: By statute, commissions belong to the brokerage firm. See A.R.S. 32-2101(46). Further, real estate licensees may only accept commission by and through the broker to whom he is licensed. See A.R.S. 32-2155(a). Thus, because the brokerage firm "owns" the commission, the listing agent may not pursue the commission claim against the seller without the broker's consent.

Agent Obligated to Advise Parties of Potential Consequences of a Creative Financing Agreement

FACTS: Buyer and seller entered, and agreed in concept, that buyer would purchase the subject property by paying the seller \$25,000 in cash and then simply "take over" the payments on the seller's mortgage. The parties approached the real estate licensee and asked him to represent both parties and document the transaction for a flat fee.

ISSUE: May the agent proceed as requested?

ANSWER: See discussion.

DISCUSSION: With proper written consent, the agent may represent both parties in the transaction. Additionally, the agent may agree to do the work for a flat fee since commissions are freely negotiable.

Once taking on the role as a dual agent, however, the agent owes certain duties to both the buyer and seller. Here, the agent should advise the parties that their contemplated

structure could trigger the due on sale clause of the underlying mortgage, thereby allowing the lender to call the entire note due and payable. This could have adverse consequences for both the buyer and seller. Accordingly, the agent should provide written notice to both parties of this potential outcome and advise them to seek independent legal counsel.

Note: Arizona REALTORS® maintains a form titled **Loan Assumption Addendum** that can be used in scenarios such as the one described above. The form specifically addresses due on sale clauses.

There is No Species Requirement for Service Animals

FACTS: The prospective tenant has a 3 foot python that he claims is his emotional support animal. The prospective tenant produced documentation from a medical provider that the snake is in fact an emotional support animal. The landlord does not want to allow the snake to be on the premises.

ISSUE: Are there species restrictions for emotional support animals?

ANSWER: No.

DISCUSSION: Emotional support animals are treated differently under the law than a service animal. A service animal is covered by the Americans With Disabilities Act ("ADA") and is highly trained to perform a task – such as a seeing eye dog for instance. To qualify as a service animal, under the ADA, the animal must be either a canine or a miniature horse.

There are, however, no species restriction as to emotional support animals. Therefore, the snake would be considered an emotional support animal under the circumstances and the landlord cannot deny housing to the prospective tenant based solely on the support animal being a snake nor preclude the snake from living in the property.

Arizona REALTORS® Forms Are for Member Use Only

FACTS: An Arizona REALTOR® intends to provide blank copies of several Arizona REALTORS® standard real estate forms to a friend seeking to sell their own home without the assistance of licensed Arizona real estate professional. Because the REALTOR® printed the forms from her zipForm® account, the REALTOR's® name and the name of her brokerage appear on the bottom of each form. →

ISSUE: Before providing the blank forms to her friend, the REALTOR® asked whether she should remove her contact information from the footer of the forms.

ANSWER: See Discussion.

DISCUSSION: The first thing the REALTOR® should know is that by providing blank copies of Arizona REALTOR® forms to her non-licensed friend, the REALTOR® is violating federal copyright law. This is the case regardless of whether her name appears on the bottom of the forms.

Arizona REALTORS® standard real estate forms are federally registered with the United States Copyright Office and protected under federal copyright laws. As a result, Arizona REALTORS® holds the copyright and exclusive right to all Arizona REALTOR® branded forms. Arizona REALTORS® grants members an individual license to use Arizona REALTOR® forms in connection with their real estate transactions. However, members are strictly prohibited from reproducing or distributing blank forms without Arizona REALTORS® permission.

Note: Arizona REALTORS® forms are a valuable member benefit. Arizona REALTORS® therefore aggressively pursues and protects its copyrighted forms. [Click here](#) for more information on the importance of Arizona REALTORS® copyrights.

Property Manager May Place Animals Left in an Abandoned Property with a Shelter

FACTS: Residential tenant(s) abandoned the subject property and left behind two adult cats. Upon retaking possession of the property, the property manager discovered the two adult cats that were left behind.

ISSUE: Is the property manager required to care for the cats found in the abandoned property?

ANSWER: See discussion.

DISCUSSION: The Arizona Residential Landlord Tenant and Act was modified in 2018 to address animals left in an abandoned residential property. Specifically, A.R.S. § 33-1370 provides that the landlord may remove animals left behind and place them in a shelter or boarding facility. The landlord must keep a record of the name and location of the facility where the animals were placed. See A.R.S. § 33-1370(E).

Presence of a Dwelling is Irrelevant to Whether an Affidavit of Disclosure is Required

FACTS: The buyer and seller executed an AAR Residential Resale Real Estate Purchase Contract. The listing agent states the seller will not need to provide an Affidavit of Disclosure because the property has a dwelling on it.

ISSUE: Is an Affidavit of Disclosure only required when selling vacant land in unincorporated areas of the county?

ANSWER: See discussion.

DISCUSSION: A seller is required to provide an Affidavit of Disclosure in accordance with § 33-422 if: (i) the seller is selling five or fewer parcels; (ii) the parcels are not subdivided land; and (iii) the parcels are located in an unincorporated area of the county.

The statute does not require the land to be vacant, raw land. If the property is unsubdivided and in an unincorporated area of the county, then an Affidavit of Disclosure is required by statute.

Guardianship May Be Needed if Seller is Incapacitated

FACTS: Husband and wife were facing a financial emergency and decided to sell their house. Only husband's name is on the deed. Husband signed a listing agreement with Broker.

One week later, husband is in a coma.

ISSUE: Can wife sign a purchase contract for husband if he is in a coma?

ANSWER: No.

DISCUSSION: Because husband is the only name on the deed, only husband can sign a purchase contract.

Therefore, wife will likely have to file for a temporary or permanent guardianship, which would provide her the legal authority to sign a purchase contract on behalf of husband as he currently does not have the capacity to sign.

Wife should consult an attorney or visit the Superior Court web site under the self-help page to begin guardianship proceedings.

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: Worker Classification Update



Chloe Hecht
Senior Counsel
and Director of Legal Affairs

This month, watch and learn from Chloe Hecht, Senior Counsel and Director of Legal Affairs as she discusses recent lawsuits and best practices for worker classification in the Window to the Law series. *"Keep in mind that an independent contractor agreement alone could be insufficient to establish that salespeople are in fact independent contractors. Courts and government agencies will look at the realities of the parties' relationship and how much control the broker actually exerts over his or her salespeople..."*

Watch the video here: <https://www.nar.realtor/window-to-the-law/worker-classification-update> and for further information: [Independent Contractor Status Frequently Asked Questions](#)



Window to the Law

Window to the Law is a monthly video series focusing on a legal topic of interest. Not just for legal professionals, Window to the Law covers topics applicable to legal compliance for real estate professionals, brokerages, and REALTOR® associations. To view videos visit: <https://www.nar.realtor/videos/window-to-the-law>

NAR YouTube Channel

In addition to the Window to the Law video series, view [Legal Updates on NAR's official YouTube channel](#).

More Legal Information View NAR's Legal topics <https://www.nar.realtor/legal>



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