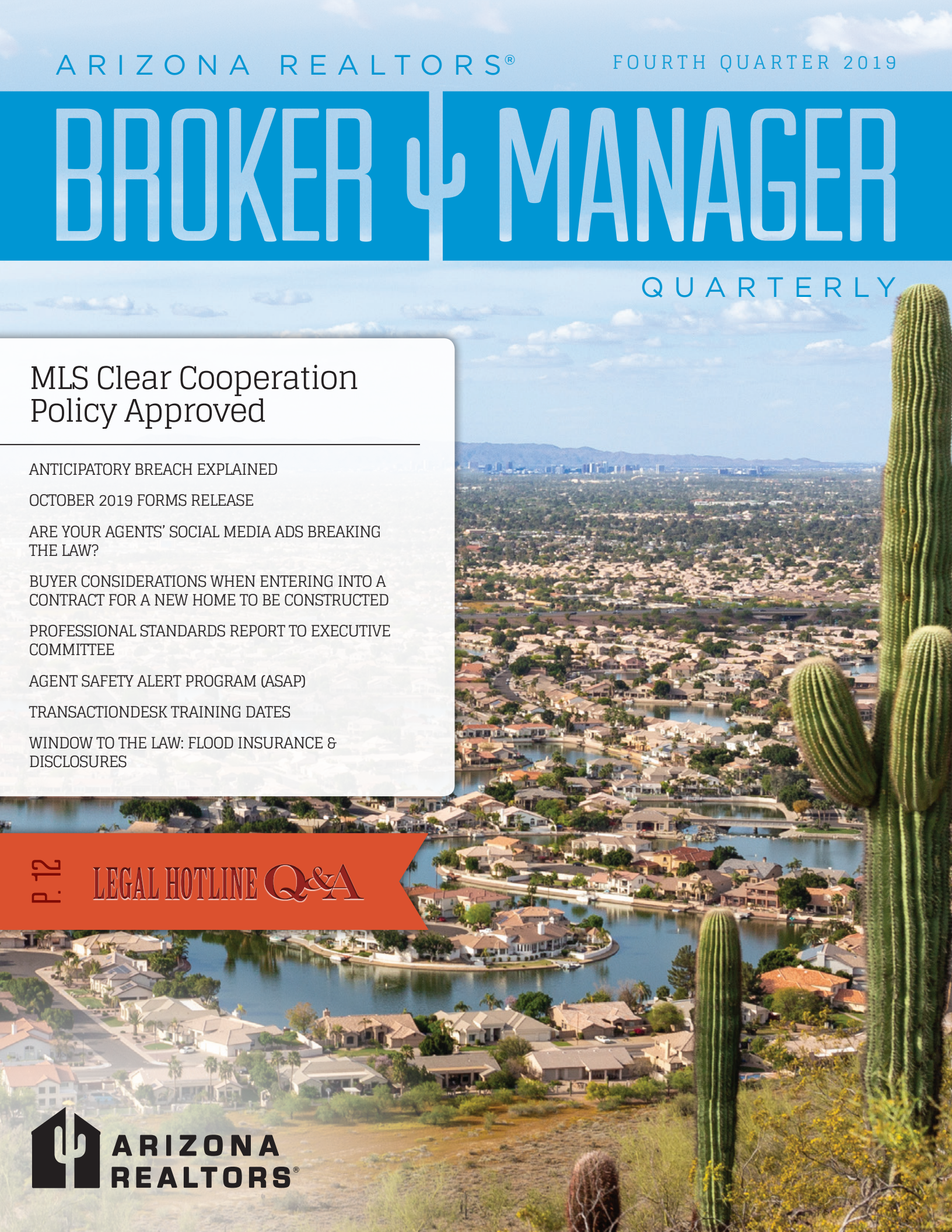
ARIZONA REALTORS®

FOURTH QUARTER 2019

BROKER & MANAGER

QUARTERLY

MLS Clear Cooperation Policy Approved



ARIZONA REALTORS®

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ARIZONA REALTORS®

BROKER & MANAGER

FOURTH QUARTER 2019 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

MLS Clear Cooperation Policy Approved

Recommendation: To adopt the following policy as new MLS Statement 8.0, NAR Handbook on Multiple Listing Policy:

> *Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.* [updated 11/11/19]

Rationale: Distribution of listing information and cooperation among MLS participants is pro-competitive and pro-consumer. By joining an MLS, participants agree to cooperate with other MLS participants except when such cooperation is not in their client's interests. This policy is intended to bolster cooperation and advance the positive, procompetitive impacts that cooperation fosters for consumers. The public marketing of a listing indicates that the MLS Participant has concluded that cooperation with other MLS participants is in their client's interests.

Frequently Asked Questions

Why was this policy approved?
Brokers and MLSs from across the country asked NAR to consider policy that will reinforce the consumer benefits of cooperation. The MLS creates an efficient marketplace and reinforces the pro-competitive, pro-consumer benefits that REALTORS® have long sought to support. After months of discussion and consideration within NAR's MLS Technology and Emerging Issues Advisory Board, this proposal was brought forth for the industry to discuss and consider, then approved by NAR's Board of Directors.

Who made the decision that this policy was needed?
NAR's MLS Technology and Emerging Issues Advisory Board is made up of brokers and MLS executives from across the country. Two dozen volunteers review industry concerns from a wide range of business and regional viewpoints. Potential policy changes are discussed within the group to create a positive impact on the industry and to address broker needs within the marketplace. These proposals move on to the 130-person Multiple Listing Issues and Policies committee for consideration, and if approved, on to NAR's 900 member board of directors for final ratification.

Does Policy Statement 8.0 require listings to be included in an MLS's IDX displays?
No. While listings that are displayed on the Internet must be submitted to the MLS and distributed to other MLS participants for cooperation, submitting a listing for cooperation within the MLS does not necessarily require that listing to be included in an MLS's IDX display, if the seller has opted out of all Internet display. Per MLS rules, participants can work with their listing clients to determine an appropriate marketing plan, taking into account the client's needs and full disclosure of the benefits to market exposure.

Does Policy Statement 8.0 prohibit office exclusives?
No. "Office exclusive" listings are an important option for sellers concerned about privacy and wide exposure of their property being for sale. In an office exclusive listing, direct promotion of the listing between the brokers and licensees affiliated with the listing brokerage, and one-to-one promotion →

between these licensees and their clients, is not considered public advertising.

Common examples include divorce situations and celebrity clients. It allows the listing broker to market a property among the brokers and licensees affiliated with the listing brokerage. If office exclusive listings are displayed or advertised to the general public, however, those listings must also be submitted to the MLS for cooperation.

Does Policy Statement 8.0 require listings to be submitted to the MLS if they are advertised to a select group of brokers outside the listing broker's office?
Yes. "Private listing networks" that include more brokers or licensees than those affiliated with the listing brokerage constitute public advertising or display pursuant to Policy Statement 8.0. Listings shared in multi-brokerage networks by participants must be submitted to the MLS for cooperation.

Does Policy Statement 8.0 apply to non-active listings?
Yes. Policy Statement 8.0 applies to any listing that is or will be available for cooperation. Pursuant to Policy Statement 8.0, "coming soon" listings displayed or advertised to the public by a listing broker must be submitted to the MLS for cooperation with other participants. MLSs may enact "coming soon" rules providing for delays and restrictions on showings during a "coming soon" status period, ensuring flexibility in participants' listing and marketing abilities, while still meeting the participant's obligations for cooperation.

What if the listing isn't ready to be shown? Are "Coming Soon" or "Delayed showing" listings allowed under Policy Statement 8.0?
The concept of "Coming Soon" and "Delayed Showing" can be achieved within the local MLS. Listings which are truly not yet ready to be shown can be shared with the MLS's brokers and agents to create exposure while the property is being prepared for showing.

MLSs can also add clarity to the coming soon and delayed showing process by defining specific statuses and showing requirements if these listings are to be included in the MLS. The most common implementations do not allow for showings of the listing until its status is changed to active, and any showings of the listing would immediately trigger that status change.

Does Policy Statement 8.0 require a broker to turn in every listing to the MLS within 24 hours of signing the listing?
No. MLSs have different local rules as to listing turn-in times. If a listing is taken and is not yet ready to be marketed/shown, longer timelines for turn in may apply in local markets. If a listing is marketed to the public, however, Policy Statement 8.0's 24 hour turn-in timeline goes into effect.

Has this kind of policy been implemented somewhere already?
Similar policies have been enacted in some marketplaces. MRED in Illinois has a similar policy in place. The organization has produced a white paper explaining the benefits to the marketplace (link is external).

Bright MLS on the Eastern seaboard has a similar policy (link is external) in effect. Northwest MLS in the Seattle area has had a policy disallowing the pre-marketing of properties since 2013. Its intent could be viewed as similar to Policy 8.0 in terms of encouraging greater participation and inventory within the MLS.

How can an MLS address compliance?
Compliance is up to local determination. The policies in the markets previously discussed usually include an escalating process of warnings and fines. Reporting of non-compliance is often taken care of by the marketplace. When listings are publicly marketed, agents and consumers become aware and can report unsubmitted listings by MLS participants to the MLS.

Does this policy affect commercial listings?
Residential real estate and commercial real estate are transacted with significant differences. This policy only affects residential real estate.

How will the new policy affect listings not yet available for showing and the calculations of "days on market?"
These are factors that can be determined locally. Brokers should discuss with their MLSs the desire to submit properties which are not yet ready for showings in the MLS. Brokers and MLSs should consider whether a new listing must immediately become active, whether a temporary "coming soon" or "no showings" status is allowed, and when "Days on Market" will begin in these scenarios.

Why was the time-frame within the recommendation updated to 'one business day'?
The MLS Tech and Emerging Issues Advisory Board held a conference call on October 30, 2019. Based on feedback and concerns over the time enforcement, the timeframe was changed from '24 hours' to 'one business day.'

Reference: NAR, https://www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy

Anticipatory Breach Explained

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

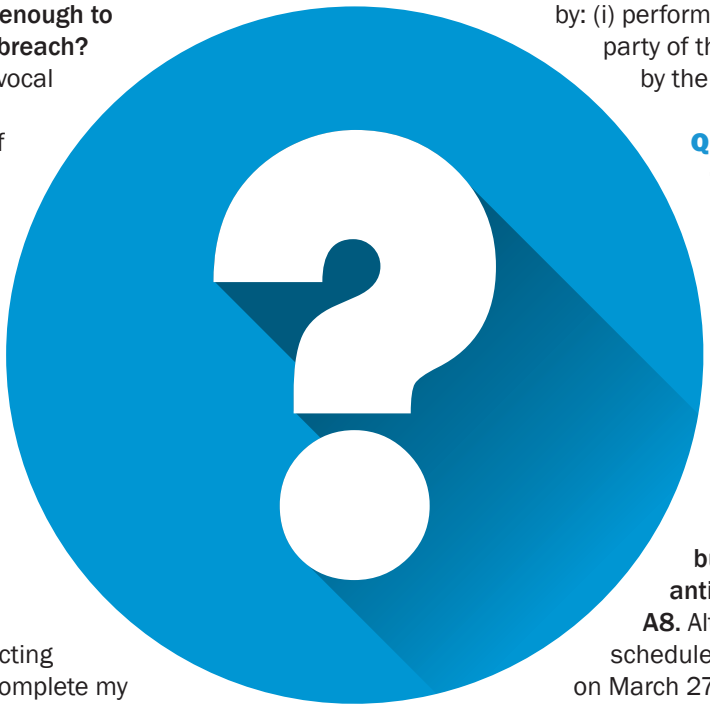
Following the recent Memorandum Decision in the case of Saxton v. Berkner, No. 1 CA-CV 18-0275 (Oct. 1, 2019), there has been a great deal of discussion surrounding the topic of anticipatory breach, also known as anticipatory repudiation. To help clarify this issue, below are some frequently asked questions and corresponding answers.

Q1. What is anticipatory breach?

A1. Arizona law defines anticipatory breach as a "positive and unequivocal manifestation on the part of the party allegedly repudiating that he or she will not render the promised performance when the time fixed for it in the contract arrives." See Kleeb v. Burns, 5 Ariz.App. 566, 568, 429 P.2d 453, 455 (App. 1967).

Q2. Is the expression of doubt enough to constitute an anticipatory breach?

A2. No. A "positive and unequivocal manifestation is required." Therefore, an expression of doubt is insufficient.



Q3. Can you provide examples of what does and does not constitute an anticipatory breach?

A3. EXAMPLE ONE – "Unless that raise I'm expecting comes through, I'm not going to be able to complete my purchase of the home."

EXAMPLE TWO – "I did not obtain the raise I was expecting and, as a result, I will not complete my purchase of the home."

Example One is an expression of doubt and not a clear manifestation of non-performance. For this reason, Example One does not constitute anticipatory breach. Alternatively, Example Two rises to the level of an anticipatory breach as it is an express refusal to perform.

Q4. In order to constitute an anticipatory breach, must the manifestation of intent not to perform be in writing?

A4. No. A verbal representation can constitute anticipatory breach provided that it is clear and unambiguous. As a practice tip, it may nonetheless be beneficial to confirm in writing the manifestation not to perform which was previously conveyed verbally.

Q5. When using the Arizona REALTORS® Residential Resale Real Estate Purchase Contract, can Party A declare Party B in breach if Party B clearly and unambiguously expresses that they will not perform as required by the Contract?

A5. No. There are no automatic breaches when using the Arizona REALTORS® Residential Resale Real Estate Purchase Contract. Therefore, if one party clearly and unambiguously expresses that they will not perform as required, the other party merely obtains the right to issue a Cure Period Notice.

Q6. Can a party cure their anticipatory breach?

A6. Yes. Should a party wish to cure their anticipatory breach upon receipt of a Cure Period Notice they can do so by: (i) performing; or (ii) reassuring the other party of their intent to perform as required by the Contract.

Q7. If a party, after receipt of a Cure Period Notice, fails to cure their anticipatory breach, can they be declared in breach of Contract?

A7. Yes. Should a party timely fail to cure their anticipatory breach after receipt of a Cure Period Notice, they can be declared in breach of contract.

Q8. In the case of Saxton v. Berkner, what action did the buyer take that resulted in an anticipatory breach.

A8. Although close of escrow was not scheduled to occur until March 31st, on March 27th the buyer "unambiguously and emphatically" communicated his refusal to perform under the contract and close on March 31st. That action led the Arizona Court of Appeals to address anticipatory breach, stating as follows, "While a contract generally cannot be breached until the date of the performance, if one party unequivocally indicates he will not perform when the date arrives, he has committed an anticipatory breach."

About the Author

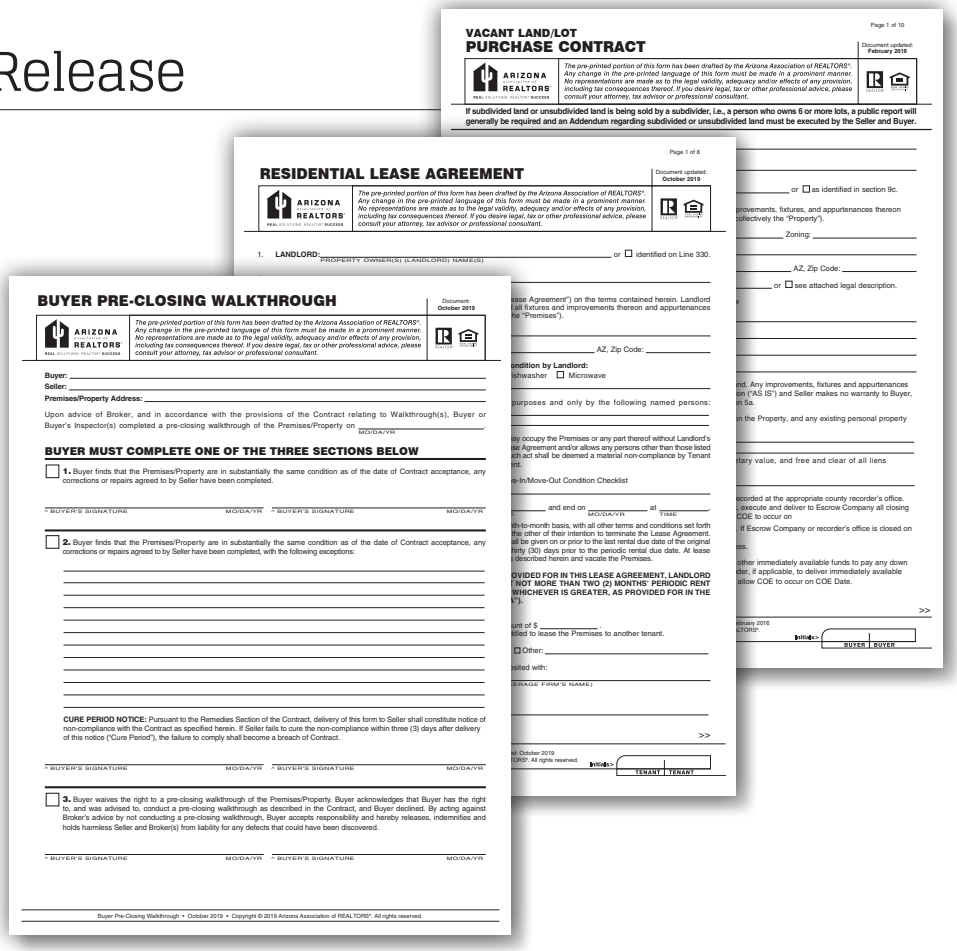
Scott M. Drucker, Esq., a licensed Arizona attorney, is General Counsel & Assistant CEO for the Arizona REALTORS® serving as the primary legal advisor to the association. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

October 2019 Forms Release

Buyer Pre-Closing Walkthrough: This form has been revised to make the form universally applicable so that it can be utilized in conjunction with all Arizona REALTOR® purchase contracts. More specifically, "Property" has been inserted next to "Premises" and the form now generally references the Remedies section of the purchase contracts as opposed to a specific section.

Residential Lease Agreement: The revision consists of an additional line being included under the "Broker on behalf of Tenant" and "Broker on behalf of Landlord" sections to make it easier for more than one agent to be identified on the Residential Lease Agreement when appropriate.

Vacant Land/Lot Purchase Contract: The revision removes the Market Conditions Advisory from section 1h titled Addenda Incorporated.



ARIZONA REALTORS®

LEGAL HOTLINE

ATTENTION BROKERS! Are you signed up for the Legal Hotline? The Legal Hotline delivers fast and accurate information to assist designated broker and their designees with day-to-day legal questions that may arise. More information on page 11 or visit www.aaronline.com/manage-risk/legal-hotline/

A SHOUT OUT

"... to Arizona REALTORS® and the Legal Hotline. I've used it at least three times in the last month alone to save deals, protect my clients, and our agents.

This is a ridiculously valuable member benefit compared to what just one of those calls may have cost and that's just one of the many benefits.
Thank you!" — Evan Fuchs

Are Your Agents' Social Media Ads Breaking the Law?

BY DR. LEE DAVENPORT

A social media marketing quiz reveals that some agents' online marketing campaigns may be putting the agents and their brokerage at risk.

Your agents have taken all of the required pre- and post-licensing courses. They are current on the REALTOR® Code of Ethics class requirements. Some may even religiously attend your sales meetings. That means they can't possibly do anything to jeopardize their career or your firm, right? Think again. Even the most studious agents can have mental lapses.

I published a quiz on my business website during the month of August 2019, to gauge real estate agents' social media marketing knowledge. The quiz, which closed on Aug. 29, was referenced on the YPN Lounge blog, and I emailed it to agents around the country (the quiz was not written, reviewed, or distributed by NAR). Results from the 1,830 responses highlight some of the slips agents are making in their daily business activities.

Find out what mistakes are most common and how to keep your team members away from a legal hot mess.

Question 1. Do your social media posts or descriptions make people feel unwelcome? For example, do you say, "No _____" and then fill in the blank with exclusions like Supplemental Security Income, children, etc.?

Broker Beware: While 94% of respondents said "never," what about the remaining 6%? What if one is on your team? Nearly all respondents who said they'd excluded certain groups said they did so because it was an option on the marketing platform they were using. If your neck muscles are starting to tense up, it's for good reason. Let's redirect this stress by calling out the marketing platforms that have options that allow agents to potentially exclude protected classes under federal and state fair housing laws. You may already know that the U.S. Department of Housing and Urban Development is suing Facebook, saying the site's ad platform enables discrimination. Agents shouldn't wait for HUD to start examining their marketing efforts before ensuring their social media advertising complies with federal and state laws.

Question 2. Are you hiding or omitting your brokerage name on social media posts?

Broker Beware: More than 27% of the respondents admit that they are not including their brokerage name in their marketing. This is a direct violation of the REALTOR® Code of Ethics (see article 12) and likely a violation of your state's laws and regulations, depending on where you live. Agents should review social media ads and posts to ensure all necessary information is included. You may want to consider sharing tips about what's required under your state's laws in an email to your team.

Question 3. Do you like to specialize in finding real estate clients around their seasons of life?

Broker Beware: Slightly more than 30% of respondents are doing just that. This specialization may not be a problem, as long as agents aren't engaging in any discriminatory behavior that violates state or federal laws or the Code of Ethics while marketing a property. For example, familial status is a federally protected class, age and military status are protected in some states' fair housing laws, and gender identity and sexual orientation are protected in the REALTOR® Code of Ethics.

Question 4. If someone informs you that he or she feels unwelcome by your social media post or video, have you ever responded, "That's what my seller told me to write"?

Broker Beware: The vast majority—96% of respondents—said "never," but the remaining 4% responded yes because they say their duty is to the client. While agents do have a duty to their clients, that does not supersede their duty to obey the law. When we make individuals, particularly those who belong to a protected class, feel unwelcome, we could be inviting trouble. It's our job as real estate professionals to educate clients on our duties and responsibilities to them *and* (not or) the law.

Question 5. Have you used filters or staging apps for your real estate listing photos without disclosing that an app was used?

Broker Beware: While about 90% answered "never," the remaining 10% could cause needless headaches for themselves. The Code of Ethics requires a "true picture" in all representation, including images, and REALTORS® may not exaggerate, misrepresent, or conceal pertinent facts relating to a property. Be careful that your use of filters or staging apps doesn't create anything other than a "true picture" in your listing photos.

Question 6. To generate higher quality leads, do you currently select social media targeting that allows you to sort by race, religion, familial status, color, handicap, national origin, or sex? →

Broker Beware: More than 7% said "yes." This is 2019. While reading the responses, I felt like a DeLorean should drive by to get me out of the 1950s. Agents have to be cognizant that they are not discriminating in their marketing, which would likely violate state and federal fair housing laws. Even more shocking, almost a third of those respondents indicated that they chose options to exclude simply because it was an option on the marketing platform. Simply because an option is available does not mean it is appropriate or legal to use. This is the second time in this short seven-question survey that this was respondents' prevailing reason for violating the law.

Agents may be on "autopilot" when it comes to legal areas that require attention and care. It makes me wonder, what else may be short-changed (perhaps time for more quizzes)? As I suggest after Question 1, agents should ensure their marketing complies with federal, state, and local laws.

Question 7. Complete this sentence: Ignorance of the law is _____.

Broker Beware: In this multiple-choice question, 97% of the survey participants selected "no excuse." However, the remaining 3% chose "not a big deal because I am sure I will get a warning first." This attitude is a liability both to the agent and to his or her firm. Agents and teams should be less—shall we call it "creative"—in their marketing and have a mindset of asking for permission rather than assuming forgiveness will be an option.

Broker-to-Broker is an information network that provides insights and tools with business value through timely articles, videos, Q&As, and sales meeting tips for brokerage owners and managers. Get more Broker-to-Broker content here.

About the Auther

Dr. Lee Davenport is an Atlanta-based real estate coach and blogger who has been featured in REALTOR® Magazine and the Huffington Post, to name a few. She trains real estate agents and brokers across the country on how to work smarter with technology. Join Lee's free RE Tech Insider's Club at LearnWithLee.REALTOR for tips and tools to help your business thrive. Follow Lee on YouTube and search the #LearnWithLee hashtag.

Buyer Considerations When Entering into a Contract for a New Home to be Constructed

EXCERPT FROM: *ARIZONA REAL ESTATE A PROFESSIONAL'S GUIDE TO LAW AND PRACTICE*. WRITTEN BY ARIZONA REALTORS CEO K. MICHELLE LIND, ESQ.

When a buyer decides to buy a new home that has yet to be constructed, there are many important decisions to make, such as design, flooring, countertops and colors. With all these decisions and all the excitement of buying a new home, the legal issues are often forgotten or ignored. However, there are a few issues that demand a buyer's attention. For example, before signing a new home contract, buyers should do the following:

Read the Subdivision Public Report

[T]he purpose of the public report is to disclose important information about the subdivision. Therefore, a new home buyer should always read the public report before signing a purchase contract.

Read the CC&Rs and Other Homeowners Association Rules

Most new homes are in a homeowners association. Covenants, Conditions and Restrictions (CC&Rs) generally empower a homeowners association to control certain aspects of home's use. The CC&Rs may be very strict, especially those addressing landscaping, RV parking, and play equipment. It is essential that the buyer review and agree to these restrictions prior to entering into a contract; afterwards is generally too late. In addition to the CC&Rs, a homeowners association may be governed by articles of incorporation, bylaws, rules and regulations, and often architectural control standards, which should also be reviewed.

Read the Purchase Contract

Buyers must understand the importance of reading the purchase contract carefully and should be advised to keep the following questions in mind:

- Who will hold the earnest money and other advance deposits? If possible, all earnest money and other advance deposits should be held by the escrow company. If the deposits are held by the seller, the buyer may have a difficult time recovering those funds in the event the seller fails to perform.

- Does the contract contain a financing contingency for the benefit of the buyer? Unless the buyer plans to pay cash, the contract should contain a financing contingency stating that the contract is contingent upon the buyer qualifying for a loan. If the buyer is unable to qualify for a loan to buy the home, the buyer should be entitled to a return of the earnest money. Some new home contracts provide only that the seller has the right to cancel the contract if the buyer fails to qualify for a loan, which does not protect the buyer.

- When will the home be completed? The seller should be asked to give a realistic estimate as to when construction will be completed. A realistic completion date is important so that the quality of the construction will not be compromised by a contractor who is rushing to complete the home. A realistic completion date will help the buyer plan the move and avoid unanticipated housing costs. If the completion date is critical, the buyer may be able to negotiate a contract provision in which the seller agrees to pay a certain dollar amount to the buyer per day for late completion.

- What are the buyer's remedies if there is a problem? The remedies for problems may be specifically set forth in the contract. The contract should direct the buyer to the Arizona Registrar of Contractors (ROC), a governmental agency that regulates home builders. This agency can assist buyers with some construction defects. The contract may require that any disputes be resolved by binding arbitration, which may eliminate the right to a trial by judge or jury and the right to appeal.

The Arizona REALTORS® Purchase Contract for New Home (With Lot) was removed from the Association's library of forms in 2015. However, to assist members working with builders and/or clients in need of a new home purchase contract, Arizona REALTORS® maintains a list of real estate attorneys who can generate a new home construction contract or template for a very modest price. Any such contract or template can be tailored to fit the particular needs of the builder or client and can be reused in future transactions.

Please contact: jansteward@aaronline.com for the attorney referral list.

New Home Defects and Disputes A new home seller/builder is held to impliedly warrant that the construction has been done in a workmanlike manner and that the home is habitable. →

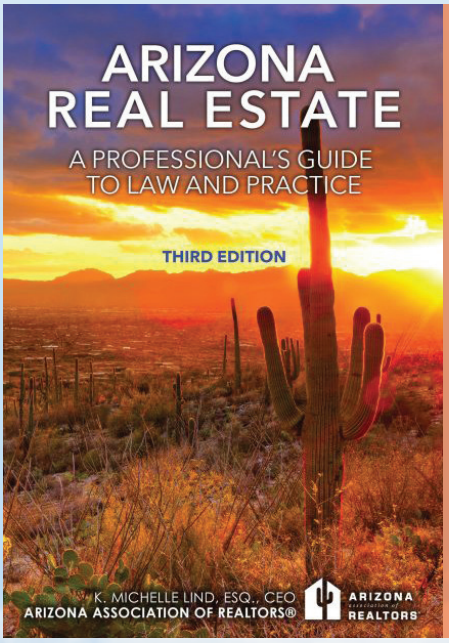
Columbia Western Corp., v. Vela, 122 Ariz. 28, 592 P.2d 1294 (App. 1979). The implied warranty arises from the contractual relationship between the builder and the purchaser. However, the implied warranty extends to subsequent purchasers of the home. Richards v. Powercraft Homes, 139 Ariz. 242, 678 P.2d 427 (1984). As to subsequent purchasers, the warranty is generally limited to latent defects that manifest after the subsequent owner's purchase, which were not discoverable had a reasonable inspection of the structure been made prior to purchase. Id.

Unless a new home contract contains a commercially reasonable alternative dispute resolution procedure, a buyer is required give the seller a notice and opportunity to cure a defect before bringing an action related to the design, construction, condition or sale of the home. A.R.S. §12-1361 et. seq. Most new home contracts include an alternative dispute resolution clause. "If the contract contains [an alternative dispute resolution procedure,] the procedures shall conspicuously appear in the contract in bold and capital letters and a disclosure statement in at least twelve-point font, bold and capital letters shall appear on the face of the contract and shall describe the location of the alternative dispute resolution procedures within the contract." A.R.S. §12-1366(C). The ROC may also be helpful in resolving any construction disputes. The purpose of the ROC is to assist consumers with any problems they may have with a licensed contractor. A home buyer may file a complaint at the ROC for:

- Poor workmanship
- Abandonment of the project
- Failure to perform as agreed
- Failure to pay subcontractors
- Violation of building codes
- False or misleading advertising

KEY POINTS TO REMEMBER

- A new home buyer should always read the public report before signing the purchase contract—afterwards is too late.
- A new home buyer should always read the CC&Rs before signing the purchase contract—afterwards is too late.
- Lot reservations may be taken before the public report is issued, but the buyer may cancel at any time.
- The buyer should be aware that if the earnest money is held by the new home seller/developer, rather than in an escrow company, the earnest money is at risk.
- Many disputes with new home seller/builders are subject to statutory notice and opportunity to cure provisions.



Arizona Real Estate: a Professional's Guide to Law and Practice – Third Edition. Now Available! Written by Arizona REALTORS® CEO K. Michelle Lind, Esq.

The third edition was released in March 2018, and is available in both paperback and eBook formats.For bulk paperback orders please contact Christina Smalls at christinasmalls@aaronline.com

Available for purchase on Amazon:
- Amazon Paperback Edition @ $17.92
- Amazon Kindle Edition @ $9.99

The eBook is fully searchable:
- Type in a word/phrase and the search box will bring up each occurrence and which page(s) it can be found
- You can copy and paste information from the eBook into an email or document
- You can highlight and bookmark areas so that you can easily refer back to those areas.

https://www.aaronline.com/manage-risk/azre-book/

Professional Standards Report to the Executive Committee

Lisa Paffrath, Risk Management Committee Chair, delivered the following Professional Standards report to the Executive Committee for the 2019 third quarter.

"There were a total of:

- **28** ethics complaints filed with **15** forwarded.
- **9** arbitration requests filed, **4** of which were forwarded for mandatory mediation.
- **13** ethics hearings held, **no** arbitration hearings, and **no** procedural reviews.

Incredibly, for 2019 we're on pace to break a record in regard to the number of ethics complaints filed and the number of ethics hearings held. Through three quarters (2019), we're on pace for 123 ethics complaints and 87 ethics hearings, which are both very large numbers.

- For the third quarter of 2019 our Ombudsman Program received:
  - **11** Requests. **9** were in the scope of the program, and of those **9**, **8** were successfully resolved.
- Our Mediation Program received:
  - **26** mediation requests in the third quarter of this year. **14** mediations were held, **10** of which were successful."

Agent Safety Alert Program (ASAP)

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

Unexpected Guest

While REALTOR® SAFETY MONTH has officially ended, keeping ourselves safe is a year-round responsibility. To wrap up the annual awareness campaign, Arizona REALTORS® President D. Patrick Lewis shares a frightening situation he experienced while showing a house. Click the image below to view the video.

ARIZONA REALTORS® LEGAL HOTLINE

A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The Arizona REALTORS® Legal Hotline is designed...

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

The Hotline is provided by the attorneys at Manning & Kass

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

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

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www.aaronline.com/legal-hotline

REAL SOLUTIONS. REALTOR® SUCCESS.

LEGAL HOTLINE

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

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

Listing Agreements Belong to the Brokerage, Not the Agent

FACTS: The agent, who had 18-active listings, severed with her brokerage firm and joined a competing brokerage firm. The agent has demanded that the designated broker from her original firm "transfer" all the listings to her new firm.

ISSUE: Is the designated broker required to "transfer" all the listings?

ANSWER: See discussion.

DISCUSSION: Generally speaking, the listings belong to the brokerage firm, not the agent. However, the independent contractor agreement between the brokerage firm and agent may address what happens when an agent severs her relationship with the brokerage firm. Assuming that the independent contractor agreement does not obligate the broker to do so, the designated broker is under no obligation to "transfer" the listings to the agent at her new brokerage.

Buyer Can Generally Assign Contract Rights

FACTS: After commencement of the purchase contract and just prior to the close of escrow, the buyer informed the seller that the buyer was unable to close escrow. The seller provided a three-day cure period notice. Within the three-day cure period, the buyer attempted to cure by assigning his right under the purchase contract to the buyer's private investor. The buyer has provided, pursuant to the contract, a $25,000 earnest deposit. The seller intends on rejecting the buyer's attempt to cure by way of an assignment.

ISSUE: Can a buyer cure a potential breach of the purchase contract by assigning the purchase contract to another buyer who can meet the terms and conditions of the purchase contract?

ANSWER: See discussion.

DISCUSSION: The seller and the buyer are the only parties to the purchase contract. However, in Arizona, the general rule is that a contract for the sale of real property is assignable unless the contract expressly states otherwise. Therefore, generally the seller cannot reject the assignment of the purchase contract so long as it is reasonable to believe that the new buyer (assignee) is capable of closing escrow pursuant to the terms and conditions of the purchase contract.

The Buyer is Not Obligated to Sign the Seller's Property Disclosure Statement

FACTS: The buyer and seller executed the standard Arizona REALTORS® Residential Purchase Contract. The seller timely provided a Seller's Property Disclosure Statement ("SPDS") to the buyer. The buyer, however, refuses to sign the SPDS and provide it to the seller.

ISSUE: Is the buyer obligated to sign the SPDS and return it to the seller?

ANSWER: See discussion.

DISCUSSION: Pursuant to the Disclosure Section of the contract, the seller is required to provide a SPDS to the buyer within three days after contract acceptance. However, the contract does not obligate the buyer to sign the SPDS nor return it to the seller. Thus, the buyer is under no obligation to do so. Even if the buyer does not sign the SPDS, the time to disapprove any items noted therein is five days after the buyer's receipt of the SPDS.

Note, as a risk reduction tool for brokerage firms involved, they should encourage the buyer to sign the SPDS acknowledging receipt of the form.

Listing Agent Must Disclose Co-Broke Offering to Seller

FACTS: The listing agent, when filling out the listing agreement, does not disclose the amount of the co broke

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offering he will be making in the Multiple Listing Service. The seller inquired as to how much a buyer's agent would be paid on a successful closing but the listing agent refused to disclose that information.

ISSUE: Is the listing agent obligated to advise the seller of the amount of the co-broke offering?

ANSWER: See discussion.

DISCUSSION: The listing agent owes a fiduciary duty to the seller. Included in that fiduciary duty is the obligation of disclosure and accounting. The listing agent therefore has an obligation to disclose the amount of the co broke offer to the seller.

A Landlord May Treat A Residential Rental as Abandoned Under Certain Circumstances

FACTS: The tenant has been absent from the residential property for at least two weeks and the landlord believes that the tenant has abandoned the premises.

ISSUE: Has the tenant abandoned the premises pursuant to the Arizona Residential Landlord and Tenant Act?

ANSWER: See discussion.

DISCUSSION: Because the tenant's personal property remains in the unit, a finding of abandonment under the Landlord/Tenant Act requires:

1. The tenant has been absent from the unit, without notice to the landlord, for at least seven days;
2. Rent is more than ten days past due; and
3. There is no reasonable evidence other than the tenant's personal property, that the tenant is occupying the residence. See A.R.S. § 33-1370(J).

Assuming that the aforementioned elements are established, the tenant will be deemed to have abandoned the property under the Arizona Residential Landlord and Tenant Act.

Landlord Must Hold Tenant's Abandoned Personal Property for 14 Days

FACTS: The residential tenant abandoned the property as defined in the Residential Landlord and Tenant Act. However, the tenant left all of his furniture, electronics and clothes in the residence.

ISSUE: May the landlord remove the personal property from the residence so he can rehabilitate and re-rent the property to a subsequent tenant.

ANSWER: See discussion.

DISCUSSION: After a tenant's abandonment, the landlord must hold the tenant's personal property for a period of 14 days, either in the residence or at a storage facility. *See* A.R.S. § 33-1370(F). If, after notice, the tenant takes no action to recover the personal property for 14 days, the landlord may either sell the property and apply the proceeds to outstanding rent or donate the personal property to charity. *Id*.

Cure Notice Must be Delivered to Buyer Through Agent

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

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

ISSUE: Did the buyer receive a valid Cure Notice?

ANSWER: No.

DISCUSSION: Pursuant to Section 7a of the Residential Resale Real Estate Purchase Contract: If a party fails to comply with any provision of this Contract, the other party shall deliver a notice to the non-complying party specifying the non-compliance.

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

Advertising Must Identify the Brokerage Involved

FACTS: The brokerage contracts with a broker who works closely with a private investor. The private investor intends to purchase a billboard that reads as follows: "Will buy your home for cash call [800 number]." The investor intends to have the eight hundred number go directly to the broker's phone number.

ISSUE: Is this a violation of the Arizona Department of Real Estate advertising requirement?

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ANSWER: Yes.

DISCUSSION: Advertising means "the attempt by publication, dissemination, exhibition, solicitation or circulation, oral or written, or for broadcast on radio or television to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in [property] . . . and any photographs, drawings or artist's presentations of physical conditions or facilities existing or to exist on the property." A.R.S. § 32-2101(2). The billboard is a solicitation for those interested in selling their property for cash.

The Commissioner's Rules, A.A.C. R4-28-502, sets forth the rules for all advertising. A salesperson or broker acting as an agent is prohibited from advertising property in a manner which implies that no salesperson or broker is taking part in the offer for sale or lease. Further, all advertising must identify in a "clear and prominent manner the employing broker's legal name or the dba name contained on the employing broker's license certificate." The billboard links potential sellers to a brokerage without (1) indicating that a salesperson is involved in the transaction; and (2) without clearly identifying the brokerage involved. Accordingly, this is a violation of the Commissioner's rules on advertising.

Check Do-Not-Call Registry Before Calling FSBO

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

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

ANSWER: Yes.

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

Cure Notice Sent Via Text Message Is Improper

FACTS: During a transaction, a listing agent sent an image of a Cure Period Notice via text message to the buyer's agent.

ISSUE: Can a Cure Notice be provided by text message?

ANSWER: No.

DISCUSSION: Section 8m of the Residential Resale Real Estate Purchase Contract states: "Unless otherwise provided, delivery of all notices and documentation required or permitted hereunder shall be in writing and **deemed delivered** and **received** when: (i) hand-delivered; (ii) sent via facsimile transmission; (iii) sent via electronic mail, if email addresses are provided herein; or (iv) sent by recognized overnight courier service . . ."

As such, the listing agent did not deliver the Cure Period Notice properly. The listing agent should proceed with sending the Cure Notice again via one of the options listed above.

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.

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