

# BROKER & MANAGER

QUARTERLY

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# ETHICS

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# BROKER & MANAGER

FIRST QUARTER 2021 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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## NEW MULTIPLE LISTING SERVICE FORMS RELEASE

In an effort to standardize listing agreements in Arizona, the multiple listing services (MLSs) reached out to the Arizona REALTORS® Risk Management Committee and requested that the Arizona REALTORS® draft Listing Agreements for release to the MLSs for their consideration.

As a result of that request, by way of a Workgroup chaired by Mimi Lundy<sup>[1]</sup>, the Arizona REALTORS® drafted the following three NEW forms: (1) **Residential Listing Contract Exclusive Right to Sell/Rent**; (2) **Residential Listing Contract Exclusive Agency** (collectively "Listing Agreements"); and (3) **Listing Contract Addendum**. The Listing Agreements and Listing Contract Addendum were provided to each MLS on February 1, 2021. Their use of the forms is not mandatory, meaning each MLS can decide for itself if and when to adopt them. Please therefore contact your MLS to confirm whether it has elected to adopt the new forms.

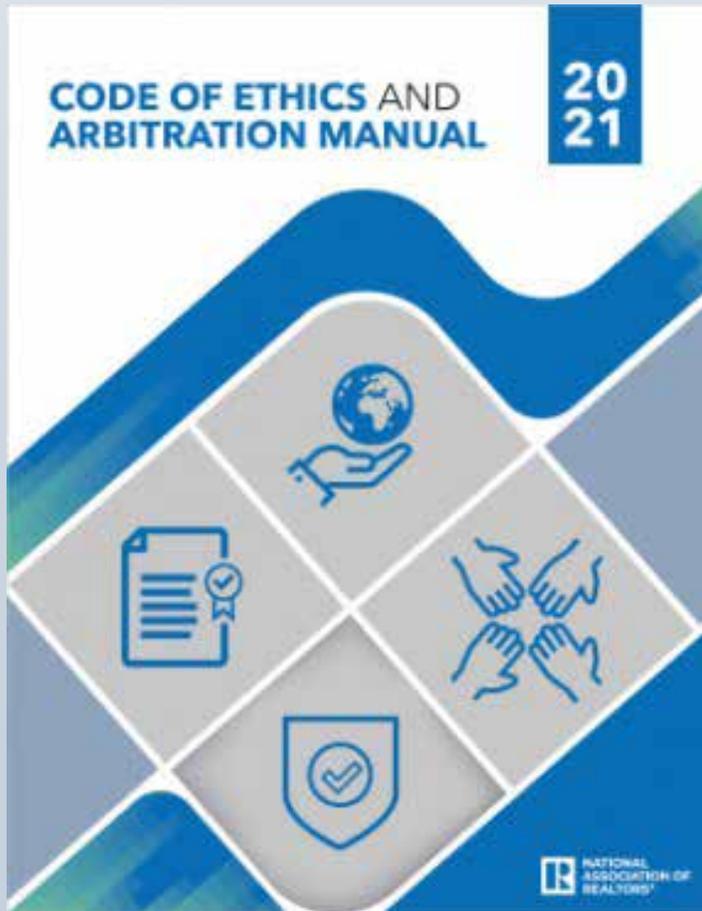
**NOTE:** *Frequently asked questions for the forms were provided to each MLS to share with its members at the time the forms are rolled out should they choose to utilize the new Listing Agreement and Listing Contract Addendum*

[1]Mimi Lundy would like to thank the other members of the workgroup who represented each of the MLSs throughout the state of Arizona and generously volunteered their time to draft these forms. 🙌



# CODE OF ETHICS APPLIES TO DISCRIMINATORY SPEECH AND CONDUCT

REALTORS® stand for and believe in equal housing opportunities and fair housing for all and are dedicated to fostering a community of inclusion and diversity. Due to the National Association of REALTORS® (NAR) receiving an unprecedented number of complaints regarding discriminatory speech and conduct online this year, REALTORS® rallied to halt this type of behavior. And, because “That’s Who We R,” effective November 13, 2020, the NAR Board of Directors passed multiple recommendations to extend the application of Article 10 of the Code of Ethics to discriminatory speech and conduct beyond a REALTORS® real estate practices.



The changes to the Code of Ethics and Arbitration Manual are as follows:

1. Policy Statement 29 has been revised to apply to all REALTORS® activities; and
2. A new Standard of Practice (SOP) 10-5 under Article 10 states:

*REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.*

In conjunction with the adoption of SOP 10-5 and revised Policy Statement 29, a new [Appendix XII to Part Four of the Code of Ethics and Arbitration Manual](#) (Appendix) was also approved by the Board of Directors so that associations across the country will have guidance to ensure the uniform application of SOP 10-5 and Policy Statement 29.

Additionally, effective January 1, 2021, the definition of “public trust” will be expanded to include discrimination against the protected classes under Article 10 of the Code of Ethics and all fraud. More specifically, the definition of “public trust” currently includes demonstrated misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm.

The approved change to “public trust” expands the definition to include all discrimination against the protected classes under Article 10, and all fraud. As a result, Arizona REALTORS® will now be required to share with the Department of Real Estate final ethics decisions that find a REALTOR® in violation of the Code of Ethics in instances involving real estate-related activities and transactions where the public trust, as expanded, was deemed to have been violated.

For an in-depth understanding of these changes, please see NAR’s [FAQs](#). 

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

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# BUYER-BROKER EXCLUSIVE EMPLOYMENT AGREEMENT

Document updated:  
February 2021



The pre-printed portion of this form has been drafted by the Arizona Association of REALTORS®. Any change in the pre-printed language of this form must be made in a prominent manner. No representations are made as to the legal validity, adequacy and/or effects of any provision, including tax consequences thereof. If you desire legal, tax or other professional advice, please consult your attorney, tax advisor or professional consultant.



4. **Employment:** Broker agrees to:
5. a. locate Property meeting the following general description:
6.  Residential  Land  Commercial  Other: \_\_\_\_\_ (“Property”)
7. **within the following geographical area(s):** \_\_\_\_\_ ;

[click here to view](#)

**SAMPLE BUYER-BROKER EXCLUSIVE EMPLOYMENT AGREEMENT**

On February 1st, following approval by the Arizona REALTORS® Risk Management Committee and Executive Committee, a revised Buyer-Broker Exclusive Employment Agreement (BBEEA) was released for use by all members. The revised form will contain one substantive change, found on line seven, which will now appear as follows:

The purpose of this change is to allow the buyer and their agent to insert a geographical limitation, should they choose to do so, meaning that the Buyer-Broker’s exclusive employment will be limited to that specific area.

## FREQUENTLY ASKED QUESTIONS

**Q1.** Must the buyer and their agent insert a geographical limitation on line seven?

**A1. No.** The insertion of a geographical limitation is not mandatory and line seven should be completed only if the buyer and their agent mutually agree to limit the geographic scope of the exclusive representation.

**Q2.** What if line seven is left blank?

**A2.** If line seven is left blank, the form will function as it previously did, meaning that there will be no express geographic limit to the scope of the exclusive representation.

**Q3.** What are some examples of “geographical area(s)” that could be written on line seven?

**A3.** Any well-defined geographical area agreed to by the buyer and their agent is acceptable. Examples would be the State of Arizona, a specific county, a specific city or town, or even a specific neighborhood or housing development.

**Q4.** The buyer and their agent mutually agree to limit the geographic scope of the exclusive representation to Maricopa County and therefore write in “Maricopa County” on line seven of the form. Thereafter, the buyer purchases a home in Tucson using a different agent. Does the buyer owe a commission to the agent with whom they executed the BBEEA that limited the scope of the Agreement to Maricopa County?

**A4. No.** Using the BBEEA, the buyer and their agent mutually agreed to limit the scope of the exclusive representation to Maricopa County. Because the buyer purchased a home in Pima County, no compensation is owed to the Maricopa County agent.

**Q5.** Because the revised BBEEA allows the buyer and their agent to choose the geographic scope of the representation, can the agent practice in a location in which they are unfamiliar and lack expertise?

**A5.** A.A.C. R4-28-1101(H) prohibits salespersons and brokers from providing professional services concerning a type of property or service that is outside the salesperson’s or broker’s field of competence without engaging the assistance of a person who is competent to provide those services, unless the salesperson’s or broker’s lack of expertise is first disclosed to the client in writing and the client subsequently employs them. Similarly, Article 11 of the National Association of REALTORS® Code of Ethics states that “REALTORS® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client.”

# 5 Quick Facts & Tips About the SPDS to Keep in Mind

1

## FACT:

Use of the Arizona REALTORS® Residential Seller's Property Disclosure Statement (SPDS) is not mandated by Arizona law. However, Sellers are legally required to disclose known facts materially affecting the value of the property that are not readily observable and are not known to the buyer.

**TIP:** Sellers should always use a SPDS as failure to do so makes it more likely that they will inadvertently fail to disclose a material fact.

2

## FACT:

Even if a buyer waives receipt of a SPDS, the seller is still bound by their legally mandated disclosure obligations.

**TIP:** In the event a buyer agrees to waive the SPDS, it is recommended that the buyer's agent provide them with a blank version of the form for their review.

3

## FACT:

Although the seller has never lived in the home, they are still legally required to disclose what they know about the property.

**TIP:** In a traditional "fix and flip," the seller does not live in the home. However, it is still critical that they disclose all they know, including the repairs and upgrades that they performed.

4

## FACT:

If utilizing the Arizona REALTORS® Residential Resale Real Estate Purchase Contract, the seller contractually agrees to deliver a completed SPDS to the buyer within three days of contract acceptance.

**TIP:** If the seller fails to deliver the SPDS within three days after contract acceptance, the disapproval period for those items is the end of the inspection period or five days after receipt of the SPDS, whichever is later.

5

## FACT:

By law, sellers are not obligated to disclose that the property is or has been: (1) the site of a natural death, suicide, homicide or any other crime described as a felony; (2) owned or occupied by a person exposed to HIV, or diagnosed with AIDS or any other disease known to be transmitted through common occupancy of real estate; or (3) located in the vicinity of a sex offender. See A.R.S. § 32-2156.

**TIP:** Although the statute does not obligate the seller or brokers to disclose such issues, if asked, a seller must answer truthfully or state that the information will not be disclosed.



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# NAR-DOJ AGREEMENT REGARDING MLS RULES



NATIONAL  
ASSOCIATION *of*  
REALTORS®



THE UNITED STATES  
DEPARTMENT *of* JUSTICE

In November of 2020, the National Association of REALTORS® (NAR) notified its members of the fact that it had been cooperating with the United States Department of Justice (DOJ) to develop rules ensuring that the amount of compensation offered to buyer's agents for each MLS listing be made publicly available.

At the time, NAR explained that the exact language had yet to be finalized, leaving the question as to when the new rules would be released and implemented. NAR has since clarified that there are multiple legal steps that must first occur before the rules can take effect. For example, a Federal Court will need to formally certify NAR's agreement with DOJ, a process that takes at least two months, sometimes longer. Thereafter, the new rules will need to be approved by the NAR Board of Directors.

Although the precise timing remains uncertain, it will not happen immediately and there will be ample time for REALTORS® to read and consider the rules before they

must be followed. Furthermore, most of the changes will just explicitly state what is already the spirit and intent of NAR's Code of Ethics and MLS policies regarding providing information about commissions and MLS participation. NAR has promised to keep members apprised of the status of the new rules and the Arizona REALTORS® will be sure to do the same. 📌

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

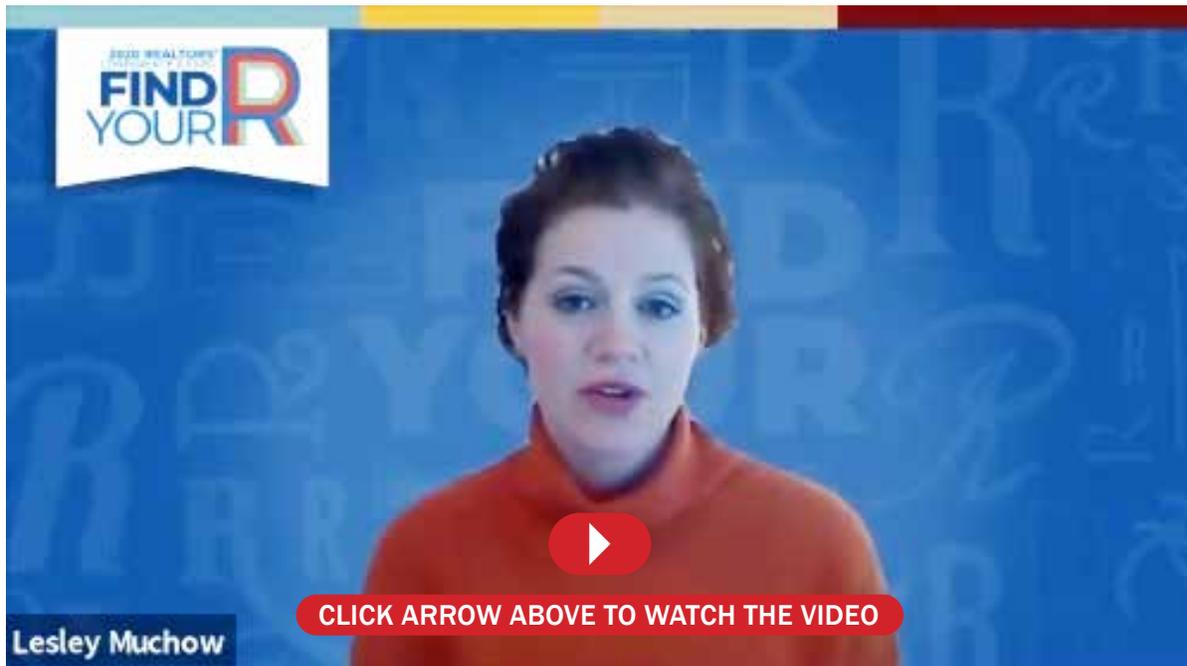
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Vice President, Deputy General Counsel of the National Association of REALTORS® discusses the latest developments and what they mean for Arizona REALTORS®





# NATIONAL ASSOCIATION *of* REALTORS®

## **What are the new rules and what will change?**

Although final language is still being determined, most of the changes seek to more explicitly state what is already the spirit and intent of NAR's Code of Ethics and MLS Policies regarding providing information about commissions and MLS participation.

In accordance with the MLS system's long-standing focus on creating an efficient, transparent marketplace for home buyers and sellers, the amount of compensation offered to buyers' agents for each MLS listing will be made publicly available. Publicly accessible MLS data feeds will include offers of compensation, and buyers' agents will have an affirmative obligation to provide such information to their clients for homes of interest.

The rule changes re-affirm that MLSs and brokerages, as always, must provide consumers all properties that fit their criteria regardless of compensation offered or the name of the listing brokerage.

While NAR has long encouraged buyers' agents to explain how they expect to be paid, typically through offers of cooperative compensation from sellers' agents, there will be a rule that more specifically states that buyers' agents cannot represent that their services are free to clients.

The new rules will require, with the seller's prior approval, a licensed real estate agent will have access to the lockboxes of properties listed on an MLS even if the agent does not subscribe to the MLS.

## **Why are you making these rule changes?**

While NAR disagrees with the DOJ's characterization of our rules and policies, and NAR admits no liability, wrongdoing or truth of any allegations by the DOJ, NAR has agreed to make certain changes to its rules to address the questions raised by the DOJ. By reaching this agreement, NAR will be able to remain focused on supporting our members as they preserve, protect and advance the American dream of homeownership.

## **Why did the DOJ challenge these rules?**

While we can't speak for the DOJ, these rule changes will further our policies designed to ensure fair and competitive real estate markets for home buyers and sellers. Although final language is still being determined, most of the changes seek to more explicitly state what is already the spirit and intent of NAR's Code of Ethics and MLS Policies regarding providing information about commissions and MLS participation.

## **Is this somehow an admission of liability or that we did something wrong?**

No. While NAR disagrees with the DOJ's characterization of our rules and policies, and NAR admits no liability, wrongdoing or truth of any allegations by the DOJ, we have agreed to make certain changes to our rules to address the questions raised by the DOJ. This allows NAR to remain focused on supporting our members as they preserve, protect and advance the American dream of homeownership.

## **Why implement these rule changes now?**

Our rules and policies have long sought to ensure fair and competitive real estate markets for home buyers and sellers, and we believe the Code of Ethics and other policies already empower consumers with information. We view these changes as more explicitly stating what is already the spirit and intent of the Code of Ethics and MLS policies regarding providing information about commission and MLS participation.

## **Why did NAR not tell members about the DOJ review before? How long was the DOJ investigating NAR?**

It is customary for organizations like ours to cooperate confidentially with the DOJ until the findings of the DOJ inquiry become apparent. It would not have been appropriate for us to divulge the inquiry, or our response, while the DOJ's inquiry was ongoing.

## **What are the next steps for NAR after entering the final judgment with the court?**

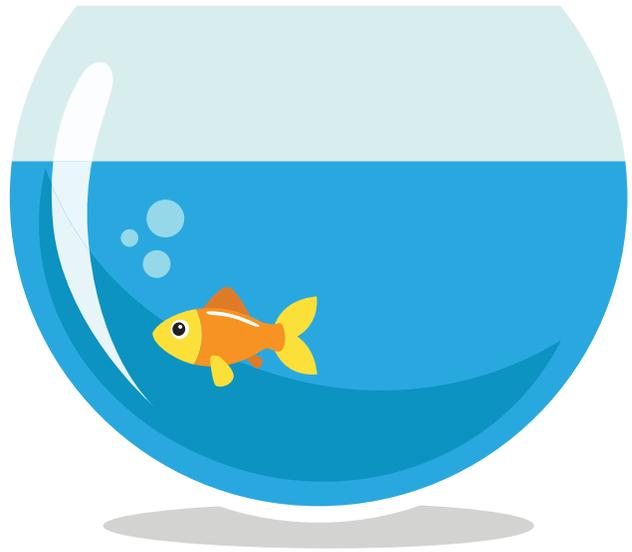
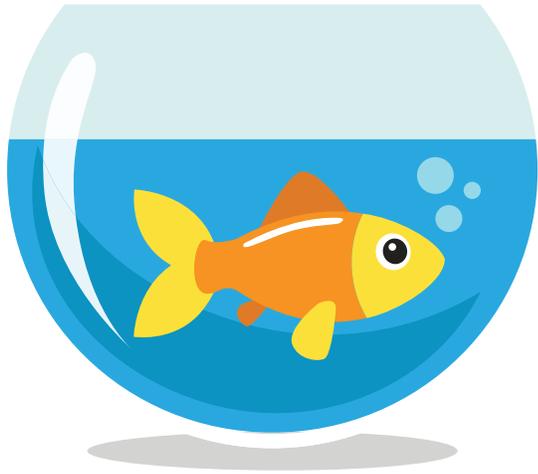
NAR will work with the DOJ to agree on exact rule changes, then the Board of Directors will have to approve the new rules. We anticipate that the new rules will take effect in the first quarter of 2021.

## **What are the roles and responsibilities of NAR, the DOJ and the Court to implement the rules? How does each group's procedure(s) differ?**

NAR will work with the DOJ to agree on exact rule changes, then the Board of Directors will have to approve the new rules. The Court reviews and approves the agreement, and then the new rules will be implemented. The DOJ will monitor our progress in implementing the rules and, once completed, NAR will confirm compliance to the DOJ quarterly.

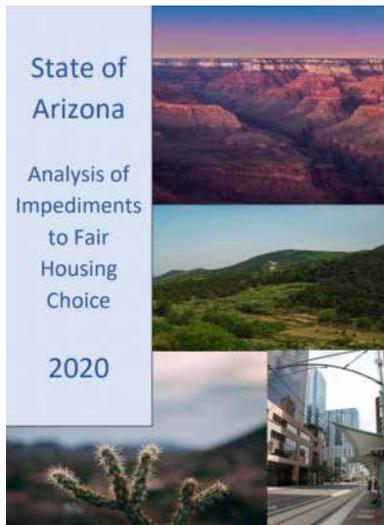
## **When will we see the final language on the rule changes?**

NAR will work with the DOJ to agree on exact rule language changes within 45 days, and we will provide them to our Board of Directors shortly thereafter. 📄



# ARIZONA ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE

Every five years, the Arizona Department of Housing (ADOH) researches and writes an Analysis of Impediments to Fair Housing Choice for submission to the U.S. Department of Housing and Urban Development (HUD). This document identifies the barriers to Fair Housing throughout the State as well as actions ADOH will undertake to reduce or eliminate the identified barriers. Completion of the Analysis of Impediments is also part of the State of Arizona’s requirement to affirmatively further Fair Housing in order to receive funding from the HUD Office of Community Planning and Development.



The State of Arizona’s most recent Analysis of Impediments to Fair Housing Choice was published in 2020 and reflects the State’s commitment to providing quality affordable housing opportunities for low- and moderate-income individuals and families regardless of race, color, religion, sex, national origin, familial status, or disability.

***Unfortunately, despite this commitment, a statewide survey, interviews with industry stakeholders, fair housing testing, as well as complaint and inquiry data all reveal that housing discrimination still occurs throughout Arizona.***

The HUD Fair Housing and Equal Opportunity Office reported 968 complaints in Arizona and 66 complaints in the Balance

of the State<sup>[1]</sup> between January 1, 2015 and July 18, 2019. Two-thirds of complaints (67%) were on the basis of disability. Familial status was a basis for 12% of complaints, and race or national origin were the basis in 6% of complaints. One in five complaints included retaliation (punishing or otherwise striking out against someone for filing a complaint).

Drilling down further, the issues leading to Fair Housing complaints revealed that 26% involved failure to make a reasonable accommodation; 16% involved discrimination in terms/conditions/privileges relating to rental property; 14% involved discriminatory terms, conditions, privileges, or services and facilities; and 11% involved discriminatory refusal to rent.

HUD’s records show that 66 Fair Housing complaints were closed between January 1, 2015 and July 18, 2019. Of these complaints, 27% were successfully conciliated or settled and an additional 9% were withdrawn with resolution, meaning that the parties reached an agreement pursuant to which the defendant provided appropriate relief. One half of complaints were found to have no cause.

As part of the Analysis of Impediments, surveys were conducted that further shed light on the prevalence and types of housing discrimination existing in Arizona. 87% of survey respondents believed that housing discrimination is occurring or likely occurring in their local area, with the belief that it primarily takes the following forms:

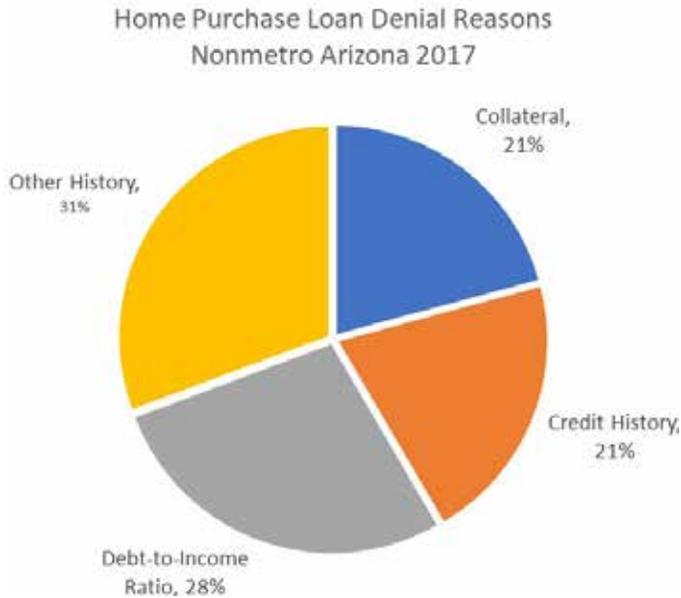
- 1. Refusing, discouraging, or charging more to rent an apartment or buy a home; and
- 2. Discrimination based on disability, including refusal to make a reasonable accommodation.

However, of those surveyed, 25% stated that even if they encountered or learned of housing discrimination, they would not know what to do or who to report it to.



## HOME PURCHASE LOAN DENIAL REASONS

Debt-to-income ratio was cited by lenders as the primary reason for 28% of home purchase loan denials, while credit history and collateral were each cited as the primary reason for 21% of denials. Debt-to-income ratio was more often cited as a reason for home purchase loan denial for minority borrowers than for White on-Hispanic borrowers.



Discrimination in lending was also revealed with minority applicants more likely to have their home purchase loan denied due to high debt-to-income ratio, and their refinancing loan denied due to work history than were White non-Hispanic borrowers. Research also pointed to aggressive high-cost lending in minority markets, which can increase a borrower's exposure to more expensive loans, decrease potential wealth accumulation, and increase the risk of future foreclosure. It was also determined that the rate of loan denial for female home purchase applicants was 1.3 times that of male applicants.

While all of these statistics are insightful, perhaps most important is that the results of the Analysis of Impediments are used to develop a Fair Housing Action Plan with measurable objectives to mitigate future housing discrimination and its effects. [👉](#)

### Specific Steps and Entire Analysis

[1] Balance of State data includes areas that receive direct Community Development Block Grant funding from HUD, often referred to as "entitlement communities" and "urban counties."

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#### ABOUT THE AUTHOR

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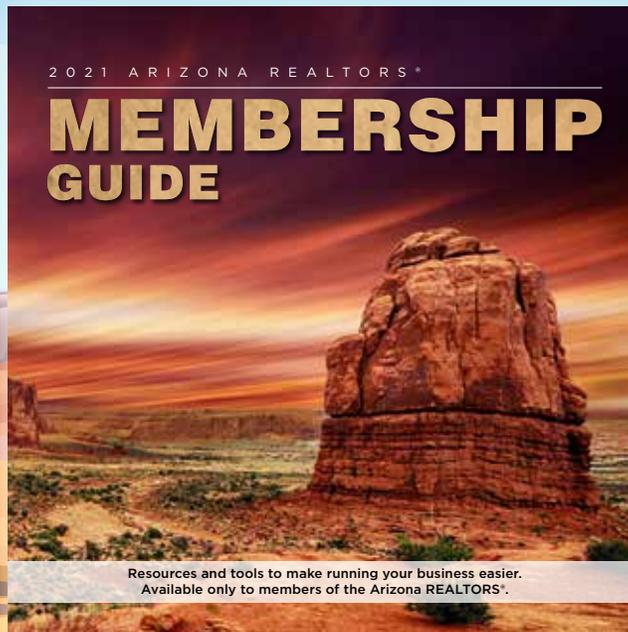
A licensed Arizona attorney, Scott is General Counsel & Assistant CEO for the Arizona REALTORS® serving as the primary legal advisor to the association.

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## 2021 MEMBERSHIP GUIDE

The annual guide provides an update of the services and resources available to members, as well as a review of last year's accomplishments and this year's leadership team.

**CLICK COVER IMAGE (BELOW) TO VIEW COMPLETE GUIDE**



# GIVE YOUR CLIENTS THE OPPORTUNITY TO JOIN IN THE FIGHT AGAINST HOMELESSNESS AT CLOSE OF ESCROW

The goal of the Arizona REALTORS® is to give every buyer and seller the opportunity to voluntarily donate \$25 (or more) to the Arizona Housing Fund at close of escrow to combat homelessness. All it takes is for you to ask your client to complete a simple one-page Escrow Donation Form and send it to the escrow company. The Escrow Company will distribute the donation to the Arizona Housing Fund at close of escrow.

You can customize the following sample email and send to your clients after the Inspection Period if you decide that is the best way to approach it:

Dear **Client Name**,

Before we get too close to closing, I wanted to ask if you would be willing to donate \$25 (or match my \$25 donation) to the Arizona Housing Fund at close of escrow.

As you know, homelessness is a serious problem in our state. Today, approximately 10,000 homeless Arizonans are searching for shelter because the existing housing for the homeless is always 100% full. The Arizona Housing Fund was founded to provide grants to build and manage additional supportive housing to fill this gap. <https://arizonahousingfund.org/>.

I would love to include you as one of my clients who donates to help the homeless. If you are interested, I have attached a donation form for your signature. Once signed, we will send the form to the escrow company, and your donation will be listed on your side of the Settlement Sheet.

Thank you for your consideration and for choosing me as your REALTOR®!



Bringing the Homeless Home.

## Escrow Donation Form

Agent's Name: \_\_\_\_\_ Office Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Title Company: \_\_\_\_\_  
Address: \_\_\_\_\_  
Escrow Officer: \_\_\_\_\_ Escrow Number: \_\_\_\_\_

I hereby authorize and instruct you to pay a donation to the Arizona Housing Fund in the following amount:

\$25.00 Residential Transaction Donation       \$100.00 Commercial Transaction Donation  
 Other      Amount: \_\_\_\_\_

Made payable to Arizona Housing Fund at Arizona Community Foundation on behalf of:

Name: \_\_\_\_\_  Buyer     Seller     Agent  
Address: \_\_\_\_\_

All contributions and a copy of this form shall be disbursed to:

Arizona Housing Fund at Arizona Community Foundation  
2201 E. Camelback Road, #405B  
Phoenix, AZ 85016  
Tax ID# 86-0348306

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Thank you for helping our homeless neighbors find a home for good. 100% of your donation will go to building affordable housing.

A donation has been made to the Arizona Housing Fund. The Arizona Community Foundation has exclusive legal control over the contributed assets. For tax reporting purposes, no goods or services were provided in exchange for this contribution. Please retain this copy to serve as your tax receipt for the above referenced donation.

Arizona Community Foundation | 2201 E. Camelback Rd, #405B | Phoenix, AZ 85016  
602.381.1400 | info@azfoundation.org | Tax ID: 86-0348306

The Arizona Housing Fund was founded to provide grants to other non-profits statewide to build and manage the much-needed Permanent Supportive Housing for the homeless. The Fund has no overhead costs because it is managed by the Arizona Community Foundation (a large non-profit established in the 1970s). Therefore, 100% of every dollar in the Fund goes directly to the qualifying non-profits.

Arizona REALTORS® know how to take on tough challenges and effectuate positive change in our communities. And, more than any other industry, REALTORS® understand the importance of a place to call home. Eliminating homelessness brings positive change not only to the individuals involved but to the community as a whole and for generations to come. 🏡

**Together REALTORS® can make a difference.**

# a look on the brighter side

The year 2020 was a difficult one. We faced unprecedented challenges and encountered obstacles that many of us never contemplated before the pandemic. And unfortunately, REALTORS® have not been immune to these difficulties. But as we look back at the real estate industry in 2020, there are positives and things to be grateful for.



**ENSURED** that Real Estate professions were designated an Essential Service.

## REALTORS® Deemed Essential

While many industries were shut down and unable to conduct business, the Arizona REALTORS® successfully lobbied the Governor to declare the practice of real estate an essential service. As a result, REALTORS®, lenders, escrow agents, appraisers and other real estate professionals were able to continue their business despite Governor Ducey's "Stay Home, Stay Healthy, Stay Connected" Executive Order.



## REALTORS® Showed Resiliency

Overcoming obstacles is often a key to success. This fact was demonstrated throughout 2020 by REALTORS® that changed their business model to put clients and customers at ease despite the presence of a highly contagious virus. Whether it meant conducting showings via Zoom, coordinating the use of a remote on-line notary, using electronic signatures to sign transaction documents, or converting open houses into appointment only showings, REALTORS® lead by example showing others how to conduct business while staying safe.



## The Importance of Home

COVID-19 restricted travel, limited outings and even caused some to work from home for extended periods of time. As a result, many Arizonans came to appreciate not only their own home, but the importance of everyone having a place in which they can feel safe and secure.

For what was unquestionably a difficult year, it turns out that our industry actually has a lot to be thankful for.



## New Home Development Soared

To increase inventory, new home construction is vital. Fortunately, in Fiscal Year 2020, the Arizona Department of Real Estate received a record number of applications from homebuilders seeking approval for a Subdivision Public Report. During the Fiscal Year, the Department processed over 1,000 applications, surpassing the previous ten-year high of 813.



## Mortgage Rates Continued to Drop

In December 2020, mortgage rates fell again, descending to a record low for the 15th time in the 2020 calendar year. As rates continued to move lower, millions of borrowers were able to save on their monthly mortgage payments while loan applications to purchase a home were 22% higher than in 2019. Amazingly, for the first time ever, mortgage rates dropped below 2.7% according to Freddie Mac's weekly Primary Mortgage Market Survey.

## REALTORS® Afforded Financial Relief

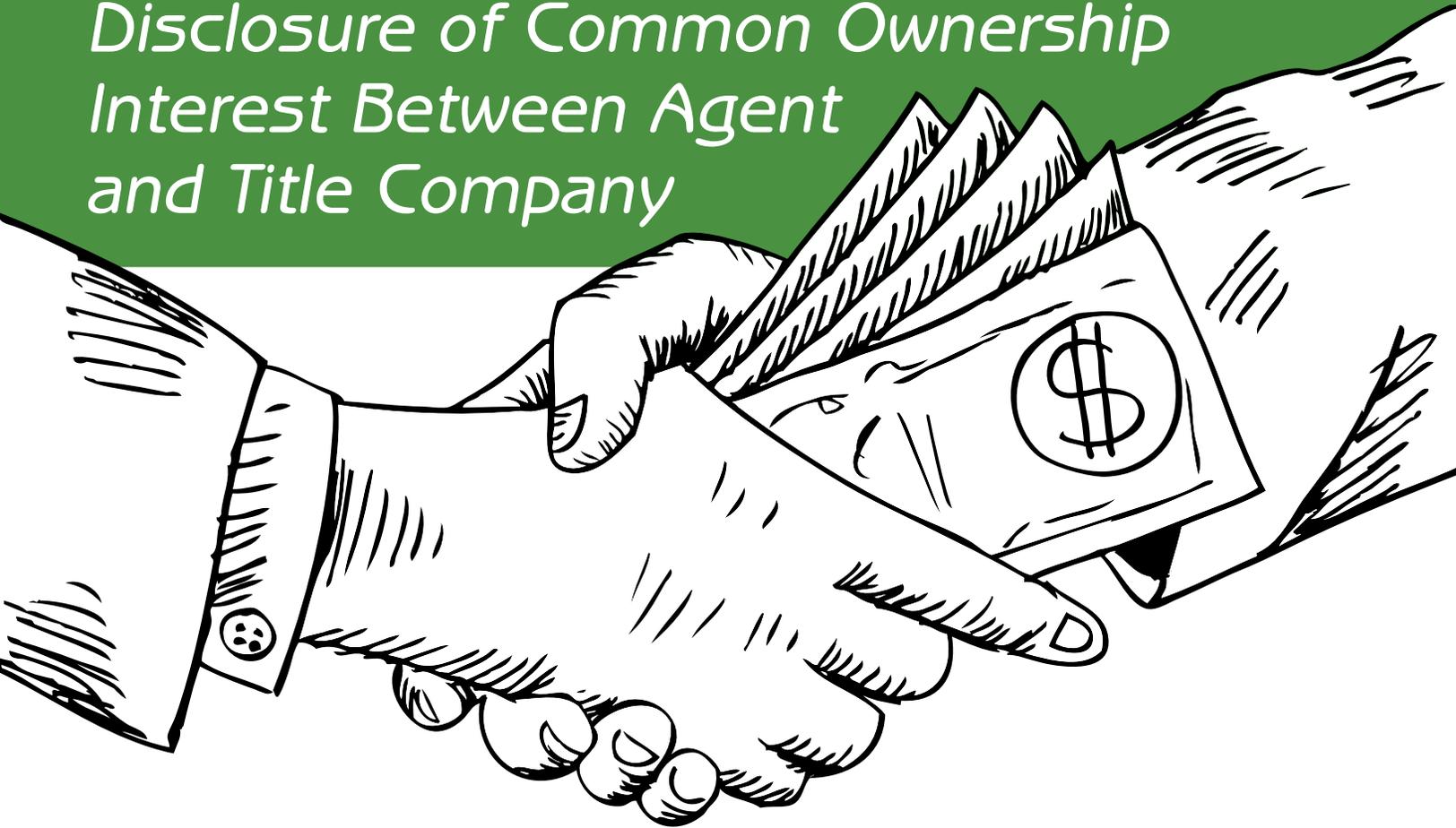
The COVID-19 pandemic posed unique financial challenges to REALTORS® across Arizona. REALTORS® were therefore fortunate that, even as independent contractors, financial assistance programs ranging from small business loans to pandemic unemployment assistance benefits were made available. Furthermore, thanks to the COVID-19 Arizona REALTORS® Relief Hotline, members were afforded access to free legal assistance to help them navigate and apply for financial assistance.



## REALTORS® not only Survived, They Thrived

One would expect that the harsh realities of COVID-19 forced many real estate licensees out of the business. However, that's simply not the case. From December 2019 to December 2020, Arizona Department of Real Estate records reveal a 2.06% increase in the number of active real estate licensees. Similarly, license renewal rates remained very high during the same period.

# Disclosure of Common Ownership Interest Between Agent and Title Company



A title company is a neutral third party employed to insure the title to the home and issue title-insurance policies to the buyer and mortgage lender. Title officers therefore research the history of the property to identify potential problems, claims, or discrepancies that may interrupt the transaction. Based on the fact that the title company is charged with formally transferring ownership from the seller to the buyer, it is critical that they serve in an impartial manner.

But what happens when the title company is owned, either in whole or in part, by the agent or broker representing a party in the transaction? Is disclosure of this fact required? Consider the following:

**FACTS:** Agent Joe Smith and Smith Title Company are affiliated businesses in that Agent Joe Smith owns a portion of Smith Title Company.

**SCENARIO:** Buyer is represented by Agent Joe Smith who recommends that Buyer utilize Smith Title Company in conjunction with Buyer's purchase of the real property. Relying on their agent's recommendation, Buyer identifies Smith Title Company on Line 117 of the Arizona REALTORS® Residential Resale Real Estate Purchase Contract.

**ISSUE:** Must Buyer and Seller be notified of the common ownership interest between Agent Joe Smith and Smith Title Company?

## DISCLOSURE TO BUYER

Section 8(a) of the Real Estate Settlement Procedures Act (RESPA) prohibits giving or accepting a "fee, kickback, or thing of value" for business referrals to settlement service providers. Nonetheless, Section 8(c)(4) of RESPA provides a "safe harbor" for affiliated businesses<sup>[1]</sup> provided that certain criteria are met. Foremost among the criteria is that the client is provided a written disclosure in a specific format identifying the nature of the joint affiliation and a written estimate of the charges generally made by the company to which the client is referred. This written notice must be given to the client at or before the time each referral is made.

In the scenario outlined above, Buyer is represented by Agent Joe Smith who is referring Buyer to Smith Title Company in which he has an ownership interest of one percent or more. Agent Joe Smith should therefore provide Buyer with a written Affiliated Business Arrangement Disclosure that:

- (i) identifies the consumer and the entity making the referral;
- (ii) discloses the business relationship between Agent Joe Smith and Smith Title Company;
- (iii) contains a signature line for the client;
- (iv) identifies the estimated charges;
- and (v) clearly states that the client is not required to use the affiliated company and that they are free to use any settlement service provider of their choice.



## DISCLOSURE TO SELLER

A.A.C. R4-28-1101(E)(4) states:

A real estate salesperson or broker shall not act directly or indirectly in a transaction without informing the other parties in the transaction, in writing and before the parties enter any binding agreement, of a present or prospective interest or conflict in the transaction, including that the salesperson or broker...has a financial interest in the transaction other than the salesperson's or broker's receipt of compensation for the real estate service.

This Administrative Rule is complemented by A.A.C. R4-28-1101(G), which states in part:

A salesperson or broker shall not accept any compensation, including rebate or other consideration, directly or indirectly, for any goods or services provided to a person if the goods or services are related to or result from a real estate transaction, without that person's prior written acknowledgment of the compensation. Once again considering the scenario outlined above, and assuming that Seller accepts Buyer's offer, Agent Joe Smith will: (i) have a financial interest in the transaction other than receipt of compensation for real estate services; and (ii) be indirectly compensated as a result of the services provided by Smith Title Company in the real estate transaction. Even though Agent Joe Smith does not represent Seller in the transaction, in order to comply with the aforementioned Administrative Rules, Agent Joe Smith should nonetheless disclose to Seller his ownership interest in Smith Title Company.

It should be noted that this scenario and subsequent analysis apply only to the stated facts in which the individual agent (or broker) maintains an ownership interest in the title company. In many instances, the nature of the joint ownership or affiliated business

relationship is far more complex and may involve multiple legal entities, holding companies, parent corporations, subsidiaries, and franchises. As the complexity of the arrangement increases, legal compliance becomes far more technical, thus falling outside the scope of this article. It is recommended that independent legal counsel be retained in all cases of affiliated business relationships and joint ownership of settlement service providers.

The laws surrounding these types of disclosures exist to protect the parties in a real estate transaction by allowing them to make informed decisions. The practice of real estate itself is driven by credibility and trust. Transparency in real estate transactions is therefore critical, especially for licensed professionals. Agents and brokers with common ownership interests that result in affiliated business relationships must therefore ensure that disclosure is made to all appropriate parties. 📌

[1]12 U.S.C. § 2602(7) defines the term "affiliated business arrangement" to mean "an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than one percent in a provider of settlement services and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider."

*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*

### ABOUT THE AUTHOR

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## Legal Scoops – Video Series

In addition to the Arizona REALTORS® Legal Hotline, **Mack in a Minute** and **Scott's Legal Scoops** address legal hotline topics through short videos. Each month, we post one short video. These are another great resource for your office meetings.



**Should Arizona REALTORS® consider Pre and Post-Possession agreements?**

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## IMPORTANT ANNOUNCEMENT REGARDING THE ARIZONA REALTORS® ELECTRONIC SIGNATURE MEMBER BENEFITS

At the Arizona REALTORS®, we recognize the importance of our members' ability to utilize a reliable and efficient electronic signature program. It is for this reason that we provide **Lone Wolf Transactions – Authentisign** as a member benefit. This platform allows all Arizona REALTORS® and their clients the ability to create and legally sign an unlimited number of documents using a wide range of devices.

While Authentisign will remain a member benefit, **effective Saturday, May 1st, 2021**, the Arizona REALTORS® eSign member benefit program will undergo the following changes.

Unlimited use Arizona REALTORS® eSign member accounts, those currently used by our members, will be converted to free, Constellation1 (creators of the eSign program) limited use accounts, **which will continue to allow members to access all of their files and current signing sessions, but will limit future free signing sessions.** The free plan offers 5 signing sessions per month but each session will only allow 1 document and 1 signer per session. Discounted rates for unlimited use access for Arizona REALTORS® members will be available starting at \$120 per year for individual users. Bulk and Broker accounts will also be available. Please contact Constellation1 sales to inquire about upgrade packages at [sales@constellationreg.com](mailto:sales@constellationreg.com). Support will be available for paid subscribers only and will be provided by Constellation1 by email at [esignsupport@realestatedigital.com](mailto:esignsupport@realestatedigital.com) or by phone at 1.800.503.5163.

Why is Arizona REALTORS® making this change?

- As previously mentioned, the Arizona REALTORS® already offers a member benefit electronic signature program that is built into our forms user interface, Lone Wolf Transactions – Authentisign. With that in mind, our Business Services and Technology Committee determined that a redundant electronic signing program, eSign, was no longer money well spent.

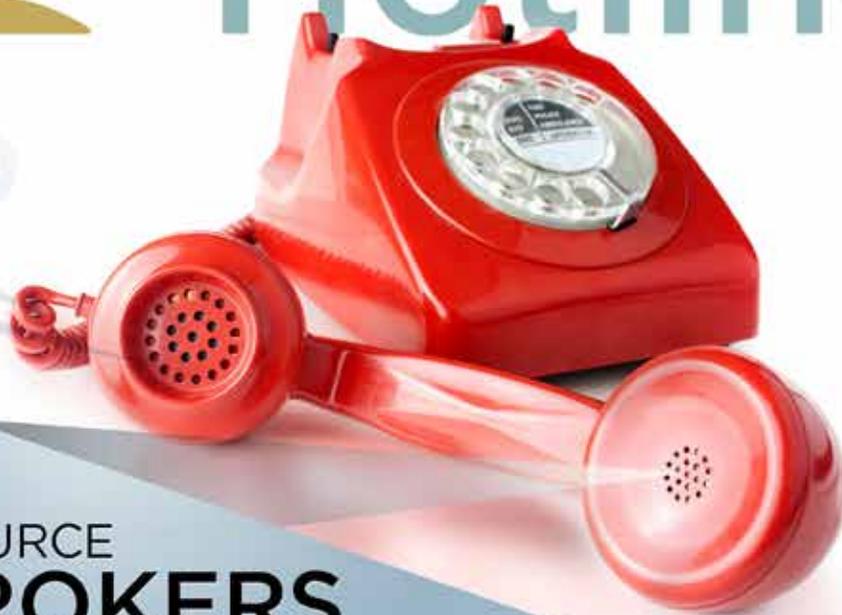
What is not changing...

- Access to members' eSign accounts will remain unchanged. Members can continue to login at [aar.esignonline.net](http://aar.esignonline.net) or utilize the Arizona REALTORS® Single Sign-On program to access eSign. Member login credentials will not be changed during the migration to the free limited use plan, and Agent Documents/Sessions will remain accessible for a period of seven years at no additional cost.
- Arizona REALTORS® will continue to provide Constellation1 with updates that will ensure proper templating of Arizona REALTORS® forms, in the same manner as is currently provided.

**Arizona REALTORS® will continue to provide unlimited use of the Lone Wolf Transactions – Authentisign program as a member benefit.** For more information or to start using Authentisign, please visit <https://www.aaronline.com/efficient-business-tools/transactiondesk/> or email our helpdesk at [support@aaronline.com](mailto:support@aaronline.com). 📩



# Arizona REALTORS® Legal Hotline



## A RESOURCE FOR **BROKERS** NEEDING LEGAL INFORMATION

The Arizona REALTOR® 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

### For More Information

Please contact Jamilla Brandt, Arizona REALTORS® Risk Management Coordinator, at [jamillabrandt@aaronline.com](mailto: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 REALTOR-ASSOCIATE® member per office and/or branch.



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# LEGAL HOTLINE

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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.*

## IRS Requires Reporting of Cooperative Commissions

**FACTS:** A listing broker places a listing on the MLS and offers a cooperative commission to any MLS participant who brings a buyer that successfully purchases the property. Ultimately, the transaction closes at which point the escrow agent makes commission payments to both the listing broker and the buyer’s broker.

**ISSUE:** In this case, who is required to report commissions to the IRS?

**ANSWER:** See discussion.

**DISCUSSION:** The listing broker has an obligation to report to the IRS the commission payment made to the buyer’s broker, even though buyer’s broker received the commission check from the escrow agent. Additionally, the buyer’s broker has an obligation to report to the IRS the commission paid to buyer’s agent.

*Note: Brokers should contact an independent tax professional with any and all questions regarding their reporting obligations.*

## FIRPTA Applies to Foreign Sellers

**FACTS:** The seller of the property is a Canadian national, and the buyers are purchasing the home as a primary residence for their son.

**ISSUE:** Are the buyers required to withhold 15% of the purchase price pursuant to the Foreign Investment in Real Property Tax Act (“FIRPTA”)?

**ANSWER:** See discussion.

**DISCUSSION:** Unless an exception applies, when the seller of real property is a foreign person, such as a non-resident alien, the buyer must withhold 15% of the amount realized from the sale (which is usually the gross purchase price) pursuant to

FIRPTA. Section 3(i) of AAR’s Residential Resale Real Estate Purchase Contract likewise provides that: “Buyer and Seller acknowledge that if the Seller is a foreign person, the Buyer must withhold a tax equal to 15% of the purchase price, unless an exemption applies.” Ordinarily, withheld funds are deposited with the escrow company and then paid to the Internal Revenue Service. FIRPTA further provides that a buyer’s failure to comply with the withholding requirements may result in the buyer’s own liability for any taxes owed by the seller. Upon filing a tax return, the seller may be entitled to the return of some or all of the amount withheld.

One of the more commonly used exceptions applies when the amount realized from the sale is not more than \$300,000.00, and the buyer—or a member of the buyer’s family—intends to reside in the home at least 50% of the time in the two-year period immediately following the sale. In this case, it appears that this exception will apply: the sales price is considerably less than \$300,000.00, and the buyers are purchasing the property as a residence for their son. However, both parties should consult their own independent legal and tax advisors regarding this issue.

## Bankruptcy Court Must Approve the Sale if the Seller has a Pending Bankruptcy

**FACTS:** The 10- acre vacant parcel of land is owned by seven different owners as Tenants in Common. All of the owners signed the purchase contract and escrow was opened. During escrow, the buyer discovered that one of the owners filed a petition for bankruptcy and the bankruptcy is currently pending. Bankruptcy counsel has advised the parties that Bankruptcy Court approval will be required to close escrow. The buyer does not want to wait for Bankruptcy Court approval and is insisting that the transaction close as scheduled.

**ISSUE:** Assuming the buyer wants to proceed with the purchase and not cancel, must the buyer wait for Bankruptcy Court approval to close escrow?

**ANSWER:** Yes.



**DISCUSSION:** The seller who is in bankruptcy must abide by the Bankruptcy Court Rules and bankruptcy law in general. That seller's ownership interest is an asset of the bankruptcy estate. The bankruptcy trustee therefore has an obligation to ensure that the price is fair and in the best interest of the bankruptcy estate. Thus, the Bankruptcy Court must approve the sale before the buyer can close escrow.

### Notice To Agent Constitutes Notice To Principle

**ISSUE:** The purchase contract provides that the buyer has ten days after the physical inspection to notify the seller in writing of any defects. The buyer's agent notified the listing broker of the defects, but could not locate the seller. Does notice to the listing broker constitute notice to the seller?

**ANSWER:** Yes. Under Arizona law, notice to an agent generally constitutes notice to a principle. In *Re Milliman's Estate*, 101 Ariz. 54, 415 P.2d 877 (1966). On these facts, since the listing broker was notified in writing of the defects, this notice is imputed to the seller.

### No Probate Required for Real Property With Low Equity

**ISSUE:** An elderly lady dies with her only heir being her adult son. Her only substantial asset is her home with an assessed value of \$120,000 and with a mortgage of \$80,000. The elderly lady has no Will. Does her adult son have to open a probate to convey the home to him?

**ANSWER:** No. Under A.R.S. §14-3971(E) no probate is required to transfer by affidavit a home with low equity. In general, the requirements are the following:

1. The equity in the home per assessed value is less than \$100,000;
2. More than six months have passed since the date of death;
3. Funeral expenses, expenses of the last illness and all unsecured debts of the decedent have been paid;
4. The person signing the affidavit is entitled to the real property by reason of the allowance in lieu of homestead, exempt property or family allowance, by intestate succession [as the sole heir or heirs, or by devise under a valid last will of the decedent, the original of which is attached to the affidavit or has been probated];
5. No other person has a right to the interest of the decedent in the described property; and
6. No federal estate tax is due on the decedent's estate.

Therefore, the adult son should be able to convey the home to himself by recording the proper affidavit.

### Landlord Cannot Institute an Eviction In The Same Month He Accepts Partial Payment

**FACTS:** The residential tenant has made late payments and partial payments since March of 2020. The tenant has communicated with the landlord sporadically claiming that COVID-19 issues have hampered his ability to pay rent. The landlord accepted a partial payment for the month of December 2020. After negotiating the December rent check, the landlord discovered that the tenant really was not having any problems related to COVID-19, but was merely refusing to pay the rent.

**ISSUE:** Can the landlord begin the eviction process in mid-December after having accepted partial rent for the month?

**ANSWER:** Probably not.

**DISCUSSION:** A.R.S. §33-1371(B) provides a landlord's acceptance of partial rent constitutes a waiver of the right to terminate the rental agreement for that breach. Thus, the landlord here cannot initiate a forcible detainer action based on the acceptance of partial rent for December.

### The Vacant Land/Lot Purchase Contract Shifts The Risk of Determining Acreage to the Buyer

**FACTS:** The buyer and seller entered into the Arizona Association of REALTORS® Vacant Land/Lot Purchase Contract. The seller believed the lot contained 10.7 acres and advised the buyer accordingly. The buyer did not conduct a survey before closing. After the closing, the buyer surveyed the lot and discovered that the lot was actually 9.2 acres. The buyer is demanding that the seller compensate him for the difference in value between the size of the lot as represented and as existing.

**ISSUE:** Is the seller legally responsible to reimburse the buyer?

**ANSWER:** Probably not.

**DISCUSSION:** The Vacant Land/Lot Purchase Contract provides at Section 6b in all bold and capital letters: Square footage/acreage: Buyer is aware that any reference of square footage/acreage of the property, both the real property (land) and improvements thereon is approximate. If square footage is a material matter to the buyer, it must be investigated during the due diligence period.

Thus, pursuant to the terms of the Contract, the buyer was obligated to investigate the size of the lot if it was material to him. The Court of Appeals in *Elm Retirement Center v. Callaway*, 226 Ariz. 287, 246 P.3d 938 (Ariz. Ct. App. 2010) confirmed the enforceability of this risk shifting concept. There, the Court enforced the language regarding the size of the home at issue and held that the seller had no liability.

## Seven Day Right of Rescission Language Must Be Included In The Contract Selling Vacant Lot In A Subdivision

**FACTS:** The agent is listing certain unimproved lots for sale in a subdivision. The developer/seller standard contract does not contain the rescission language set forth in lines 20-26 of the Arizona REALTORS® Vacant Land/Lot Purchase Contract Addendum Regarding Subdivided or Un-subdivided Lands.

**ISSUE:** Is the rescission language required by law?

**ANSWER:** Yes.

**DISCUSSION:** If the property being sold is undeveloped (in other words a vacant lot) in an existing subdivision, the rescission language is required by statute, specifically A.R.S. §32-2185.01(D). The Commissioner's Rules clarify the required language. See A.A.C. R4-28-804(A). The Rule states that a contract for the purchase or lease of an unimproved subdivided lot shall contain language substantially similar to: The purchaser or lessee has the legal right to rescind (cancel) this agreement without cause or reason of any kind, and to the return of any money or other consideration by sending or delivering a written notice of rescission to the seller or lessor by midnight of the seventh calendar day following the day the purchaser or lessee executed the agreement. If the purchaser or lessee does not inspect the lot or parcel before the execution of the agreement, the purchaser or lessee shall have six months to inspect the lot or parcel and at the time of the inspection shall have the right to unilaterally rescind the agreement.

See A.A.C R4 -28-804(A).

The language must be in bold print or print larger than the other print used in the contract document. *Id.*

## Unfulfilled Loan Contingency Notice

**FACTS:** The buyer and seller executed an AAR Residential Resale Real Estate Purchase Contract which was contingent upon the buyer obtaining financing. In connection with the contract, the buyer deposited \$15,000.00 in earnest money with escrow. Shortly before the scheduled close of escrow, the buyer lost his job and was therefore unable to obtain the required financing. The buyer provided written notice to the seller and the escrow company of the inability to obtain financing. The seller has refused to release the earnest money to the buyer claiming the Unfulfilled Loan Contingency Notice form must be used.

**ISSUE:** Is the buyer obligated to use the Unfulfilled Loan Contingency Notice to cancel?

**ANSWER:** See discussion.

**DISCUSSION:** Here, the Contract provides at Section (2) c that the buyer may cancel and be entitled to a return of the earnest money if, after a diligent and good faith effort, buyer is unable to obtain the loan and delivers notice of that inability to the seller. The Contract does not mandate that a particular form be used. The Unfulfilled Loan Contingency

Notice could have been used under the circumstances, but that specific form is not required. All the contract requires is for the buyer to provide notice, as that term is defined in Section 8(m).

The buyer is therefore entitled to cancel the Contract and receive the return of his earnest money deposit.

*NOTE: Arizona REALTORS® forms are not required in any given transaction. The parties may choose to use the forms if represented by a REALTOR®, but there is no obligation to do so.*

## In the Event Of A Seller's Breach The Buyer May Sue For Damages, Specific Performance Or Retain The Earnest Money

**FACTS:** Despite the seller's contractual obligations, it appears the seller will not close escrow and complete the transaction, because she does not have sufficient funds to move.

**ISSUE:** If the seller does not close escrow, what are the remedies? If the seller does close escrow, but does not move, what are the remedies?

**ANSWER:**

See discussion.

**DISCUSSION:** If the seller does not timely close escrow, the buyer is to issue a Cure Period Notice. If the breach is not timely cured, the buyer has three remedies. The buyer can cancel the contract and accept the earnest deposit as damages. The buyer can file a suit for specific performance to enforce the contract and attach a Lis Pendens to the property. Or, the buyer can sue for monetary damages for the breach (i.e., the replacement cost of purchasing a different house).

If the seller does close escrow, but does not timely move, the buyer should issue a Five-Day Notice to Vacate. If after expiration of the five day period the seller remains in the property, the buyer can proceed with a forcible entry and detainer action and seek to have the seller removed from the property. That requires a formal action being filed in Justice Court to obtain the required order. 📌

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### 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: NAR's Fair Housing Action Plan



NATIONAL ASSOCIATION OF REALTORS®  
**WINDOW  
TO THE LAW**

NAR's Fair Housing Action Plan, commonly referred to as "ACT!", stands for Accountability, Culture Change and Training. Joining me today to talk about ACT!, as well as best practices for complying with fair housing laws, is NAR's Vice President of Political Advocacy, Bryan Greene.

## 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>

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