

# BROKER & MANAGER

QUARTERLY

## VACATION AND SHORT TERM RENTAL LAW

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# BROKER & MANAGER

THIRD QUARTER 2022 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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## PANELISTS:



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2022 President, Asian Real Estate Association of America (AREAA)



**Lydia M. Pope**

2022 President, National Association of Real Estate Brokers (NAREB)



**Sylvia Seabolt**

2022 President, Women's Council of REALTORS® (WCR)



**Dave Gervase**

2022 President, LGBTQ+ Real Estate Alliance



**Ryan Davis**

Director, Engagement, Diversity & Inclusion, NAR



## VACATION AND SHORT-TERM RENTAL LAW IS EVOLVING

In 2017, SB 1350 became effective and addressed vacation and short-term rentals by:

- Prohibiting a city, town or county from restricting the use or regulation of vacation rentals and short-term rentals;
- Allowing the local government to determine regulations governing vacation and short-term rentals if the regulation is meant to protect public health and safety;
- Providing a mechanism to collect and remit rental taxes to the Arizona Department of Revenue; and
- Creating more economic opportunity and inclusiveness, while protecting the private property rights of the homeowner.

Since enacting the law, vacation and short-term rentals have exploded in popularity. And, as with all new things, there were unintended consequences and unforeseen circumstances. Accordingly, the law continued to evolve, now requiring hosting platforms such as Airbnb™ or Vrbo® to collect and remit occupancy taxes, not allowing rentals to be used for special events that require a permit or license, requiring contact information for the owner or designee who is responsible for responding to complaints, and imparting a timeframe for a local government to contact the owner regarding a verified violation.

Last month, Governor Ducey signed [SB 1168](#) giving local governments more power to enforce all applicable laws, regulations, and ordinances pertaining to vacation and short-term rentals. This newly enacted power allows local governments to require:

- The property owner to obtain and maintain a local regulatory permit or license;
- Before offering a vacation rental or short-term rental for the first time, the property owner or designee must notify all single-family residential properties adjacent to, directly and diagonally across the street from the vacation or short-term rental;
- The property owner or designee to display the local regulatory permit number, license number, or transaction privilege tax license number on each advertisement for a vacation or short-term rental; and

- The vacation or short-term rental to maintain liability insurance or advertise through an online lodging marketplace that provides coverage.

The revised law further allows local governments to:

- Impose a civil penalty of up to \$1,000 against the owner for every 30 days the owner fails to provide contact information for the owner or owner's designee who is responsible for responding to complaints or emergencies;
- Deny issuance of a permit or license under certain circumstances;
- Adopt an administrative process to suspend a local or regulatory permit or license for up to 12 months for verified violations associated with the property;
- Impose civil penalties against the owner of the vacation or short-term rental if the owner receives one or more verified violations related to the same vacation or short-term rental within the same 12 month period; and
- Impose a civil penalty of up to \$1,000 if the owner or designee fails to apply for a regulatory permit or license, if required.

The evolving vacation and short-term rental law allows for Arizona property owners to continue to utilize their property as they choose while also addressing community concerns by holding "bad actors" responsible for their actions. 📌

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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# Arizona Real Estate - A Professional's Guide to Law & Practice.



## THE RISKY FACTS OF REAL ESTATE LIFE - PRE AND POST POSSESSION AGREEMENTS

Buyers and sellers who want to enter into pre-possession and post possession agreements are a risky fact of real estate life. There are times when a buyer wants to move into the property before close of escrow (pre-possession) or the seller wants to stay in the property following close of escrow (post possession).

The first thing that a real estate agent absolutely needs to know and follow is their broker's policy on these types of agreements. Also, be aware that the Arizona Department of Real Estate Commissioner's Rule requires that a salesperson or broker recommend "that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property" - and this recommendation should be done in writing.

So why are these agreements risky? They are risky because in both pre and post possession agreements, the people occupying the property are not the owners, which sounds a lot like a rental. If the Arizona Residential Landlord Tenant Act applies (and there is a strong argument that it does) there are statutory rights and obligations applicable to these agreements. As a result, the risk of a dispute increases, especially if all the parties' rights and obligations are not addressed in a well-drafted written agreement.

### Post Possession by the Seller

Because the obligations in the purchase contract are fulfilled at close of escrow, the obligations to repair and maintain the property are no longer the seller's responsibility; they are the buyer's responsibility - but the seller is still occupying the property. Therefore, post possession issues include:

- Who is responsible for repairs?
- What if there is a fire, monsoon or other damage? Do the parties have the appropriate insurance policies (homeowners'/rental) in place and whose insurance policy will cover any damage?

- Will a security deposit be required in case the seller damages anything in the property? If so, how much? (The amount of a security deposit in a rental is limited to 1.5 times the amount of one month's rent).

And other matters to be addressed are:

- How much is payment/rent? Will the payment/rent be prorated?
- Who pays the utility bills? Will the utilities be transferred into the buyers' name?
- Who will occupy the property? Are pets allowed? Is smoking permitted?

Information about these and other issues are discussed in the Post Possession Agreement Checklist here: <https://www.aaronline.com/wp-content/uploads/2015/12/Post-possession-checklist-11-19-15.pdf>

### Pre-possession by the Buyer

Typically, the seller is responsible for any damage to the property prior to close of escrow. However, in the event a buyer prepossesses the property, the buyer is now responsible.

The same issues as discussed above regarding post possession agreements apply to pre-possession. But there are additional pre-possession risks, such as:

- What if there are buyer contingencies that have not been met prior to the buyer's pre-possession? Have the parties decided to waive the contingencies or are they still in place allowing the buyer to cancel the purchase contract if a contingency fails?
- What if the buyer moves in and begins to remodel the property, then thereafter either cannot or will not close escrow?



- If the sale is not completed, when does the buyer have to move out? What happens if the buyer refuses to move out?

Information about these and other issues are discussed in the Pre-Possession Agreement Checklist here: <https://www.aaronline.com/wp-content/uploads/2015/12/Pre-possession-checklist-11-19-15.pdf>

A written agreement and decision of which type of agreement is appropriate should be addressed regardless of whether a pre or post possession is for 3 days or 30 days or more. The Arizona REALTORS® has some additional resources to assist:

- A sample Arizona REALTORS® Residential Lease Agreement at: [https://www.aaronline.com/wp-content/uploads/2022/02/04/Residential\\_Lease\\_Agreement\\_October\\_201-9-SAMPLE.pdf](https://www.aaronline.com/wp-content/uploads/2022/02/04/Residential_Lease_Agreement_October_201-9-SAMPLE.pdf)
- A sample Post Possession Agreement (not an Arizona REALTORS® form) at: <https://www.aaronline.com/wp-content/uploads/2021/05/03/Post-Possession-Agreement-SAMPLE.pdf>

- A sample Pre-Possession Agreement (not an Arizona REALTORS® form) at: <https://www.aaronline.com/wp-content/uploads/2021/05/03/Pre-Possession-SAMPLE.pdf>

Due to the risk and liability involved with pre-possession and post possession of a property, the best practice is for the parties to not enter into such an agreement. However, if the parties insist, the real estate agent should consult with their broker and advise the parties in writing to seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks. 📌

*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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Michelle Lind is Of Counsel to the Arizona REALTORS® and the author of *Arizona Real Estate: A Professional's Guide to Law and Practice*. This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice and you should not act upon it without seeking independent legal counsel.



## Introducing the R.I.S.E. (REALTORS® Inspiring Service Excellence) Honor Roll Program

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Every month, the Arizona REALTORS® will publicly announce the Honor Roll list, which will feature your remarkable agents who were nominated by their broker for being exceptional.

**Professionals...That's Who We R.** 📌

Deed - no 1 - May 10 1865

Commencing at a stone in the old road and running thence north 15 degrees east and 60 minutes west 10 chain and 60 links thence south 10 degrees east 90 minutes west 22 chain and 10 links to a stone

# ARIZONA DEED RESTRICTIONS

Discriminatory restrictive covenants refer to contractual agreements that prohibit the purchase, lease, or occupancy of property by individuals against whom discrimination is prohibited. These covenants, which single out individuals based on factors such as race, ethnicity, and religion, were recorded when a lot was created, a subdivision was approved, or when a home was built and have left a legacy of housing discrimination.

Fortunately, discriminatory restrictive covenants are not valid, nor enforceable. In 1948 the United States Supreme Court ruled that racially restrictive covenants cannot be enforced. In 1968, the federal Fair Housing Act banned covenants discriminating on the basis of race, color, religion, or national origin.

Arizona law is also clear in this regard, repudiating the legality and enforceability of discriminatory restrictive covenants. Specifically, Arizona law, A.R.S. § 32-2107.01(A), states:

The [state real estate] commissioner shall execute and record in the office of the county recorder in each county in this state a document that disclaims the validity and enforceability of certain restrictions and covenants. The document shall contain a disclaimer in substantially the following form:  
**It is the law of this state that any covenants or restrictions that are based on race, religion, color, disability status**

**or national origin are invalid and unenforceable. If the invalid covenant or restriction is contained in a document that is recorded in this county, it is hereby declared void.**

Under Arizona Department of Real Estate Commissioner Louis Detorre, the required document has been recorded in all 15 counties within the State of Arizona. Below you will find the recorded documents from each county in the state of Arizona that effectively voids discriminatory restrictive covenants in deeds. These restrictive covenants are found by many buyers when researching the restrictions and limitations as to who can live at the property and how it can be utilized. Prior to this webpage, it could prove difficult to find the document that was recorded pursuant to Arizona law that voids discriminatory deed restrictions within that particular county.

If your buyer questions you about discriminatory deed restrictions, please direct them to this webpage that explains how the United States Supreme Court, Federal Fair Housing Act, and Arizona law have addressed and struck down discriminatory provisions within deeds.

Included in the Buyer Advisory, see Page 3; Item 5.  
**Convents, Conditions and Restrictions (CC&Rs)** 

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**Apache County**

**Cochise County**

**Coconino County**

**Gila County**

**Graham County**

**Greenlee County**

**La Paz County**

**Maricopa County**

**Mohave County**

**Navajo County**

**Pima County**

**Pinal County**

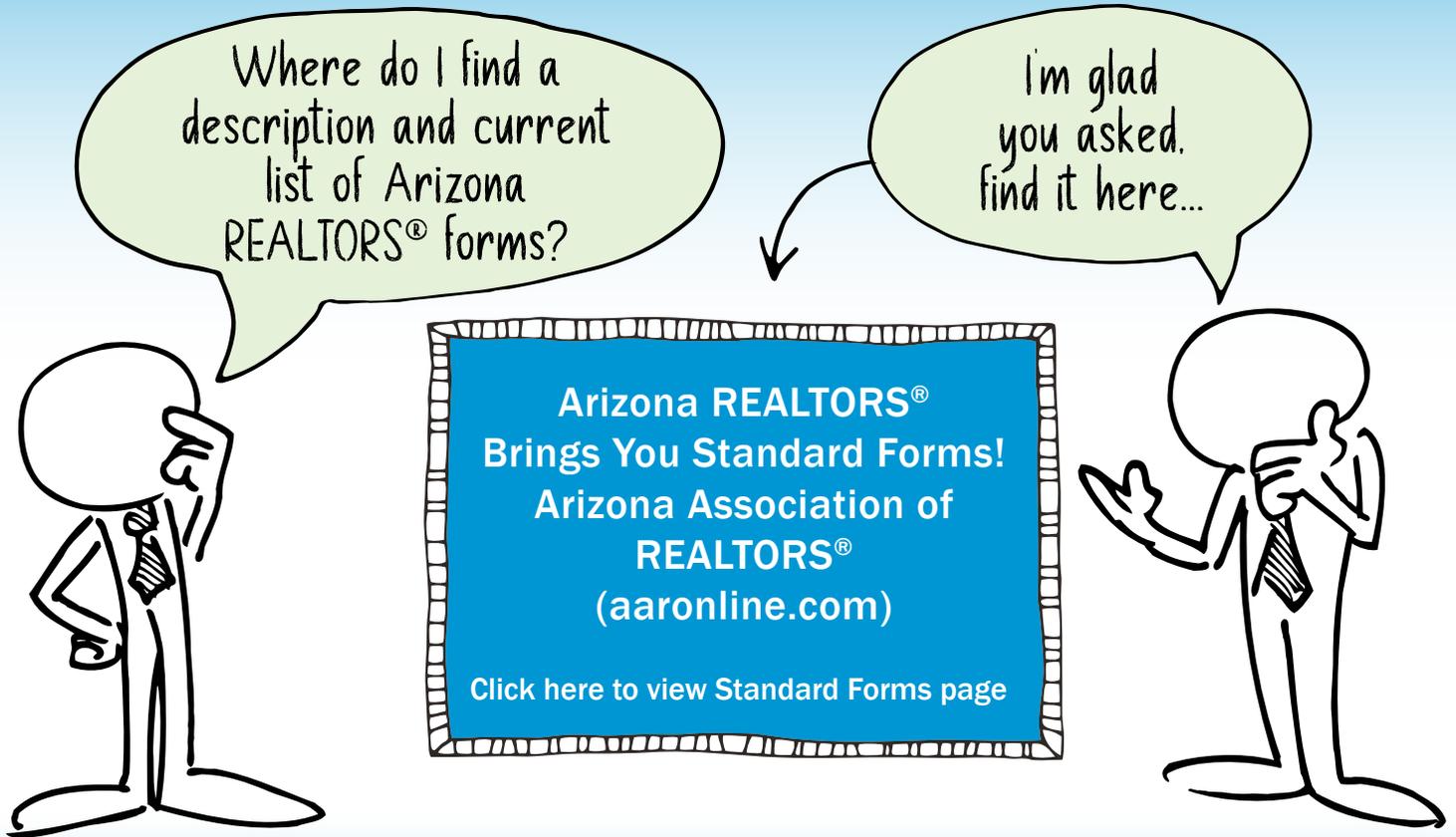
**Santa Cruz County**

**Yavapai County**

**Yuma County**

**CLICK EACH BOX ABOVE TO VIEW DOCUMENT BY COUNTY**

# If you don't ask ...



MAY - JULY 2022

Excerpt from Volume 2022 - Issue 2

## Arizona Department of Real Estate Bulletin

<https://azre.gov/sites/default/files/2022%20ADRE%20Bulletin%20-%20Final.pdf>

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### Games of Chance - Games of Risk - Lotteries - Contests

Whew. Yes, ADRE recently received numerous complaints regarding Games of Chance.

Holding a game of chance, game of risk, lottery, or contest is not in and of itself a violation of Title 32, Chapter 20. However, a licensee is not permitted to use information collected as a result of a game of chance, game of risk, lottery or contest to solicit - directly or indirectly - potential clients for the sale, lease or use of real property.

Knowing this may be confusing, since it is nuanced, the Department worked with the Attorney General's Office and the Arizona Association of REALTORS® on an Informational Sheet and FAQs related to Games of Chance, Games of Risk, Lotteries and Contests.

You are strongly encouraged to read the FAQs to help you determine what activity is and is not legal. As always, you should ensure your activities are approved by your Designated Broker and you may decide seeking legal counsel may also be necessary.

Games and  
Contests



+

Solicit  
Prospects



+

For the Sale, Lease  
or Use



=



+



-



=



ARS 32-2153(A)(13)



[www.azre.gov](http://www.azre.gov)

## Games of Chance - Games of Risk - Lotteries - Contests

You have questions, we have answers.

### A.R.S. 32-2153(A)(13)

Grounds for suspension or revocation. A licensee has:

13. Solicited, either directly or indirectly, prospects for the sale, lease or use of real property, cemetery property or membership camping contracts through a promotion of a speculative nature involving a game of chance or risk or through conducting lotteries or contests that are not specifically authorized under this chapter.

Holding a game of chance, game of risk, lottery, or contest is not in and of itself a violation of Title 32, Chapter 20. However, a licensee is not permitted to use information collected as a result of a game of chance, game of risk, lottery or contest to solicit - directly or indirectly - potential clients for the sale, lease or use of real property.

**WARNING:** There are statutes, outside of Title 32, Chapter 20 related to registering games of chance, games of risk, contests and lotteries, of which licensees should be aware.

Additionally, you should ensure your activities are always approved by your broker and you may decide seeking legal counsel may also be necessary.





## Games of Chance – Frequently Asked Questions

### **Q1. Can I conduct a raffle in an effort to attract potential buyers and/or their agents to my open house?**

A1. No. Unless exempt as permitted under certain circumstances for a developer, a raffle is considered a game of chance or risk and, under this scenario, is being conducted to solicit prospects for the sale, lease or use of real property.

### **Q2. If I conduct a raffle or other type of game of chance or risk and insert the contact information of the participants into my database to be used for future marketing endeavors, am I at risk of violating A.R.S. § 32-2153(A)(13)?**

A2. Yes. Because the effect of the game or contest is to obtain information that will be used in soliciting prospects, either directly or indirectly, for the sale, lease or use of real property, you are at risk of violating A.R.S. § 32-2153(A)(13).

### **Q3. If I conduct a raffle or other type of game of chance or risk and only use the information obtained to notify the winner of the game, am I at risk of violating A.R.S. § 32-2153(A)(13)?**

A3. Possibly. If the information obtained via the raffle or other type of game of chance is only used to notify the winner and none of the information obtained is used to thereafter solicit prospects for the sale, lease, or use of real property, you would not be in violation of A.R.S. § 32-2153(A)(13). However, if holding the raffle or other type of game of chance at or in coordination with the promotion of a specific property intended to be sold, leased or used, then you are at risk of violating A.R.S. § 32-2153(A)(13).

### **Q4. If I engage in what would be considered an act of gambling to attract customers but do not use information collected on participants to later solicit prospects for the sale, lease, or use of real property, am I at risk of violating any other statutes?**

A4. Possibly. Gambling, which is defined under Title 13, Chapter 33, of the Arizona Revised Statutes, is regulated at the state level. If concerned with running afoul of Arizona's Criminal Code, it is recommended that licensees consult with independent legal counsel.



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# Basic Coverage

- Instruction for installing and configuring new hardware and software
- Diagnosis and repair of computer hardware and software issues
- Advice for purchasing hardware, software and services
- Basic instruction for major software applications
- Recommendations for upgrades and updates
- Advice for performance optimization
- Troubleshooting network issues

## Support

### Operating Systems:

- Microsoft Windows 10®
- Microsoft Windows 7®
- Microsoft Windows 8®
- Mac OS X® (10.3 and higher)

### Hardware:

- Smart phones: iPhones, Android, Windows
- Tablets: iOS, Android, Windows
- Digital Cameras
- CD/DVD Drives & Blu-ray
- Laptops
- Monitors
- Network Adapters
- PC add-on cards
- PDAs
- Printers: USB, Wi-Fi
- Scanners
- Sound Cards
- Storage Media
- USB Devices
- Video Cards

### Browser/Net:

- Wi-Fi Set Up
- Internet Service Providers
- Microsoft IE/Edge
- Mozilla Firefox
- Google Chrome
- Opera
- Safari
- Networking
- Work Groups
- Share Files
- Share Printer

### Browser/Net:

#### Email

- MS Outlook
- Webmail
- Windows Mail

#### Real Estate Specific

- Form Simplicity
- The Living Network

#### Office/Financial

- Adaptec Toast
- Adaptec EZCD Creator
- Adobe Acrobat
- Corel Office Products: WordPerfect, Quattro Pro Presentations, Visual Intelligence
- Corel Draw
- Intuit Quicken
- Intuit Quickbooks
- iTunes
- Microsoft® Media Player
- Microsoft® Office Products: Word, Excel, PowerPoint, Access
- Microsoft® Outlook
- Microsoft® Publisher (Versions 2000 and higher)
- Microsoft® Visio
- Versions 2000 and higher
- Microsoft® Works
- Nero Burning ROM
- Roxio CD-Burning Products
- Winzip Applications

### All PC compatible, Mac and Clones such as:

- Acer
- Apple
- AST
- ASUS
- Clones/Whitebox
- Dell
- Epson
- Fujitsu
- Gateway
- Hewlett Packard
- IBM
- Lenovo
- Sony
- Toshiba
- Winbook and others

### Firewall/Intrusion Applications:

- Virus Removal
- AVG AntiVirus
- Lavasoft Ad-Aware
- McAfee AntiVirus
- Norton AntiVirus
- Spyware/Adware Intrusion Products
- Symantec pcAnywhere
- Tend Micro
- ZoneAlarm and others



# Legislative & Political Affairs Update

Written by Matthew Contorelli, Government Affairs Director

## From Session to the General Election!

After 166 days, the Arizona Legislature completed its work and adjourned “Sine Die” in the early hours of June 25th. While the road was long, the Arizona REALTORS® worked tirelessly throughout the 2022 legislative session and reviewed over 1,800 bills to deliver the following wins for REALTORS®, property-owners and those seeking housing across Arizona:

- **PASSED** legislation to support Real Estate teams (HB2172)
- **FORGED** new disclosure requirements for wholesalers to better protect homeowners and potential buyers (HB2747)
- **DEFEATED LEGISLATION** that would have prioritized developers over private property rights and smart growth (HB2674)
- **EDUCATED** legislators on the regressive residential rental tax (SB1116)
- **SUPPORTED** responsible solutions to the housing crisis as an appointed member of the Housing Supply Study Committee (HB2674)
- **OPPOSED** shortsighted short-term rental regulations that would violate private property rights (SB1168)
- **FOUGHT** against unfunded mandates that could increase licensure fees
- **ADVOCATED** for responsible water policy
- **CHAMPIONED** funding for infrastructure

Once session adjourned, the Arizona REALTORS® and the RAPAC Trustees immediately transitioned into the 2022 primary election by evaluating new candidates and reviewing voting records to elect REALTOR® Party champions that will help advance our legislative agenda in 2023.

With the Primary Election come and gone, the Arizona REALTORS® had an 82% success rate among primary endorsements. Surprises came on both sides of the aisle. As polling predicted at the top of the ticket, Katie Hobbs was the first gubernatorial candidate to claim victory over her Democratic opponent, Marco Lopez. Kari Lake claimed her victory over well-funded Republican candidate, Karrin Taylor Robson, later in the week. The Arizona REALTORS® are now looking on to the General Election and confident that we will have allies on both sides of the aisle to protect private property rights and support homeownership and housing for ALL Arizonans. Stay tuned!

While Arizona REALTORS® look forward to next year’s in-person gathering for our annual REALTOR® Day at the Capitol, the government affairs team is still hard at work monitoring the legislative process. Watch as Government Affairs Director Matt Contorelli gives members a unique glimpse behind the scenes in this tour of the state capitol.

You will see where the laws affecting our industry are made and talk about how the Arizona REALTORS® are working with elected leaders from across the state to advance and defend REALTOR® Party Issues. 📍

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## Nikki's Nuggets – Antitrust



Nikki J. Salgat, Esq.  
AAR General Counsel

CLICK ARROW ABOVE TO WATCH THE VIDEO



In this edition of Nikki's Nuggets, Arizona REALTORS® General Counsel Nikki Salgat reveals some best practices related to antitrust.

[Click here](#) for more short videos which are a great resource for your office meetings.

# ¿Habla Español?

[www.aaronline.com/spanish](http://www.aaronline.com/spanish)

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## 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 Zelms, Erlich & Mack

### 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.*

## THE NON-BREACHING PARTY MUST AFFIRMATIVELY CANCEL THE CONTRACT AFTER THE THREE (3) DAY CURE PERIOD EXPIRES

**FACTS:** Seller and buyer have entered into an Arizona REALTOR® Residential Resale Real Estate Purchase Contract (Purchase Contract). The Purchase Contract calls for a particular close of escrow date. The buyer was unable to close on the close of escrow date. The seller did not issue a cure notice. The seller asserts that the contract was automatically cancelled when the buyer failed to close on the close of escrow date.

**ISSUE:** Does the Purchase Contract automatically cancel when a buyer fails to timely close?

**ANSWER:** No.

**DISCUSSION:** Pursuant to the Purchase Contract, either party may cancel the contract in the event of a breach of contract by the other party. (Section 7b.) However, before a breach of contract can occur, a cure notice must be issued, and the potentially breaching party must be allowed three days to cure the potential breach before the potential breach becomes an actual breach. (Section 7a.) There is no provision in the Purchase Contract that indicates that the contract automatically cancels if one party fails to close, and the seller does not have the right to cancel based on the potential breach created by the buyer’s failure to close unless and until the seller issues a cure notice to buyer and then three (3) days have elapsed without the buyer curing the potential breach.

## A LICENSEE MARKETING A PROPERTY LISTING BY ANOTHER AGENT MUST DISPLAY THE LISTING BROKERAGE FIRM IN ADVERTISEMENTS

**FACTS:** An agent active on social media posts properties listed by a different brokerage firm and invites potential buyers to call him for assistance. The social media posts do not identify the listing agent or brokerage firm.

**ISSUE:** Is this practice permissible?

**ANSWER:** See discussion.

**DISCUSSION:** The Commissioner’s Rules provide:

“A licensee who advertises property that is the subject of another person’s real estate employment agreement shall display the name of the listing broker in a clear and prominent manner.” A.A.C. R4-28-502 (F).

Thus, the agent must identify the listing brokerage in a clear and prominent matter to be compliant.

## ONE PARTY MAY NOT UNILATERALLY CHANGE THE TERMS OF A CONTRACT

**FACTS:** The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (the “Contract”). Pursuant to the Contract, the financing contingency is waived; the buyer is paying cash. Now, the buyer wants to change the terms of the Contract to include a financing contingency.

**ISSUE:** Can the buyer unilaterally change the terms of the Contract to include a financing contingency?

**ANSWER:** No.

**DISCUSSION:** The buyer cannot unilaterally change the terms of the Contract. As drafted, the Contract calls for all cash with the financing contingency waived. Thus, the buyer is obligated to perform regardless of financing.

However, waiving the financing contingency does not preclude the buyer from attempting to get or obtaining financing. The waiver of the financing contingency only removes the buyer’s right to cancel if he is unable to obtain financing. Thus, if the buyer cannot obtain financing, the buyer must still close escrow.

Note: If the parties want to modify the terms of the Contract to make it contingent on financing, both the buyer and seller need to sign an addendum changing that term.

### **AN ADDENDUM ONLY CHANGES CONTRACT TERMS SPECIFICALLY IDENTIFIED**

**FACTS:** The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Purchase Contract (Contract) along with a Buyer Contingency Addendum. The Buyer Contingency Addendum required the buyer to close escrow on his property by February 15th at lines 53 – 54. After escrow was opened the parties executed an Addendum extending the close of escrow date on the buyer’s purchase of the seller’s home. The Addendum did not mention or reference the February 15th deadline for the buyer to close on his sale set forth in the Buyer Contingency Addendum. The buyer did not close escrow on his home by the February 15th deadline and the seller claims the contract is therefore cancelled.

**ISSUE:** Is the Contract cancelled because the buyer did not close escrow on his home by February 15th?

**ANSWER:** Yes.

**DISCUSSION:** The Buyer Contingency Addendum is very specific on the remedy if the buyer does not close on the sale of his property by the specified date. Lines 53-54 provide if the buyer does not close timely, “this Contract shall be deemed cancelled and the Earnest Money released to Buyer.” The Addendum executed by the parties references the close of escrow on the seller’s property; it does not address the close of escrow on the buyer’s property. The Addendum, therefore, does not change the cancellation language in the Buyer Contingency Addendum.

### **A CONTRACT EXECUTED ONLY BY THE LISTING AGENT AND THE BUYER IS INVALID**

**FACTS:** An agent is representing a seller under an Arizona REALTORS® Residential Listing Contract Exclusive Right to Sell/Rent agreement. The listing agent receives an offer from a prospective buyer’s agent. The offer expires at 5:00 pm the day the offer is made. The listing agent cannot reach the seller, but the offer appears to be too good to pass up. The listing agent signs the contract on behalf of the seller and sends it back to the buyer’s agent. When the seller finds out, she is very upset and does not want to be bound by the contract.

**ISSUE:** Is the contract enforceable against the seller?

**ANSWER:** No.

**DISCUSSION:** Arizona’s Statute of Frauds, A.R.S. § 44-101, requires that agreements for the sale of real property are invalid unless they are in writing and “signed by the party to be charged, or by some person by him thereunto lawfully

authorized.” Here, the party to be charged is the seller. The statute further states that in the case of a sale of real property, the agreement is invalid if signed by an agent of the party to be charged unless the authority of the agent is in writing and signed by the party to be charged. The Residential Listing Contract Exclusive Right to Sell/Rent does not give the listing agent authority to execute a purchase contract on behalf of the seller. Because the agent has no written authority to execute a purchase contract, the signature by the agent will not bind the seller and the agreement is invalid.

### **AGENT CAN DO BPOs FOR LENDER**

**ISSUE:** The agent has a relationship with a lender that has resulted in numerous REO property listings for the agent from the lender. The lender has now requested that the agent furnish broker price opinions (BPOs) on more than 300 of the lender’s properties in foreclosure. The lender will pay \$75 for each BPO. Can the agent receive \$75 compensation for each BPO?

**ANSWER:** Yes. The agent is entitled to furnish BPOs to the REO lender. A.R.S. §32-3602(1). Inasmuch as the agent must be “acting” as a real estate agent, however, the \$75 compensation should be paid to the agent’s broker.

### **THE SELLER IS CONTRACTUALLY OBLIGATED TO PROVIDE ACCESS EVEN IN AN ALL-CASH TRANSACTION**

**FACTS:** The buyer and seller entered into an Arizona REALTORS® Residential Resale Real Estate Contract (Contract). Pursuant to the Contract, the buyer is paying cash and waived the appraisal contingency. While escrow was pending the buyer requested access to the property for an appraiser. The seller refused, claiming the buyer had no right to conduct an appraisal because the appraisal contingency was waived.

**ISSUE:** Is the seller contractually obligated to allow access to an appraiser?

**ANSWER:** Yes.

**DISCUSSION:** The waiver of the appraisal contingency only removes the buyer’s right to cancel the Contract if the property appraises for less than the purchase price. Thus, even if the property does not appraise for the purchase price, the buyer cannot cancel but, rather, must close escrow. Waiving the appraisal contingency does not mean the buyer cannot investigate value via an appraisal or otherwise. In fact, Section 6a of the Contract allows a buyer to investigate the condition and value of the Property during the inspection period. Additionally, the seller’s contractual obligation to allow access continues even after the inspection period is over. Specifically, Section 6m provides: “Seller shall make the Premises available for all inspections and walkthrough(s) upon reasonable notice by Buyer.” Accordingly, as long as the buyer provides reasonable notice, the seller is contractually obligated to allow access to the appraiser.



## ASSISTANCE WITH AIRBNB™ RENTALS FOR ANOTHER MAY BE REAL ESTATE ACTIVITY

**FACTS:** A licensee assists several property owners with renting out their properties through Airbnb™. She is paid for her assistance. She does not run any of this activity through the brokerage.

**ISSUE:** Can a licensee assist with Airbnb™ rentals outside of the brokerage?

**ANSWER:** See discussion.

**DISCUSSION:** Pursuant to Arizona Revised Statutes (A.R.S.) § 32-2121(A)(15): Licensing rules do not apply to “A person who, on behalf of another, solicits, arranges or accepts reservations or money, or both, for occupancies of thirty-one or fewer days in a dwelling unit in a common interest development.”

However, the Arizona Department of Real Estate (“ADRE”) Property Management Audit Package states:

Is a real estate license required to manage vacation rentals?

Yes and No.

The exemption ((A.R.S.) § 32-2121(A)(15)) applies to Vacation Rentals in a single, common interest development, i.e., a condominium complex or subdivision with common areas, not properties located in various locations throughout a city or adjacent cities.

Therefore, the licensee may be conducting real estate activity.

As a best business practice, the activity should be conducted through the brokerage. The broker may be subject to liability if the activity is deemed real estate activity and the licensee failed to notify the broker.

## LANDLORD MAY REVOKE AN OFFER TO RENT PRIOR TO ITS ACCEPTANCE

**FACTS:** The prospective tenants, who are not members of a protected class, were approved to rent the single-family residence by the landlord and property manager. The property manager, therefore, prepared a draft lease and emailed it to the prospective tenants. The tenants did not respond for over 48 hours. The landlord, anxious to get the property leased, advised the property manager to revoke the offer to lease and pursue another one of the many tenants that submitted rental applications. The property manager complied. The prospective tenants subsequently complained that the property manager was unlawfully discriminating against them and revoking the offer to rent was “illegal.”

**ISSUE:** Was revoking the offer to rent illegal?

**ANSWER:** No.

**DISCUSSION:** The tenants are not members of a protected class. Therefore, there can be no discrimination under the Fair Housing Act. Moreover, here, the revocation of the offer was based on the tenants’ failure to respond timely in a hot rental market. The landlord and property manager had the legal right to revoke the offer to rent at any time prior to acceptance by the tenants. See *Richards v. Simpson* 111 Ariz. 415, 531 P. 2d 538 (1975). As such, revoking the offer to rent was not illegal under these circumstances.

## PROSPECTING FOR LEADS MUST BE DONE BY A REAL ESTATE LICENSEE

**FACTS:** An agent wants to hire an unlicensed third party to create a promotional program where the third party would email contacts in a database with a questionnaire asking how likely the recipient would be to sell their home in the next six months. In exchange for responding to the questionnaire, the recipient would be entered into a drawing to win a Visa gift card.

**ISSUES:** May the agent hire the third party to create such a promotional program?

**ANSWER:** NO.

**DISCUSSION:** First, prospecting for clients via the outlined promotional activity constitutes the practice of real estate. See A.R.S. §32-2101(49)(i). The unlicensed third-party vendor can therefore not facilitate the promotional program.

Second, a raffle is a game of chance where the player gives consideration in exchange for a prize with monetary value and the winner is drawn by luck. In Arizona, a raffle may only be held by qualifying organizations which are generally limited to charitable organizations. See A.R.S §13-3302. Because the recipient here is required to complete the survey (thereby providing consideration) the promotional program is a raffle. Because neither the agent nor the brokerage is a qualifying organization, the raffle would not be allowed by state law. 📌

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### ABOUT THE AUTHOR



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*Richard V. Mack is a partner at Zelms, Erlich & Mack, 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: Overview of RESPA for Real Estate Professionals



## Window to the Law

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