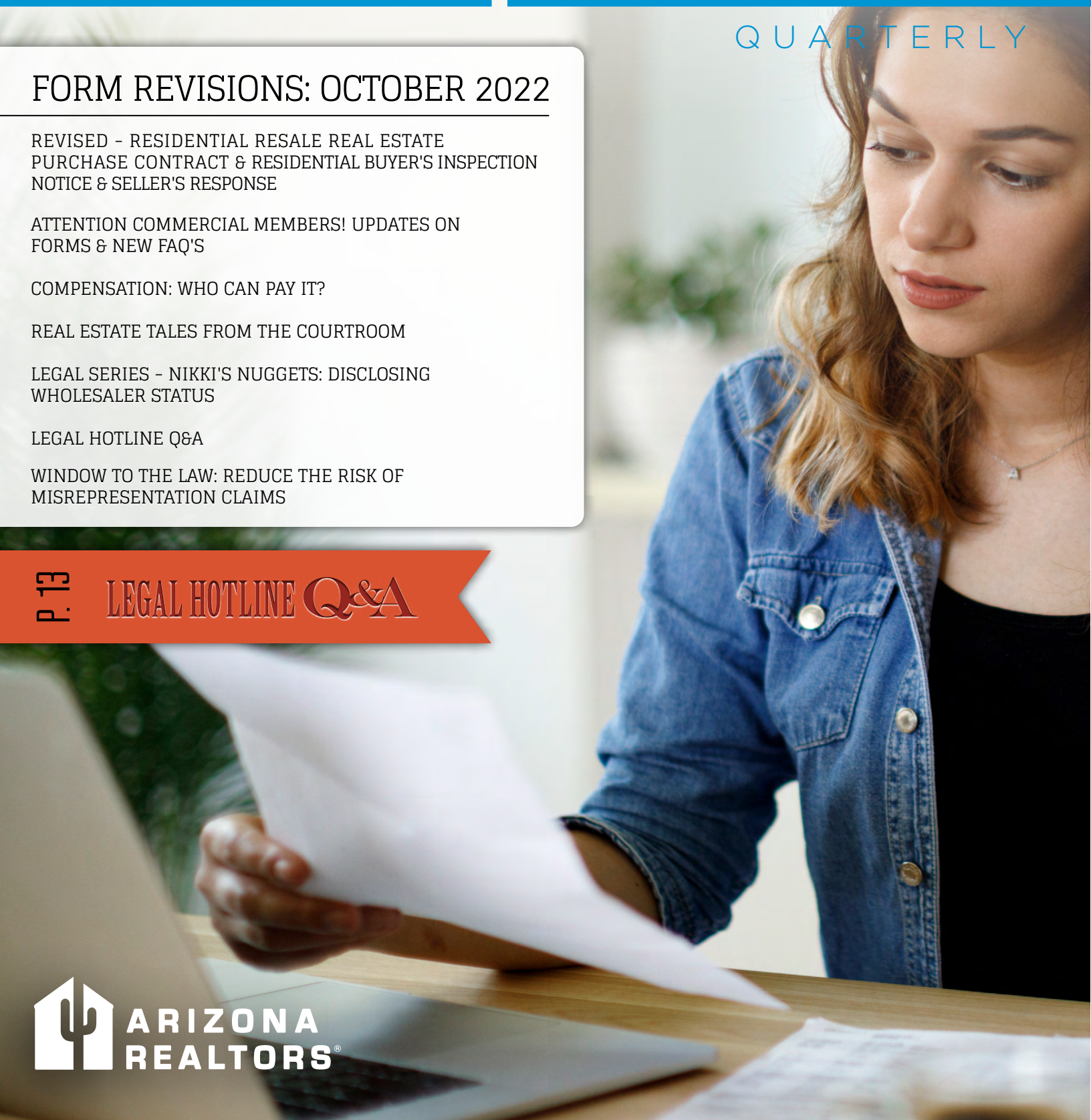
ARIZONA REALTORS®

FOURTH QUARTER 2022

BROKER & MANAGER

QUARTERLY

FORM REVISIONS: OCTOBER 2022



ARIZONA REALTORS®

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ARIZONA REALTORS®

BROKER & MANAGER

FOURTH QUARTER 2022 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

IN THIS ISSUE

AGENT SAFETY ALERT PROGRAM (ASAP)

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

CLICK TO LEARN ABOUT REALTOR® SAFETY

REVISED PURCHASE CONTRACT AND BINSR

On October 1st, the Arizona REALTORS® released a revised Residential Resale Real Estate Purchase Contract (Purchase Contract) and Residential Buyer's Inspection Notice and Seller's Response (BINSR).

Background:

Last year the BINSR Workgroup[1], chaired by Tahona Epperson, prepared a revised draft of the BINSR to be considered for future release. Upon receipt of the Loop comments, the Workgroup determined that limited changes to the Purchase Contract would need to occur to effectuate changes to the BINSR.

The workgroup ultimately decided to minimally change the Purchase Contract and the BINSR by making the verbiage in the forms broader so that the parties can choose how they would like to take care of disapproved items.

Purchase Contract revisions:

Sections 5a and 6j of the Purchase Contract now include the words "or address" in those portions of the Purchase Contract that discuss whether seller if given the opportunity, is willing, or not willing to correct items disapproved. In other words, the parties may now "correct or address" disapproved items in whatever manner they choose.

See redlined Purchase Contract here.

BINSR revisions:

In addition to the broader verbiage inserted into the Purchase Contract which allows for the parties to "correct or address" disapproved items, the BINSR now instructs the parties to utilize an addendum to address disapproved items, if applicable. The revised BINSR also contains a new Buyer and Seller acknowledgment which cites Arizona law and states the requirement to utilize a licensed contractor to perform any agreed upon corrections when (i) the aggregate contract price, including labor and materials, is $1,000 or greater; (ii) the work to be performed is not of a casual or minor nature; or (iii) the work to be performed requires a local building permit. Finally, the revised BINSR advises the buyer that "if the Seller agrees to address the items disapproved by monetary credit or change in Purchase Price, an addendum must be submitted to Buyer's lender, who may limit or restrict total contractual credits."

See redlined BINSR here.

To better comprehend the revised forms and understand why changes were made, please see the frequently asked questions.

FREQUENTLY ASKED QUESTIONS

Q1. Why is the word "address" used?

A1. The word "address" was chosen by the Workgroup because it gives the broadest scope for buyers and sellers to agree on how to deal with disapproved items.

Q2. How does this broader scope affect the contract?

A2. With the addition of the new broader verbiage, the parties are not contractually limited to solely negotiating repairs and/or corrections to the disapproved items.

Q3. Does the new broader Purchase Contract verbiage and BINSR revisions change the way buyers and sellers currently use the BINSR?

A3. No. The new broader verbiage contractually provides the parties with more options to negotiate how to "correct or address" disapproved items. To ensure you are properly using the BINSR, see the Back to BINSR Basics article.

Q4. How else can the parties "address" disapproved items?

A4. If neither party wishes to enter into negotiations for repairs and/or correct disapproved items, the parties could opt to negotiate a credit or price reduction via an addendum. If the parties negotiate via an addendum, the parties should be mindful of the contractual deadlines provided for in section 6j of the Purchase Contract.

Q5. What if the parties wish to negotiate for repairs and/or corrections and a credit or price reduction?

A5. The buyer should still identify and list those items the buyer disapproves of along with the request for repairs and/or corrections on the BINSR and attach an addendum requesting a credit or price reduction.

Q6. What if the buyer only wishes to negotiate a credit or price reduction?

A6. The buyer should still list in the BINSR any items the buyer disapproves of and attach an addendum requesting a credit or price reduction.

Q7. Why must an addendum be used?

A7. The BINSR is a notice document which the buyer may use to give the seller notice regarding those items the buyer disapproves of. The BINSR is not an addendum and should not be used to modify the terms of the Purchase Contract. As such, the revised BINSR now includes verbiage reminding the parties to utilize an addendum, if applicable.

Q8. When using an addendum to request a credit or price reduction, should the addendum say "in lieu of repairs, buyer requests $5,000?

A8. No. The addendum should simply state "Seller to credit Buyer $5,000 in closing costs" or "Purchase Price is $X."

Q9. Are there other ways the parties might choose to "address" the disapproved items rather than a repair or credit or price reduction?

A9. Yes. For example, the parties could extend close of escrow, offer to pay additional months of HOA fees, or pay down points on the buyer's interest rate.

Q10. Why is the new acknowledgment for buyer and seller included in the BINSR?

A10. The workgroup felt it was important to include this language so that buyers and sellers are aware that if the parties negotiate and agree to repairs, Arizona law requires the use of a licensed contractor when (i) the aggregate contract price, including labor and materials, is $1,000 or greater; (ii) the work to be performed is not of a casual or minor nature; or (iii) the work to be performed requires a local building permit.

Q11. There are other exemptions for when a homeowner can perform work on their property, why aren't these included?

A11. The Arizona law that was inserted into the buyer and seller acknowledgment is specific to the part of the transaction in which the buyer is requesting repairs and the seller is deciding whether or not to complete the buyer's requested repairs. Therefore, the only statutory information included in the BINSR is the information applicable to the transaction at that time.

Q12. Does including the licensed contractor statute replace "workmanlike manner"?

A12. No. The acknowledgment specifically identifies that work must be performed in a workmanlike manner. However, should the agreed upon corrections/repairs meet any of the statutory requirements, Arizona law requires that the work must be performed by a licensed contractor.

Q13. Are agents supposed to explain the licensed contractor statutes to the buyer and seller?

A13. No. Agents should not attempt to practice law. The law is cited for the buyer and seller to reference, if necessary.

Q14. Do agents have to enforce whether a licensed contractor is used to perform repairs and/or corrections?

A14. No. Agents duties do not include enforcing the law.

Q15. Why was new verbiage in the buyer's acknowledgment added above the buyer's signature on page 2?

A15. The new verbiage was added because if the parties negotiate a monetary credit or change in Purchase Price, the buyer should be aware that their lender may limit or restrict the total contractual credits. In other words, even if a seller agrees to give the buyer a credit, if the buyer is financing their purchase of the property, the buyer may want to contact their lender to confirm the buyer can receive the negotiated credit because a lending program may only allow for a buyer to receive a certain amount of credit. Additionally, any time contractual terms are modified, the lender must be notified, along with the escrow company.

Q16. Why does the Seller's Response allow for a seller to attach an addendum?

A16. Suppose the buyer requests repairs and does not request a credit or price reduction but the seller does not want to perform any repairs. Instead of declining to perform any repairs, the seller could respond with an addendum offering the buyer something else instead of performing repairs. Alternatively, the seller may decline to sign an addendum submitted by the buyer and may instead wish to offer different terms.

Special thanks to the workgroup members who spent a significant amount of time working on the revisions to these forms. The workgroup members assisting Tahona were Martha Appel, John Mijac, James Adams, Diana Bingham, Hydie Edwards, Wednesday Enriquez, Tiffany Jones, Cathy Swann, Deborah Yost, and Annie Barmore, along with the Arizona REALTORS® staff members Michelle Lind, Nikki Salgat, Jan Steward and Jamilla Brandt.

Additional Forms Released in October:

For quite some time, it has become increasingly common for more than one agent to represent the buyer or seller in a transaction. For that reason, it was determined that the following forms would benefit from including an additional line to identify multiple agents representing the buyer or seller:

(1) Buyer-Broker Exclusive Employment Agreement

(2) Disclosure of Buyer Agency and Seller Waiver and Confirmation

(3) Real Estate Agency Disclosure & Election

(4) Unrepresented Seller Compensation Agreement

(5) Vacant Land / Lot Purchase Contract

As such, the above listed forms now contain an additional line to address those transaction in which a buyer and/or seller are represented by multiple agents.

COMMERCIAL FORMS - - FROM AIR CRE CONTRACTS

Commercial Members: The Deal Just Got Sweeter – Take Advantage of the Arizona REALTORS® and AIR CRE Agreement

Years ago, the Arizona REALTORS® negotiated with AIR CRE to offer a discounted plan allowing our members to access AIR CRE's Contracts software. The software includes 50+ of the most commonly used commercial real estate contracts, including Purchase and Sale, Lease and Listing Agreements. And, depending on the level of the plan a commercial member purchased, the cost of the Software and credits ranged from $129 to $499.

Recently, the Arizona REALTORS® entered into a new contract with AIR CRE which went into effect on September 23, 2022. **The new contract allows Arizona REALTORS® to download the AIR CRE Contracts software and receive 50 credits for FREE.** In other words, members will not incur any cost to download the software and access Arizona-specific commercial forms until after the member has used their 50 credits. Once the 50 credits are depleted, the member may then purchase additional credits for $1.50 each, in any increment they choose.

CLICK TO LEARN MORE AND GET THE SOFTWARE AAR.AIRCRECONTRACTS.COM

Frequently Asked Questions

Q1. How long will 50 credits last me?

A1. Each contract has a certain number of credits associated with it ranging from 1-6 depending on the complexity of the contract. All lease and purchase agreements are 6 credit contracts.

Q2. Will I be charged additional credits if I have to modify a draft?

A2. No. A user can create and modify as many "DRAFT" versions of a contract as desired, only being charged the appropriate credits once a "FINAL" copy is created.

Q3. What if I already purchased AIR CRE Contracts? How does this new agreement affect me?

A3. If you already purchased the software, AIR CRE will still give you 50 additional credits.

Q4. What if I have a legal question about the verbiage in an AIR CRE commercial contract?

A4. You will have free access to AIR CRE's attorney, Brian Mashian, via telephone at 310-207-1646 for contract related questions.

Q5. What if I need technical support?

A5. AIR CRE provides all sales and technical support via www.aircrecontracts.com or 213-687-8777.

BROKER to BROKER FORUM

Mark Your Calendar for our 2023 Broker to Broker Forums

January 18	April 19	July 19	October 11
February 16	May 17	August 16	November 15
March 15	June 21	September 20	December 20

These virtual forums offer brokers/managers the opportunity to stay abreast of the hot topics and issues that are most important and relevant to you, as the leaders in your brokerages. This forum allows you to pick the collective brains of fellow Arizona brokers.

Check out the Broker Forum recording archives here: https://www.aaronline.com/increase-knowledge/new-broker-programs/broker-university/

Tech Marketplace is an Arizona REALTORS® member resource where you will find a variety of applications, software, products, and services.

COMPENSATION: WHO CAN PAY IT?

A.R.S. §32-2155 provides that only "a broker shall employ and pay active licensees, and a licensee shall accept employment and compensation as a licensee only from the legally licensed broker to whom the licensee is licensed." Effective on September 24, 2022, HB 2172 allows a real estate licensee to hire another licensee as a W-2 employee, pending their broker approval, and other conditions. The new law reads as follows:

A. A broker shall employ and pay only active licensees, and a licensee shall accept employment and compensation as a licensee only from EITHER OR BOTH OF THE FOLLOWING:

1. The legally licensed broker to whom the licensee is licensed

2. AN EMPLOYER OTHER THAN THE LEGALLY LICENSED BROKER AS DESCRIBED IN PARAGRAPH 1 OF THIS SUBSECTION IF ALL OF THE FOLLOWING APPLY:

   (a) THE EMPLOYER HOLDS A LICENSE.

   (b) THE LICENSEE IS THE EMPLOYER'S EMPLOYEE AND RECEIVES A FEDERAL FORM W-2 WAGE AND TAX STATEMENT.

   (c) THE EMPLOYER HAS THE SAME EMPLOYING BROKER AS THE LICENSEE.

   (d) THE EMPLOYER OBTAINS WRITTEN PERMISSION FROM THE EMPLOYING BROKER TO PAY THE LICENSEE.

So, what does this mean for brokers and real estate licensees?

Q1. Does the employing broker have to allow the licensee to pay another licensee?

A1. No. The employing broker does not have to allow a licensee to pay another licensee. However, if the broker does allow a licensee to pay another licensee, the licensee must obtain written permission from the employing broker to pay another licensee.

Q2. What if licensee A employs licensee B but licensee B works for a different broker than licensee A?

A2. Per A.R.S. §32-2153, a licensee cannot represent a broker other than the broker to whom the licensee is licensed. In addition, under A.A.C. R4-25-306(A)(2), an agent can only perform real estate services on behalf of the agent's employing broker. Therefore, licensee A may not hire licensee B while licensee B works for a different broker.

Q3. What is an employee?

A3. The Internal Revenue Service (IRS) has very specific guidelines for **CLASSIFYING workers into employees or contractors.** In general, the amount of control (behavioral and financial) and the relationship of the parties determines if that person is an employee.

Q4. What is a W-2 employee?

A4. A W-2 employee is a worker who receives a W-2 tax form from their employer. Per the IRS, "[e]very employer engaged in a trade or business who pays remuneration, including noncash payments of $600 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 for each employee."

Q5. Is payment of compensation limited to employees that are paid an hourly rate or can a licensee pay another licensee their commission?

A5. As long as licensee A has the employing broker's written permission and licensee B is a W-2 employee of licensee A, licensee A may pay licensee B pursuant to the parties agreed upon employment arrangement.

Note: For information on proper classification of employees as 1099 independent contractors or W-2 employees, visit the IRS **website**. Additionally, visit the Department of Labor's **website** for information on proper wages and compensation for employees and other labor-related requirements.

Q6. Is the employing broker still required to supervise the real estate licensee that is employed by another licensee?

A6. Yes. Even though the real estate licensee employs and compensates another licensee, it does not relieve the broker's duty to supervise both licensees.

Q7. How should the employing broker address the obligations of its licensee who is paying another licensee?

A7. The employing broker should first update their policies and procedures to address whether the employing broker allows for a licensee to pay another licensee. The Arizona REALTORS® updated the Team Toolkit to assist brokers and agents with matters to consider should the employing broker allow a licensee to pay another licensee.

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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REAL ESTATE TALES FROM THE COURTROOM!

IN THIS REAL ESTATE MALPRACTICE LAWSUIT, THE COURT DISCUSSES A REAL ESTATE AGENT'S DUTY TO THE CLIENT VERSUS A REAL ESTATE AGENT'S DUTY TO A NON-CLIENT.

The Alleged Facts

The real estate agent represented the seller in selling vacant hillside land in Surprise, Arizona, in which the agent had been involved in the successful efforts to subdivide into lots. During that work, the real estate agent had contact with a civil engineer about road access to the lots. The civil engineer testified that he told the real estate agent that it would take at least one year to do the road work required (including permitting) before any construction on an access road could begin. However, the real estate agent testified to seeing the access road being built five to six months after that meeting with the civil engineer.

A few years later, the buyers contacted this real estate agent to view the lots as a possible homesite. During a site visit, in responding to the buyers' questions about the access road, the real estate agent said it was a good road built at a substantial cost, although it was not yet complete. One of the buyers testified that the real estate agent said, "the county wouldn't let us sell these lots up there if this road weren't [sic] built right." When the buyers asked the real estate agent whether they should have their own real estate agent, the real estate agent said that was not necessary. The buyers then signed an agreement whereby the real estate agent acted as a dual agent. (The reported case does not specify whether this agreement was the AAR Consent to Limited Representation Agreement.)

At a later meeting, the real estate agent provided the buyers with written easements in case they had "any lingering doubts about the road." The real estate agent assured them "that everything was good about the road" and that the buyers "knew everything there was to know about" the road. The real estate agent provided the buyers a disclosure affidavit that stated "[t]here is ... legal access" and "physical access to the Property." After reviewing the affidavit, the buyers again expressed concern about access, including whether a two-wheel drive vehicle could operate on the road. The real estate agent then added a handwritten note on the affidavit stating the road was "[c]urrently not traversable by two wheel drive passenger motor vehicle."

The Lawsuit

When the buyers were unable to obtain a permit to build a home on the lot, they filed this lawsuit against the real estate agent and the seller asserting fiduciary duty and negligence-based claims, misrepresentation of the status of the road, and failure to disclose material information about the status of the road, resulting in a seven-day jury trial. "The jury heard expert testimony about a real estate agent's obligation to give "full, complete, accurate disclosure of important information" in the agent's possession, and that this standard could be breached if an agent affirmatively gave information without knowledge of its truth or that the agent knew was incorrect."

After deliberation, the jury returned a verdict in favor of the buyers for $318,200.47, allocating no fault to the buyers, 30 percent fault to the seller and 70 percent fault to the real estate agent. The real estate agent appealed.

The Appeal – What Law Applies

On appeal the real estate agent argued that the superior court should "have offered a specific legal instruction ... as set forth in *Aranki v. RKP Investments*, 194 Ariz. 206, 979 P.2d 534 (App.1999)" which states:

The real estate agent is not liable to the buyers for passing on information without proof that they did so under circumstances suggesting they knew or should have known that any information provided by the sellers might be false.

However, the Court of Appeals noted that this language in the Aranki case addressed a negligent misrepresentation claim by a buyer against a seller's agent, not a client's fiduciary duty claims against the client's agent.

The Court went on to discuss an agent's fiduciary duty to a client, noting cases that state: "A real estate agent owes the duty of utmost good faith and loyalty to his [or her] principal" and real estate agents owe "duty of good faith and loyalty to their principal" and "must exercise reasonable due care and diligence to effect a" transaction to the client's "best advantage", along with the Commissioner's Rule A.A.C. R4-28-1101(A) that a real estate agent "owes a fiduciary duty to the client and shall protect and promote the client's interests."

>

The Court explained that the Aranki case recognized the "important distinctions between the claims" by a buyer against a seller's agent (where no fiduciary duty is owed) and by a buyer against the buyer's agent (where a fiduciary duty is owed). "Aranki simply acknowledged the compatibility of the fiduciary duty an agent owes to his client with the duty to deal fairly with all other parties to the transaction."

The decision in the Aranki case stated:

> The duty of fair dealing does not include investigations to discover defects in the sellers' property ... Thus, the misrepresentation claim would be proved here only if plaintiffs [the purchasers] could establish that the [seller's brokers and agents] ... knew or should have known of the defects [in the land] giving rise to this litigation and failed to disclose such information. The sellers' real estate brokers and agents are not liable to the [non-client] buyers for passing along such information without proof that they did so under circumstances suggesting that they knew or should have known that the information provided by the sellers might be false.

THERE WAS VIRTUALLY NO DISCUSSION BY THE COURT OF APPEALS ADDRESSING THE FACT THAT THE REAL ESTATE AGENT WAS ACTING AS A DUAL AGENT IN THE TRANSACTION AT ISSUE.

The Court of Appeals Decision

The Court of Appeals in this case ultimately determined that the superior court did not err and the judgment against the real estate agent and in favor of the buyers was affirmed.

Case Lessons:

- If the buyer questions the accuracy of the seller's representations or any information, advise the buyer in writing to obtain independent verification.
- Do not be the source of information – be the source of the source.

Helmke v. Service First Realty, LLC, Court of Appeals of Arizona, No. 1 CA–CV 14–0078 (2015)

NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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.

ARIZONA REALTORS® ADVERTISING CHECKLIST

When advertising, can you answer "yes" to ALL of the following questions to ensure compliance with Arizona rules and statutes?

Broker Approval
Has the advertisement been submitted to the Designated Broker for compliance review prior to release?

☐ YES ☐ NO

Name of Licensee
Does the advertisement use the licensee's name exactly as it appears on their real estate license?

☐ YES ☐ NO

Brokerage Name
Does the advertisement identify in a clear and prominent manner the employing broker's legal name or the DBA name contained on the employing broker's license certificate?

☐ YES ☐ NO

Franchise
If the brokerage is an office of a franchise, does the advertisement identify the specific office in addition to displaying the franchise name?

☐ YES ☐ NO

Another's Listing
If advertising property that is the subject of another person's real estate employment agreement, does the advertisement display the name of the listing broker in a clear and prominent manner?

☐ YES ☐ NO

True & Accurate Picture
Does the advertisement contain accurate claims and representations and fully state factual material? Does the advertisement avoid misrepresenting the facts or creating a misleading impression?

☐ YES ☐ NO

Team Advertising
If published by a real estate team, does the advertisement make it clear that the team is part of an employing brokerage and does it identify the employing broker in a clear and prominent manner?

☐ YES ☐ NO

Games of Chance
Does the advertisement avoid soliciting prospects for the sale, lease or use of real property through a promotion of a speculative nature involving a game of chance or risk, or through conducting lotteries?

☐ YES ☐ NO

Payment of Compensation for Referral Fees
Does the advertisement avoid offering compensation or anything of value to an unlicensed person in exchange for the referral of a prospective client or customer?

☐ YES ☐ NO

Property Owned by Licensees
If the licensee is advertising their own property for sale, lease or exchange, does the advertisement contain the words "owner/agent"?

☐ YES ☐ NO

Unlicensed Assistants
If the advertisement includes an unlicensed assistant, is the individual identified as being "unlicensed"?

☐ YES ☐ NO

ARIZONA REALTORS®

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

Click here for more short videos which are a great resource for your office meetings.

ARIZONA REALTORS®

RISE

REALTORS® Inspiring Service Excellence

Honor Roll

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

Have any of your agents gone above and beyond by taking their peer-to-peer interactions from ordinary to extraordinary? Give them a shout out by nominating them for R.I.S.E. Honor Roll: https://www.aaronline.com/r-i-s-e-honor-roll-program/

We love to see great REALTORS® doing great things.

REALTOR® members encompass the "Attributes of Professionalism", and the Arizona REALTORS® wants to celebrate agents who have demonstrated a higher standard of performance and professionalism.

The R.I.S.E. Honor Roll program was created to spotlight professionalism as it occurs, while creating a culture of gratitude between members.

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.

Arizona REALTORS® Legal Hotline

A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The Arizona REALTORS® Legal Hotline is designed...

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

The Hotline is provided by the attorneys at Zelms, Erlich & Mack

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

For More Information

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

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LEGAL HOTLINE

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

LISTING BROKER UNDER A "FLAT FEE" LISTING AGREEMENT SHOULD BE IDENTIFIED IN THE CONTRACT

FACTS: A brokerage has a "listing" that charges a flat fee to the sellers to place the property on the Multiple Listing Service ("MLS"). The sellers agree to pay the MLS-offered co-broke to an agent that procures a buyer. The MLS states all offers should be presented to the sellers, and that the brokerage should not be listed on page 10 of the Residential Resale Real Estate Purchase Contract ("Contract").

ISSUE: Should the listing broker be listed on page 10, section 9a of the Contract, when the buyer's agent presents an offer to a seller listed in the MLS under a flat fee listing agreement?

ANSWER: See discussion.

DISCUSSION: Although a broker can limit the services the broker provides to a client, a broker cannot limit the regulatory authority of the Arizona Department of Real Estate. Therefore, a "limited-service broker" is required to comply with all real estate statutes and rules, including A.R.S.§ 32-2151.01(A), which requires that "[e]ach licensed employing broker shall keep records of all real estate... transactions handled by or through the broker." Thus, the listing broker should be identified on page 10 of the Contract, and a copy of all transaction documents should be retained by the listing broker.

In regard to the buyer's broker who is instructed to submit an offer directly to the seller, A.A.C. R4-28-1102, states: "[e]xcept for owner listed properties, negotiations shall be conducted exclusively through the principal's broker or the broker's representative unless: 1. [t]he principal waives this requirement in writing, and 2. [n]o licensed representative of the broker is available for 24 hours."

The sellers and the limited-service broker can satisfy this Rule by providing a written waiver (preferably in the listing agreement) indicating that the buyer's agent should present/negotiate the buyer's offer directly with the seller.

APPRAISAL CONTINGENCY MAY BEGIN AGAIN

FACTS: A buyer and seller entered into a Residential Resale Real Estate Purchase Contract (the "Contract"). During the escrow process, the buyer received notice from her lender that the property appraised for the contract price. The buyer therefore notified the seller that the property had appraised for the contract price.

However, ten (10) days before close of escrow, the underwriter notified the buyer that the appraisal had been flagged for review. Within three (3) days, the buyer was notified that the appraisal value had been decreased during the review. The buyer now notifies the seller that she cannot qualify and, pursuant to section 2l of the Contract, is electing to cancel based on the appraisal contingency.

ISSUE: Can the buyer cancel based on section 2l of the Contract during an appraisal review?

ANSWER: Probably.

DISCUSSION: Section 2l of the contract reads: "If the Premises fail to appraise for the purchase price in any appraisal required by lender, Buyer has five (5) days after notice of the appraised value to cancel this Contract and receive a refund of the Earnest Money or the appraisal contingency shall be waived, unless otherwise prohibited by federal law."

During an appraisal review, the buyer received a new notice of value, therefore, the buyer likely had five (5) days from the notice of the new value to cancel or waive the contingency. If the buyer fails to cancel within five (5) days, then the buyer must proceed with the Contract

BROKER MUST PRODUCE SUBPOENAED DOCUMENTS

FACTS: The broker received a subpoena from the Superior Court to produce its file in a civil litigation. The broker is not a party to the litigation but did represent a party during the transaction at issue.

ISSUE: Does the broker's duty of confidentiality prohibit him from producing the documents requested in the subpoena?

ANSWER: See discussion.

DISCUSSION: Generally speaking, a brokerage owes its client a duty of confidentiality. This means that the broker may not divulge transaction documents or information to a third party without its client's consent. However, a subpoena is in essence a court order commanding the delivery of the documents. The court order trumps the duty of confidentiality. In other words, the broker should comply with the subpoena and produce the requested documents.

Note: Any personal information, such as social security number, date of birth, etc. should be redacted from any documents before they are produced.

NOTICE TO AGENT CONSTITUTES NOTICE TO PRINCIPLE

ISSUE: The purchase contract provides that the buyer has ten days after contract acceptance 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 in imputed to the seller.

PREVIOUS LISTING AGENT STILL BOUND BY CONFIDENTIALITY

FACTS: Broker A had a property listed two years ago. The sellers ultimately decided not to sell at that time, and the listing expired.

Two years later, the property is for sale with Broker B. Broker A has a buyer that is interested in making an offer on the property. Broker A knows that Mrs. Seller is ill and this might be helpful in negotiations for his buyer. However, the knowledge was obtained while Broker A had the property listed for sale two years ago.

ISSUE: Can Broker A disclose the information to the buyer?

ANSWER: No.

DISCUSSION: After termination of an agency relationship, the fiduciary duty is ended. *See Coldwell Banker Commercial v. Camelback Office Park,* 156 Ariz. 226, 231, 751 P.2d 542, 547 (1988). However, pursuant to the Restatement (Second) of Agency: 1 §396 Using Confidential Information after Termination of Agency:

> Unless otherwise agreed, after the termination of the agency, the agent:
> - (d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relationship.

Therefore, Broker A's continuing duty of confidentiality to the seller after the listing expired would preclude him from disclosing the confidential information about Mrs. Seller even after termination of the agency relationship, unless Broker A obtains Mrs. Seller's consent.

AN EMAIL FROM AN AGENT OUTLINING TERMS IS NOT AN OFFER

FACTS: An agent representing a buyer sent an email to the listing agent generally outlining the terms of an offer the buyer intends to make. The buyer's agent is insisting that the email "offer" be presented to the seller and the seller respond.

ISSUE: Is the listing agent obligated to provide the email to the seller?

ANSWER: See discussion.

DISCUSSION: The listing agent is obligated to promptly submit all offers to the seller. See A.A.C. R4-28 802(B). An email from a buyer's agent generally outlining terms, however, is not an "offer" as contemplated by the statutes. As such, the seller and listing agent are not obligated to respond to the email. As a matter of good practice, the listing agent should notify the seller of the potential offer.

BROKER ENTITLED TO CONTACT BUYER DESPITE ATTORNEY'S INSTRUCTION

ISSUE: The broker represents the buyer in the transaction. The buyer has never mentioned that the buyer is represented by an attorney. An attorney telephones the broker and says that the attorney represents the buyer, and that the broker in the future must contact the attorney, not the buyer. Can the broker contact the buyer to confirm that the attorney is representing the buyer?

ANSWER: Yes. The broker has a fiduciary duty to the buyer, and should contact the buyer to confirm that the buyer only wants to have contact with the broker through the buyer's attorney. The broker should then procure a written confirmation from the buyer.

A TAIL PROVISION IN THE ARIZONA REALTORS® LISTING CONTRACT IS GENERALLY ENFORCEABLE

FACTS: The seller and agent entered into an Arizona REALTOR® Residential Listing Contract Exclusive Right to Sell/Rent. The tail clause in lines 66-70 was for a period of 90 days after expiration of the listing. During the term of the listing, the buyer viewed and made an offer to purchase. The buyer's offer was rejected at the time because there was a higher competing offer that was accepted instead. That contract ultimately canceled and the listing expired a few weeks later. Two weeks after the listing expired, the original buyer closed escrow on the property. No agent participated in the closing between the buyer and seller. The agent discovered the closing and demanded her listing commission. The seller refused to pay the commission.

ISSUE: Is the agent entitled to a commission even though the transaction closed after the listing expired?

ANSWER: See Discussion.

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DISCUSSION: The Listing Contract at lines 66 through 69 provides: "After the expiration of this Agreement, the same commissions, as appropriate, shall be payable if a sale or rental is made by Owner to any person to whom the Premises has been shown or with whom Owner or any broker has negotiated concerning the Premises during the term of this Agreement: (i) within (blank) days after the expiration of this Agreement, unless the Premises has been listed on an exclusive basis with another broker...".

Generally, tail provisions like the one contained in the Arizona REALTORS® Listing Contract are enforceable as written." *See Hyde Park-Lake Park, Inc. v. Tucson Realty & Trust Co*., 18 Ariz. App. 140, 500 P.2d 1128 (App. 1972). Based on the facts presented, the agent has contractually earned the agreed upon commission because the buyer and seller closed escrow shortly after the listing contract expired, well within the 90day tail period set forth in the agreement.

A LISTING AGENT MUST DISCLOSE KNOWN MATERIAL FACTS EVEN IF INSTRUCTED BY THE SELLER OTHERWISE

FACTS: The seller is verbally abusive to the listing agent. The seller has also instructed the listing agent not to disclose to potential buyers that an oleander hedge encroaches onto the neighbor's property.

ISSUE: Must the listing agent follow these instructions?

ANSWER: No.

DISCUSSION: The listing agent must disclose all known material facts regardless of instructions from the seller. See A.A.C. R4-28-1101. Additionally, the listing agent may want to consider terminating the relationship based on the seller's issuance of instructions contrary to law and the seller's abusive behavior.

NO CURE PERIOD NOTICE IS NECESSARY WHEN BUYER DOES NOT PROVIDE A RESIDENTIAL BUYER'S INSPECTION AND SELLER'S RESPONSE (BINSR)

FACTS: The buyer and seller entered into an Arizona REALTORS® Residential Resale Purchase Contract. The 10-day inspection period passed, and the buyer did not cancel, present a BINSR or otherwise disapprove of any items.

The seller claims the buyer is not acting in good faith and insists that the listing agent prepare a 3-day cure notice.

ISSUES: Is a cure period notice necessary when a buyer does not provide a BINSR?

ANSWER: NO.

DISCUSSION: A buyer is not contractually obligated to provide a BINSR pursuant to the contract. Rather, by failing to provide a BINSR or cancel, the buyer has waived the inspection contingency and is obligated to close escrow without any repairs. In fact, lines 287-289 of the contract provide:

BUYER'S FAILURE TO GIVE NOTICE OF DISAPPROVAL OF ITEMS OR CANCELLATION OF THE CONTRACT WITHIN THE SPECIFIED TIME PERIOD SHALL CONCLUSIVELY BE DEEMED BUYER'S ELECTION TO PROCEED WITH THE TRANSACTION WITHOUT CORRECTION OF ANY DISAPPROVED ITEMS.

As a result, there is no need for the seller to issue a cure period notice because the buyer is obligated to close escrow regardless.

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.

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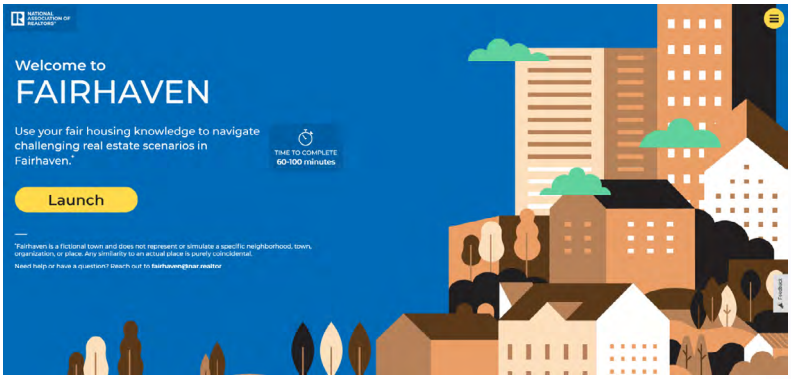

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