



CERTIFIED
RISK MANAGEMENT
SPECIALIST

EMPLOYMENT, AGENCY & THE STANDARD OF CARE

Jim Sexton | Rick Mack, Esq.

CE: 3 Hours Agency / 3 Hours Commissioner's Standards



Rev: 5_2025

255 E. Osborn Rd., Suite 200 • Phoenix, AZ 85012
Telephone: 602.248.7787 • Toll-free in AZ: 800.426.7274 • Fax: 602.351.2474
www.aaronline.com

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Course Introduction and Learning Objectives

Introduction

This course addresses risk management topics and issues related to agency, employment and the standard of care. Many disputes arise as a result of the parties' failure to understand the terms of employment agreements and what constitutes an appropriate standard of care in an agency relationship. When disputes over commissions occur, the circumstances in a transaction and the terms of the employment agreement will play a significant role in arbitration and civil litigation. This course is designed to assist brokers and salespersons in reducing the risks related to agency and employment agreements in Arizona.

Arizona Real Estate: A Professional's Guide to Law and Practice – Available on Amazon: Chapters 2, 3 and 4 of *Arizona Real Estate: A Professional's Guide to Law and Practice*, authored by K. Michelle Lind, Esq., are the basis of this class with portions of this course reprinted from the text. You are encouraged to review this book in its entirety.

Learning Objectives

Upon completion of this course, students will be able to:

- Describe the general requirements of broker employment agreements.
- Explain how a commission is earned under a listing agreement.
- Explain how commission issues should and should not be addressed.
- Describe how an agency relationship is created in Arizona.
- Identify the duties of a broker as required by the ADRE Commissioner's Rules.
- Identify the risks associated with different types of agency relationships.
- Avoid risks through the proper use of the Real Estate Agency Disclosure and Election (READE) and the Consent to Limited Representation ("Consent") forms.
- Describe how the standard of care is established under state law, the Commissioner's rules and common law.
- Explain the specific duties to buyers and sellers required to provide the legally required standard of care.

Unit 1: Broker Employment Agreements

Learning Objectives

Upon completion of this unit, students will be able to:

- Describe the general requirements of broker employment agreements.
- Explain how a commission is earned under a listing agreement.
- Explain how commission issues should and should not be addressed.

1-1: Independent Contractor Agreements (ICAs) between an Employing Broker and Salesperson

Salespersons are “employees” for regulatory and civil liability purposes

The Commissioner’s Rules require the broker to maintain close supervision and control over salespeople. R4-28-1103(A) provides: “An employing broker and a designated broker shall exercise reasonable supervision and control over the activities of brokers, salespersons, and others in the employ of the broker...” R4-28-1103(D) provides “An employing broker is responsible for the acts of all associate brokers, salespersons, and other employees acting within the scope of their employment.”

The scope of employment issue was addressed by the court in the case of *Santoril v. Martinez Russo, LLC*, 240 Ariz. 454, 381 P.3d 248 (App 2016). In this wrongful death case, a salesperson returning from a real estate sales appointment crossed the center line in the car he was driving and struck the Plaintiff’s husband’s vehicle – both men died in the accident. In the resulting lawsuit, the court addressed whether Arizona’s real estate statutes and regulations establish as a matter of law that the relationship between brokers and their salespersons is one of employer and employee. The court concluded that “although the statutes and regulations impose on a broker the responsibility to closely supervise a real estate transaction and the documentation of that transaction, they do not establish the requisite control over other aspects of a salesperson’s activities (such as driving to and from sales appointments), and thus do not dictate an employer-employee relationship as a matter of law.”

Statutory Non-Employees for Tax Purposes

The Internal Revenue Code provides a statutory classification for real estate salespersons as “statutory non-employees” for federal income and employment tax purposes. To qualify for “statutory non-employee” status, the real estate salesperson must:

- Be licensed as a real estate agent;
- Receive substantially all compensation based on sales or other output, rather

- than the number of hours worked; and
 - Have a written contract with the brokerage firm that provides that the salesperson will not be treated as an employee for federal tax purposes.
- I.R.C. §3508

Other Tax Considerations

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Civil Liability considerations

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What provisions should be considered in an ICA?

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Although terms of Independent Contractor Agreements vary with the broker, common provisions include the following:

Obligations of the Salesperson to:

- Remain licensed
- Maintain REALTOR membership
- Abide by all laws and rules
- Abide by brokers policies and procedures
- Pay any amounts due to the broker
- Work Diligently

Obligations of the Broker to:

- Remain licensed
- Compensate the salesperson
- Provide office space
- Independent contractor status
- Errors and Omissions insurance
- Allocation of expenses
- Payment of commissions on pending transactions upon departure of the salesperson
- The files and documents that the salesperson may take upon departure
- Dispute resolution between broker and salesperson as well as between two salespersons within the brokerage
- Liability and indemnification

Tips to Manage Independent Contractor Relationship with Sales Agents

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Team Agreements

Brokers, team leaders and team members should ensure to document the relationship between the Designated Broker and the team/team leader, as well as the relationship between the team leader and their team members. Independent contractor agreements, as well as broker/team agreements and team leader/team member agreements should document these relationships.

AAR offers a team toolkit to assist brokers and agents who are considering employing, forming, managing or becoming a team member which is available on the AAR website. The toolkit covers brokerage considerations, broker/team agreements and team leader/team member agreements.

Assistants, Transaction Coordinators, and Administrators - Independent Contractors or Employees?

Real estate salespersons working as independent contractors have been challenged in three lawsuits - so far unsuccessfully. (For more information on these cases, go to: www.aaronline.com/2002/01/the-ramifications-of-an-independent-contractor-agreement-between-a-broker-and-a-salesperson/). But, what about assistants, transaction coordinators, or administrators working for a broker or salesperson – are they independent contractors or employees?

1-2: General Requirements of Broker-Client Employment Agreements

What risks are associated with failing to understand the general requirements of employment agreements?

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What are the statutory requirements for employment agreements?

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Other employment agreement limitations & requirements

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Is a written employment agreement required for representation?

Gibson v. Parker Trust, 22 Ariz. App. 342, 527 P.2d 301 (App. 1974)

Case Facts:

- The seller discussed selling his ranch with a broker but did not sign a listing agreement.
- The broker proceeded to advertise the property, making the seller aware of these activities.
- Gibson, another licensee, contacted the broker after seeing the ads and an agreement was reached that the two would split the commission if Gibson produced a ready, willing and able buyer.
- The broker claimed he told Gibson he only had an oral listing agreement, while Gibson argued the broker claimed to have an exclusive written listing.
- The ranch was ultimately sold with Gibson's assistance for \$1,600,000, after which the seller refused to pay real estate commissions.

Discuss:

In your opinion, is compensation owed to either broker? Why or why not?

Decision:

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Is a written employment agreement required for a broker to collect a disputed compensation?

The Statute of Frauds

1-3: Listing Agreements

Listing Contracts and their addendum are Multiple Listing Service forms.

What risks are associated with listing agreements?

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Types of Listing Agreements

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What risks are associated with an exclusive right to sell listing?

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What risks are associated with an exclusive agency agreement?

Workshop: Listing Agreements

You are meeting with Andrew and Ellie Turner to list their home. They want the home, which appraised at \$250,000, listed at \$249,900. This is consistent with the area comps. Mr. Turner explains that they need to net at least \$236,000 from the sale. He has an acquaintance who has discussed buying the property, so he doesn't want to pay commission if he ends up selling it himself.

Assuming you agree, what terms should be included in the listing agreement?

Compensation Options:

Listing Broker Compensation Unbundled to provide the parties with flexibility and choice.

Listing Broker will negotiate their compensation.

- Listing Broker will input the compensation owed to them for a sale based on a ___% of the full purchase price or a \$_____ amount.
- The seller, in consultation with the Listing Broker, can decide whether or not they will authorize the Listing Broker to communicate the seller's willingness to potentially compensate a prospective buyer broker depending on the terms of the purchase offer.

What risk is associated with unrepresented buyers?

Listing Contract Addendum

The title of the form now includes a blank spot to fill in which addendum number applies (e.g. the first addendum would be "1").

Three (3) potential terms that could be modified or added via click box:

- The first is to modify Broker Compensation;
- the second is to modify the Term Expiration;
- third is any other term to be modified or added.

Two (2) potential ways to cancel the agreement via click box.

- The first includes no conditions to mutually cancel.
- The second provides the parties space to include conditions that must be met for the cancellation to be effective. Both cancellations include a mutual release.

1-4: When a Commission is Earned Under a Listing Agreement

If the agreement is an exclusive listing and the property is transferred during the term of the listing, the broker is generally entitled to compensation.

Why is additional compensation available for an unrepresented buyer?

What if the seller does or does not authorize the Listing Broker to potentially communicate their willingness to compensate a prospective buyer broker depending on the terms of a purchase offer?

What happens when the broker produces a ready, willing, and able buyer, but no sale results?

In Bass Investment Co. v. Banner Realty, Inc., 103 Ariz. 75, 436 P.2d 894 (1968), the Arizona Supreme Court stated two general rules for when a broker is entitled to a commission:

- (1) If a broker brings the seller a buyer ready, willing and able to pay the list price for the property listed, regardless of whether the seller sells or refuses to sell.
- (2) If the broker brings to the seller a buyer who is willing and able to buy at a price below the listed price, the commission is earned if, but only if, the seller actually sells the property or is willing to sell to that buyer.

Management Clearing, Inc. v. Vance, 106 Ariz. 95, 471 P.2d 707 (1970)

Case Facts:

- The sellers entered into an exclusive listing agreement with a broker to sell an apartment complex.
- The broker found a buyer and produced an offer as agreed upon, except for the addition of a clause making the offer contingent on “an inspection and approval of the interior.”
- The sellers refused to sign the contract.
- The broker proceeded to file a claim for the commission.

Decision:

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Discussion:

- Do you agree with the Court's decision?

***Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 630 P.2d 49 (App. 1981)**

Case Facts:

- The sellers listed their property with the broker.
- The broker secured a buyer for the property and brought an offer to the sellers.
- The sellers accepted the offer, which contained three contingencies:
 - (i) approval of the title,
 - (ii) approval of the termite inspection and
 - (iii) execution by the buyer and seller of a more detailed agreement than the purchase contract.
- All the parties showed up at the closing as scheduled except for the sellers.
- The buyer brought the funds needed to the scheduled closing.

Decision:

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Discuss:

- Do you agree with the Court's decision? Why was this decision different from the previous case?

What “red flags” may indicate a seller is reluctant to complete a sale?

- **If you have concerns about a seller’s willingness to perform under the contract, under what circumstances must you disclose this to the buyer?**

Hyde Park-Lake Park, Inc. v. Tucson Realty & Trust Co., 18 Ariz. App. 140, 500 P.2d 1128 (App. 1972)

Case Facts:

- The seller entered into an exclusive 90-day listing agreement with the broker.
- The listing agreement stated that the broker would be paid a commission on any sale that took place within 90 days after the expiration of the agreement, if the broker had contact with the buyer during the original listing period.
- After expiration of the listing agreement, the seller did sell the property to a buyer, whose name the broker had submitted as someone he had talked to during the listing period.
- The sellers did not pay the broker's commission and the broker proceeded to file a claim.

Assume you are the seller's broker in this case, having executed the Arizona REALTORS® Listing Agreement. Are you entitled to a commission? Why or why not?

Decision:

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Importance of a "tail" period:

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A Listing Agreement is not a Binding Agreement to Sell

If the broker produces a "ready, willing and able" buyer (with no material contingencies), the seller will likely owe the broker a commission, but the seller is under no obligation to sell the property to the buyer.

1-5: Buyer-Broker Employment Agreements

A **Buyer-Broker Employment Agreement** is used by a buyer to employ the services of a broker. The agreements benefit the buyer by setting forth the terms of the buyer-broker relationship.

*The **AAR Buyer-Broker Exclusive Employment Agreement (August 2024)** is available for use by buyer's brokers.-The agreement benefits the broker by assuring that the broker will be compensated the agreed upon amount if the buyer purchases a property during the term of the agreement. The agreement can be of particular importance when representing a buyer in a short sale transaction.*

In the Employment section of the form, the broker agrees to locate the generally described property; negotiate to obtain acceptable terms and conditions for the purchase, exchange, option or lease of the property; and assist the buyer during the transaction within the scope of the broker's expertise and licensing.

11. **Employment:** Broker agrees to:
12. a. locate Property meeting the following general description:
13. ☐ Residential ☐ Land ☐ Commercial ☐ Other: _____ ("Property") within
14. the following geographical area(s): _____;
15. b. negotiate at Buyer's direction to obtain acceptable terms and conditions for the purchase, exchange, or option of the Property;
16. c. assist Buyer during the transaction within the scope of Broker's expertise and licensing.

The **Buyer Broker Agreement to Show Property (August 2024)** is a non-exclusive buyer broker agreement/does not establish an exclusive relationship.

This agreement allows a buyer to enter into multiple Agreements to Show Property with multiple different brokers. This form is used when the buyer engages the broker for the purpose of viewing property and providing other real estate services at Buyer's discretion that may include contract negotiation and advocacy services throughout a real estate transaction. The Buyer Showing Instructions states the Broker will show all property listings that fit the Buyer's criteria.

5. Buyer engages Broker for the purpose of viewing property and providing other real estate services at Buyer's discretion that may
6. include contract negotiation and advocacy services throughout a real estate transaction.
23. **Buyer Showing Instructions:** Broker shall show property listings that fit Buyer's criteria regardless of compensation offered to
24. Broker by seller or seller's broker unless instructed otherwise by Buyer in writing. If necessary, Buyer instructs Broker to negotiate
25. Broker Compensation to be paid by seller or seller's broker. These negotiations shall not jeopardize, delay, or interfere with the
26. initiation, processing, or finalizing of a transaction.

What happens if the Agreements fails to identify the compensation the buyer's broker is to earn?

How does the AAR Buyer-Broker Exclusive Employment Agreement address risks associated with buyer representation?

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How does buyer broker earn compensation using the AAR Buyer -Broker Agreement to Show Property?

14. **Broker Compensation:** If Broker represents Buyer in the purchase of a property, as indicated on the purchase contract that was
15. signed prior to the Expiration Date, Buyer agrees to compensate Broker as follows ("Broker Compensation"):

Scenario:

A buyer contacts you and asks to be shown several properties. After two meetings, during which you show the buyer five different homes, the buyer says they'll contact you after they meet with their lender. A few days later, you find out the buyer made an offer through the listing broker for one of the homes you showed them.

What are your options if you and the buyer entered into a Buyer-Broker Exclusive Employment Agreement?

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Is your answer the same if you and the buyer entered into an Agreement to Show Property?

YOUNG v Rose

Over an 18-month period beginning in April 2006, the Roses and **Young**, a licensed real estate agent, entered into three "Buyer-Broker Agreements" naming **Young** as the Roses' "exclusive real estate agent." The third agreement expired in October 2007.

On January 11, 2009, **Young** sent an e-mail message to Jordan **Rose** regarding four properties possessing some of the Roses' "wish list" amenities, though each exceeded the desired purchase price of "under \$4,000,000.

Young attached a portable document format (PDF) version of the agreement to her e-mail message. Jordan forwarded that e-mail message to her assistant, with the direction to "pls print and have us sign and get back to Julie." **Young** did not manually sign the agreement.

During the term of the 2009 Agreement, the Roses purchased a home within the 85253 zip code, using a real estate agent other than **Young**. The Roses paid that agent a commission. **Young** thereafter sued the Roses for breach of contract, seeking to recover the commission set forth in the 2009 Agreement.

Decision:

230 Ariz. 433, [286 P.3d 518 \(App. 2012\)](#)

Termination of the Employment Agreements

Buyer-Broker Employment Agreements may be terminated in several ways:

- Completion of performance by sale and closing of the property;
- Expiration of the term of the agreement; or
- Mutual agreement of the parties – Buyer/Tenant Employment Agreement Addendum

Are the broker's duties to the buyer/seller after termination in a non-Exclusive Relationship different?

1-6: Compensation Misconceptions

There is no requirement to reduce your compensation **R4-28-1101.D:**

"A licensee shall not allow a controversy with another licensee to jeopardize, delay, or interfere with the initiation, processing, or finalizing of a transaction on behalf of a client. This prohibition does not obligate a licensee to agree to alter the terms of any employment or compensation agreement or to relinquish the right to maintain an action to resolve a controversy."

Discussion:

Isn't it unethical or illegal to include broker compensation in an agreement between the seller/landlord and the buyer/tenant?

How do you handle a CLIENT'S request to reduce the agreed upon compensation?

What do you do if ANOTHER BROKER wants you to reduce your compensation?

How do you handle a lender's refusal to approve a short sale contract unless the compensation is reduced?

Why was the SCA created?

Isn't it unethical or illegal to include broker compensation in an agreement between the seller/landlord and the buyer/tenant?

IMPORTANT NOTE: Compensation can be reduced but NOT increased.

Unit 2: Agency Relationships and a Broker's Duties

Learning Objectives

Upon completion of this unit, students will be able to:

- Describe how an agency relationship is created in Arizona.
- Identify the duties of a broker as required by the ADRE Commissioner's Rules.
- Identify the risks associated with different types of agency relationships.
- Avoid risks through the proper use of the Real Estate Agency Disclosure and Election (READE) and the Consent to Limited Representation ("Consent") forms.

2-1: Creating an Agency Relationship

Agency relationships become extremely important if a dispute arises – the first question that a lawyer will ask a broker when a claim is filed is “who did you represent?”

What risks are associated with agency relationships?

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How is an agency relationship created?

Agency is a relationship in which one person (the agent) is authorized to represent the interests of another (the client) in business dealings with third parties.

- Express Consent:

- Implied Consent:

Does compensation create an agency relationship?

***Alaface v. National Investment Co.*, 181 Ariz. 586, 892 P.2d 1375 (App. 1994)**

Case Facts:

- The buyers, the Alafaces, purchased a lot on which to build a cabin.
- The two agents they dealt with, who worked for the same realty company, both represented that water was available to the lots within the subdivision.
- When construction of the cabin was near completion, they found out they could not obtain water service.
- The Alafaces filed suit against their own agents and the seller, claiming the sellers were liable for the misrepresentation of the agents.

Judgment:

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Significance:

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Can a real estate agent's "unclean hands" harm their innocent client? *Queiroz v. Harvey*, 220 Ariz. 273, 205 P.3d 1120 (2009)

- The buyer and seller entered into a purchase contract for the sale of 20 acres of land in Tonopah. The contract provided for a purchase price of \$150,000, payable \$68,000 cash at closing, an \$82,000 seller carry-back, and a \$1,000 earnest-money deposit.
- Once the contract was executed, the buyer's broker sent the contract to escrow, but deposited no earnest money into escrow during the following week. The seller and

listing agent became concerned about the buyer's failure to deposit the earnest money and repeatedly tried to reach the buyer's broker without success.

- Finally, on a Friday, the listing broker told the escrow agent that the contract was cancelled. Either that night or the next day, the buyer's broker learned that the seller had cancelled the contract. On the following Monday morning, the buyer's broker deposited the earnest money, but the seller refused to perform.
- The buyer then sued the seller seeking specific performance of the contract

The Court determined that a court may consider a real estate agent's inequitable conduct in deciding if the agent's principal is entitled to specific performance of a contract for the sale of real estate and concluded that the agent's inequitable acts may be imputed to the client whether or not the client knew of the agent's misconduct. Thus, the court denied the buyer specific performance.

Scenario: Agency Relationships

Agent Tom represents the seller of a four-bedroom home. An unrepresented buyer calls to inquire about the property and Agent Tom arranges a showing. During the showing, the buyer notices some minor damage to a small area of trim in the family room. Agent Tom contacts the sellers, who tell him they've never noticed it and are unaware of any problems with the property. Agent Tom explains this to the buyer, who proceeds to purchase the property.

Agent Tom has the buyer sign an Unrepresented Buyer Disclosure form.

A couple of months after closing, the buyer hires a contractor to do some remodeling in the family room. The contractor discovers significant water damage in the wall where the buyer first noticed the damage to the trim. The buyer files suit against the seller and Agent Tom.

Discuss:

Assume you are the judge and jury. In your opinion, does the buyer have a case against Agent Tom for negligent misrepresentation?

How would the case be different if Agent Tom represented the buyer?

How would the case be different if Agent Tom did not have the Buyer sign the Unrepresented Buyer Disclosure Form?

2-2: Agency Duties

How are required agency duties established?

Self-Check: Agency Duties

The following questions apply to agency duties as outlined in R4-28-1101.

1. Brokers are only required to disclose known material defects to the party they represent.
 - a. True
 - b. False
2. The Commissioner's rules require brokers to protect and promote the interests of
 - a. All parties
 - b. Their client
3. Brokers are required to take reasonable steps to assist their client in confirming the accuracy of any information relevant to a transaction.
 - a. True
 - b. False
4. Brokers are required to disclose any present or prospective interest in a transaction
 - a. Within 3 business days of contract signing
 - b. Within 30 days of contract signing
 - c. Prior to contract signing
5. The Commissioner's rules permit a broker to act as a dual agent without prior written consent.
 - a. True
 - b. False

6. Brokers are prohibited from delivering possession prior to the close of escrow unless expressly instructed to do so by the
 - a. Seller
 - b. Buyer
 - c. Escrow agent
7. The requirement to expeditiously perform all duties without delay applies to
 - a. The client
 - b. All parties
8. Brokers are not required to provide services consistent with any specific real estate discipline.
 - a. True
 - b. False
9. Brokers may receive compensation for goods and services related to a transaction with prior written consent.
 - a. True
 - b. False
10. Brokers may provide services to a client outside their field of competence if they first disclose their lack of expertise to the client in writing.
 - a. True
 - b. False

Morley v. J. Pagel Realty & Insurance, 27 Ariz. App. 62, 550 P.2d 1104 (1976)

Case Facts:

- Morley owned a three-bedroom home in the Warren area of Bisbee, Arizona.
- They listed their property for sale with Pagel Realty. The asking price was \$ 15,000.
- Broker received an offer from the buyers that provided for a purchase price of \$15,000, with a \$2,500 down payment and the \$12,500 balance would be payable by buyers executing, in favor of sellers, a demand note payable at not less than \$100.00 per month. Interest rate on the note will be 8%. The note will be all due and payable 10 years from date of closing.
- Broker presented the offer to sellers without giving them any advice concerning its contents.
- At COE buyers executed a promissory note for \$ 12,500, included the words "This note is secured by a mortgage on real property," but these words were crossed out.
- Sometime during the next six months the buyers deeded the property to a third party for cash, defaulted on the note, and went bankrupt.
- Sellers sued the broker alleging breach of fiduciary duty and that they had negligently represented sellers in the sale of their land and were grossly negligent in failing to protect the seller's interests.

Decision:

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Significance:

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Scenarios: Agency Duties

Scenario 1:

Renee represents the buyer of a large home on a wooded lot. The buyer inquires about two large trees in close proximity to the home's structure that do not appear healthy. When she asks the sellers about the trees, the sellers tell her they don't think there's anything wrong with them. However, Renee is not sure and is somewhat concerned due to their location and proximity to the home.

If you were Renee, how would you proceed?

Scenario 2:

Bill gives a listing presentation to the Johnsons, who are looking to sell their home. During the listing presentation, they disclose to Bill that they'll do whatever it takes to sell quickly. They subsequently list the property with another agent.

Two weeks later, a buyer approaches Bill and signs a representation agreement with him. The buyer wants to make an offer on the Johnsons' property.

Is the information obtained from the Johnsons considered confidential?

Scenario 3:

Joyce lists a home in a subdivision. The seller wants to list the home for slightly over what Joyce believes is a fair asking price. Because it doesn't amount to a very substantial difference, Joyce agrees to list the home at the higher amount. During the first month of the listing, a home on the same street with the same floorplan is listed and sold for \$25,000 less than Joyce's listing.

A couple of weeks later, an interested buyer contacts Joyce to make an offer on the property.

What, if anything, is Joyce required to disclose to the buyer?

2-3: Agency Disclosure

What risks are associated with failing to properly disclose agency status?

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When must agency status be disclosed?

Is disclosure of agency status required in Arizona?

Why is disclosure of agency status important?

What specific items are addressed in the READE form?

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What risks are addressed by the READE form?

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What specific risks are addressed in the Unrepresented Buyer Disclosure Form

Discussion:

How do you explain agency to potential clients?

How do your explanations and the use of the READE form reduce your risks?

What are some potential outcomes of failing to properly use the READE form?

2-4: Limited Representation

What risks are associated with limited representation?

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What is limited representation

- Single Agent
- Two agents from the same brokerage

Specific risk-prone areas associated with limited representation (discuss):

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In general, an agent representing both parties must not do the following:

- Advocate or negotiate on behalf of either the buyer or the seller.
- Disclose any confidential information that would place one party at an advantage over the other party (without the informed consent of the other party), such as:
 - the buyer is willing to pay more than the price offered;
 - the seller is willing to accept less than the listing price;
 - a party will agree to financing terms other than those offered;
 - the repairs or improvements that a seller is willing to make or that the buyer is willing to forego;
 - the confidential motivating factors of either party.

Review the Consent for Limited Representation form, included in the Appendix.

What is required to properly execute the Consent form?

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When should the Consent form be signed by the parties?

Why is it necessary to have an identified property before executing the Consent form?

What specific risks is the Consent form designed to address?

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In what situations might undisclosed limited representation occur?

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2-5: Termination of an Agency Relationship

Scenarios for Discussion

Scenario 1:

You list a small cottage for the seller, Mary Davis. A prospective buyer completes an inspection of the property and discovers that the furnace needs to be replaced. You explain to Mary that the furnace issue should be resolved because of the potential health hazards. Mary refuses, and the buyer moves on. When you explain to Mary that the furnace issue will have to be disclosed to subsequent buyers, she refuses to disclose the issue. You terminate the listing agreement.

A few months later, you notice that Mary's property has been relisted with another agent. Curious, you call the agent and ask about the furnace. The new agent isn't aware of any problems.

Can you tell the other agent what you know?

Scenario 2:

You represent a buyer, Steve Wilson, in the purchase of a condo. During the course of your relationship, Steve tells you about the nasty divorce he's going through with his wife of 10 years. He mentions they are desperately trying to unload their home, which is listed by his former wife's brother.

A couple of weeks after the closing on Steve's condo, you are contacted by another buyer who asks to view a specific property. When you contact the listing agent to arrange a showing, you realize the property is the home belonging to Steve and his ex.

Can you tell your buyer what you know?

Unit 3: The Standard of Care and a Broker's Duties

Learning Objectives

Upon completion of this unit, students will be able to:

- Describe how the standard of care is established under state law, the Commissioner's rules and common law.
- Explain the specific duties to buyers and sellers required to provide the legally required standard of care.

3-1: Standard of Care

The term "standard of care" is a legal concept that is generally applied to the conduct of any professional, such as a doctor, a lawyer, or an engineer, and the legal concept of "standard of care" applies to real estate professionals as well.

The standard of care requires that a real estate agent exercise the degree of care that a reasonable agent would exercise in the same or similar circumstances.

Reasonable care may include:

- Resisting any temptation to provide advice that is outside the area of expertise for a real estate licensee.
- Recommending other professionals, when necessary, to perform inspections and investigations or to provide legal and tax advice.
- Assisting your client in verifying information when you have reason to question the accuracy of the information being provided or when your client has questioned the information.
- Disclosing all known material defects existing in the property.
- Practicing within your area of expertise.
- Understanding the purchase contract and related documents.
- Complying with the ADRE Statutes and Commissioner's Rules.

What risks are associated with failure to adhere to the standard of care required in Arizona?

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How is the standard of care established in Arizona?

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The standard of care is generally established by expert testimony, unless the conduct required by the situation is within the common knowledge of a layperson. Therefore, a plaintiff buyer or seller that alleges that a defendant agent acted negligently usually must present the testimony of a qualified expert, in other words, another agent, that the defendant agent acted unreasonably and fell below the standard of care.

The defendant agent will generally do the same – present the testimony of another agent as an expert witness that will testify that the agent's actions were reasonable under the circumstances and within the standard of care.

The judge, jury or arbitrator will consider the testimony of each expert along with the rest of the evidence presented and make the determination of whether the agent complied with the standard of care. If not, there are consequences.

Example: *Lombardo v. Albu*, 199 Ariz. 97, 14 P.3d 288 (2000)

Case Facts:

- The sellers, in default on their loan, entered into a loan agreement with their lender to list and sell their home to pay the loan. They proceeded to list the property.
- Another broker, representing the buyer, presented an offer to the listing broker, which was accepted.
- Prior to presenting the offer, the buyer's broker was told by the buyer that her husband had serious financial problems and had filed for bankruptcy. The wife made an offer in her name only.
- After several delays in closing, the buyer was unable to close on the property.
- The sellers ultimately lost their equity in the home when it was sold at a trustee's sale.
- The sellers filed suit against all the other parties involved in the transaction.

Decision:

Significance:

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Where can you find the Commissioner's rules?

<https://azre.gov/laws-rules-policy-statements-and-advisories>

Links are also available on AAR's website.

How can you stay updated on revisions to the Commissioner's rules?

Check for updates often. AAR's website also publishes information regarding changes and updates to the Commissioner's rules and other legal policy. The AAR Industry Contacts page provides useful links to government affairs.

How do courts determine whether a broker has fallen below the standard of care?

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What is a broker's liability for falling below the standard of care?

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Tips to Help You Practice Within the Standard of Care

The following is a list of tips to help you exercise reasonable care and practice within the standard of care.

- Get to know your client and their concerns.
- Read and understand the purchase contract & related forms.
- Educate your client on the process and documents.
- Avoid shortcuts, such as incorporating other documents into the contract or failing to write contingencies out completely.
- Handle all offers properly and promptly.

- Practice only within your area of expertise, both in practice area and geographically.
- When in doubt, disclose – and do it in writing.
- Assist your client with disclosures & due diligence.
- Think before you speak - don't speculate or guess. Identify the source of any information provided and direct your client to the source if possible.
- Verify information if you have reason to question the accuracy of information being provided in a transaction or if your client has questioned the accuracy of the information.
- Document the transaction - take contemporaneous notes and confirm important issues in writing.
- Communicate, communicate, communicate – answer your phone and promptly return calls to clients and the other agent. Talking is almost always better than texting.

Compensation Considerations

Code of Ethics Article 1: When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly (Amended 1/01).

R4-28-1101(F). A salesperson or broker shall not accept compensation from or represent more than one party to a transaction without the prior written consent of all parties.

3-2: Duty to Conform to the Standard of Practice for the Specific Real Estate Discipline

Scenario

You specialize in residential transactions. A client asks you to represent him in the purchase of a commercial building to use for his manufacturing business.

How should you proceed?

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What might be the consequences in failing to do the above?

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How can you avoid risks related to working in an unfamiliar geographical area?

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What other issues should you investigate when practicing in an unfamiliar area?

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3-3: Representations

What are a broker's duties in relation to the discovery of material facts?

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Are brokers required to investigate and discover all material facts about a property or transaction?

What is a broker's responsibility in regard to verifying information obtained?

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Under ADRE rule and policy, what is reasonable care?

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***Aranki v. RKP Investments, Inc.*, 194 Ariz. 206, 979 P.2d 534 (App. 1999)**

Case Facts:

- Listing Broker listed a single-family home in Cave Creek, Arizona.
- The buyers, represented by their broker, purchased the property.
- Buyers file a lawsuit against the seller, listing broker and buyers' broker. The complaint alleges that they discovered many latent defects and problems with the home after the sale closed.
- Evidence and arguments include: Buyer hired a professional inspection service for the purpose of revealing defects, and this report identified at least some of the problems that form the basis of buyer's damages claim. Buyer's had waived the seller's warranties and agreed to amend the purchase contract to buy the property "as is." Buyers allege that buyers' broker advised them that the defects were "merely cosmetic," Buyers allege that buyers' broker advised them that \$2,000 was adequate to correct any defects in the house.
- Listing broker and buyers' broker defend on two grounds: (1) lack of evidence that they knew or reasonably should have known of the problems with the home and a corresponding lack of duty to discover and disclose such problems, and (2) an exculpatory clause in the sales contract releasing brokers from liability for the condition of the premises.

Decision:

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Significance:

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3-4: Duty to Refer to Competent Professionals – Negligent Referrals

What risks are associated with recommending professionals?

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Discussion:

What standard is established under Thomson v. McGinnis in regard to negligent referrals?

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How can you avoid risks related to making referrals?

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3-5: Duty Regarding “Shopping Offers”

What risks are associated with failing to understand a broker’s duty regarding shopping offers?

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Marmis v. Solot, Co., 117 Ariz. 499, 573 P.2d 899 (App. 1977)

Case Facts:

- Buyers made an offer to purchase property from an estate.
- The offer was accepted, subject to court approval of the transaction and giving the sellers five days thereafter to accept.
- At the court hearing for approval of the transaction, the original buyer was outbid by a second buyer.
- The original buyer sued the agent representing the estate for tortious interference with business expectancy.

Decision:

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Significance:

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How can you avoid risks related to shopping offers?

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Roundtable Discussion

As a class, discuss the following:

- **When shopping an offer, how do you maintain an appropriate level of professionalism?**
- **What behaviors have you witnessed or heard about that you felt were unprofessional in regard to shopping offers?**

3-6: The Effect of Article 26

What is the significance of the court's decision in State Bar of Arizona v. Arizona Land Title & Trust Co.?

In this case, the Arizona State Bar Association's unauthorized practice of law committee filed a lawsuit alleging that real estate licensees and title companies were practicing law without a license by preparing purchase contracts and other legal documents. *Id.* The Supreme Court agreed with the State Bar, and its decision severely restricted the right of real estate licensees to draft or fill in the blanks on legal documents.

As a result, the Arizona REALTORS® drafted the language of Article 26 of the Arizona Constitution. As a result of AAR's campaign, and despite vigorous opposition by the State Bar, the voters overwhelmingly adopted Article 26 as an amendment to the Arizona Constitution, by a 4-to-1 margin, in the November 6, 1962, election.

Article 26, Section 1. Powers of real estate broker or salesman

Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.

What is the effect of Article 26?

***Olson v. Neale*, 116 Ariz. 522, 525, 570 P.2d 209 (App. 1977)**

Case Facts:

- Olson had entered into a listing agreement with Neale to sell Neale's property. After several extensions, the listing agreement expired.
- A sale was ultimately achieved after the expiration of the listing agreement, which did not provide for any commission to be paid after the expiration of the written agreement.
- Because Neale met with Olson more than once after the expiration of the listing agreement, Olson argued for a right to commission.

Decision:

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Significance:

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APPENDIX

RESOURCES:
**Arizona Real Estate: A Professional's Guide to Law
and Practice authored by K. Michelle Lind
– available on Amazon**

| | |
|--|----|
| "Independent Contractor" Article by K. Michelle Lind | 53 |
| NAR article, "Ten Ways to Successfully Manage Your Independent Contractor Relationships" | 55 |
| NAR article: Independent Contractor Status - Frequently Asked Questions | 57 |
| Buyer Broker Exclusive Employment Agreement | 60 |
| Arbitration Guidelines | 63 |
| <i>Morley v. Pagel Realty & Insurance</i> | 71 |
| Real Estate Agency Disclosure and Election Form (READE) | 76 |
| Consent to Limited Representation Form ("Consent") | 78 |
| Article 11. Professional Conduct R4-28-1101 | 79 |
| Substantive Policy Statement (Agent Responsibility to Client) | 81 |
| <i>Aranki v. RKP Investments, Inc.</i> | 82 |
| <i>Olson v. Neale</i> | 88 |
| R4-28-1103: Broker Supervision and Control | 92 |
| "Broker-Salespeople Commission Disputes" Article by K. Michelle Lind | 93 |
| "Procuring Cause and MLS Co-Brokerage Commission Agreements Between Brokers" article by K. Michelle Lind | 96 |
| Code of Ethics | 97 |

INDEPENDENT CONTRACTOR AGREEMENTS

BY K. MICHELLE LIND, ARIZONA ASSOCIATION OF REALTORS®, CEO

Real estate salespersons operating as independent contractors have been a settled area of law for years. However, in three lawsuits filed last year, two in California and one in Massachusetts, salespersons alleged that they were employees of their brokers, not independent contractors. In Massachusetts, the Superior Court ruled that the brokers properly classified the salespersons as independent contractors, but the case is now on appeal, and the California lawsuits are still pending. For more information on these cases, go to: <http://speakingofrealestate.blogs.realtor.org/2014/03/27/lawsuits-challenge-independent-contractor-status/>

SO WHAT IS THE LAW IN ARIZONA?

SALESPERSONS ARE “STATUTORY NON-EMPLOYEES” FOR TAX PURPOSES

The Internal Revenue Code provides a statutory classification for real estate salespersons as “statutory non-employees” for federal income and employment tax purposes. If the employing broker satisfies all the statutory requirements, he or she is not required to withhold federal taxes for the salesperson’s compensation. To qualify for “statutory non-employee” status, the real estate salesperson must:

- Be licensed as a real estate agent;
- Receive substantially all compensation based on sales or other output, rather than the number of hours worked; and
- Have a written contract with the brokerage firm that provides that the salesperson will not be treated as an employee for federal tax purposes.

I.R.C. §3508 <http://www.law.cornell.edu/uscode/text/26/3508>

Real estate brokers are, in effect, exempt from Arizona withholding tax requirements as well. State law provides that employers must withhold an amount from compensation paid to employees based on a

percentage of the federal tax withheld under the federal tax code. A.R.S. §43-401(A). Since the federal tax code does not require withholding of income taxes, the Arizona withholding statute does not require withholding either.

Real estate salespersons are also exempt from Worker’s Compensation and Employment tax. The Workers’ Compensation Act exempts real estate salespersons from its provisions when: (1) substantially all income received for services is directly related to sales rather than the number of hours worked; (2) the services performed by the salesperson are performed pursuant to a written contract between the salesperson and broker; and (3) the contract specifically provides that the salesperson is not treated as an employee for federal tax purposes or for the purposes of the Workers’ Compensation chapter. A.R.S. §23-910. The Employment Security Act exempts from its provisions licensed real estate and cemetery brokers and salespeople if all income is received solely by way of commission. A.R.S. §23-617(14). <http://www.azleg.gov/ArizonaRevisedStatutes.asp?Title=23>

SALESPERSONS ARE “EMPLOYEES” FOR REGULATORY AND CIVIL LIABILITY PURPOSES

Salespersons are considered employees for other purposes. The Commissioner’s Rules require the broker to maintain close supervision and control over salespeople. R4 28 1103(A) provides: “An employing broker and a designated broker shall exercise reasonable supervision and control over the activities of brokers, salespersons, and others in the employ of the broker. Reasonable supervision and control include the establishment and enforcement of written policies, procedures, and systems . . .” Further R4 28 1103 (D) provides: “An employing broker is responsible for the acts of all associate brokers, salespersons, and other employees acting within the scope of their employment.” http://www.azsos.gov/public_services/Title_04/4-28.htm

...Because of statutory exemptions, if there is a properly drafted independent contractor agreement, the broker/salesperson relationship is not treated as an employment relationship for the purposes of federal and state tax withholding...

With regard to civil liability, the Arizona Supreme Court held that the contract language between two people does not determine the relationship of the parties, rather the "objective nature of the relationship, [is] determined upon analysis of the totality of the facts and circumstances of each case." *Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 794 P.2d 138 (1990). http://www.leagle.com/decision/1990669164Ariz505_1565.xml/SANTIAGO%20v.%20PHOENIX%20NEWSPAPERS,%20INC. Therefore, an agreement stating that the salesperson is an independent contractor does not determine the relationship. The court uses a variety of factors to determine whether an employer/employee or independent contractor relationship exists. The courts look for indicia of the "right to control" in determining whether a person is acting as an independent contractor or employee. *Smith v. Goodman*, 6 Ariz. App. 168, 430 P.2d 922 (1967) (citing Restatement (Second) §2, 220). As a result of the right to control factor, the employing broker is generally held liable for the acts of salespersons under the doctrine of "respondeat superior," which provides that an employer can be held liable for damages caused by the employee acting within the scope of employment.

CONCLUSION

Because of statutory exemptions, if there is a properly drafted independent contractor agreement, the broker/salesperson relationship is not treated as an employment relationship for the purposes of federal and state tax withholding, unemployment compensation contributions or workers' compensation insurance. However, for regulatory and civil liability purposes the real estate broker/salesperson relationship is generally one of employer/employee. ✱

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ABOUT THE AUTHOR:

Michelle Lind

AAR Chief Executive Officer Michelle Lind is a State Bar of Arizona board certified real estate specialist and the author of *Arizona Real Estate: A Professional's Guide to Law and Practice*; (excerpts, Kindle Locations 1560-1631). Hillcrest Media Group). <http://www.aaronline.com/azre-book/>

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Common Provisions in Independent Contractor Agreements

The terms of an Independent Contractor Agreement vary with the brokerage, however, common provisions include the following.

OBLIGATIONS OF THE SALESPERSON TO:

- Remain licensed
- Maintain REALTOR® membership
- Abide by all laws and rules
- Abide by broker's policies and procedures
- Pay any amounts due to the broker
- Work diligently

OBLIGATIONS OF THE BROKER TO:

- Remain licensed
- Compensate the salesperson
- Provide office space
- Independent contractor status
- Errors and Omissions insurance
- Allocation of expenses
- Payment of commissions on pending transactions upon departure of the salesperson
- The files and documents that the salesperson may take upon departure
- Dispute resolution between broker and salesperson as well as between two salespersons within the brokerage
- Liability and indemnification ✱

K. MICHELLE LIND

ARIZONA REAL ESTATE (KINDLE LOCATIONS 1579-1586).
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ARTICLES

Ten Ways to Successfully Manage Your Independent Contractor Relationships

The relationship between brokers and real estate salespeople is unique. This fact has been widely codified in applicable federal and state laws, including many state unemployment insurance and worker's compensation statutes. Under federal law, the Internal Revenue Code specifically carves out real estate salespeople from the definition of employee, provided the IRS' three-factor test is met. Brokers should be aware that compliance with the IRS three-factor test does not necessarily exempt real estate salespeople from a state's definition of employee. Approaches to this issue vary greatly by state, and emerging case law is continuing to shape the liabilities brokers may face when classifying their sales agents. In states where a specific test for properly classifying real estate salespeople as independent contractors has been adopted in a particular statute, brokers should ensure compliance with the applicable test. If no specific test has been adopted, brokers should at a minimum keep in mind the ten tips outlined below.

Ten Tips for Managing Independent Contractor Relationships with Your Sales Agents

1. Have written independent contractor agreements with your real estate salespeople.
2. Don't ever refer to real estate salespeople as employees of the broker in any broker written materials or otherwise.
3. Avoid paying for any job-related training or continuing education.
4. Pay your real estate salespeople on a commission-only basis; avoid paying them at regular fixed intervals.
5. Don't require your real estate salespeople to report to the broker's office on certain days or at certain times in order to perform general office administrative duties, such as answering phones.
6. Allow your real estate salespeople to work where, when and how they deem best.
7. Maintain control of broker-employed administrative support. Avoid allowing your real estate salespeople to exercise any authority over the hiring, firing or supervising of such staff.
8. Make attendance at monthly staff or training meetings voluntary.
9. Allow real estate salespeople to choose and purchase equipment, as necessary, to perform their jobs, such as computers or iPads.
10. Issue your real estate salespeople 1099s, rather than W-2s. Do not withhold any federal or state income taxes (including estimated taxes), social security, Medicare or any other applicable federal or state taxes.

Worker Classification Resources

- REALTOR.org: Resources Compiled at: <http://www.realtor.org/topics/independent-contractor>.
- IRS guidance: <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independe...>
- US Small Business Administration resources: <http://www.sba.gov/content/self-employed-independent-contractors>.
- United States Department of Labor initiative: <http://www.dol.gov/whd/workers/misclassification/>.

- Your state's Department of Labor website.

Download a PDF of this document.

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Headquarters: 430 North Michigan Avenue, Chicago, IL 60611
DC Office: 500 New Jersey Avenue, NW, Washington, DC 20001-2020
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INDEPENDENT CONTRACTOR STATUS

FREQUENTLY ASKED QUESTIONS

LEGAL AFFAIRS DEPARTMENT

recognize real estate licensees as independent contractors when certain conditions are met, and other states are silent as to real estate licensees so the courts must apply the applicable test for determining proper classification. This is why it is vital for real estate professionals to know the laws that pertain to worker classification in their states.

4. **Is an independent contractor written agreement sufficient to classify workers as independent contractors?**

Having an independent contractor agreement is a very important element of establishing an independent contractor relationship with a real estate salesperson, but the existence of an agreement is not enough to avoid misclassification. Courts and regulatory agencies will look to the reality of the relationship, how the parties interacted, and how much control a broker exerts over the real estate salesperson in order to determine the true nature of the relationship between the parties.

5. **What types of activities should brokers avoid in order to properly classify salespeople as independent contractors?**

Under many state, and federal, laws, making certain acts “mandatory” may be considered an indication of employer-like control over the worker. One of the hallmarks of an independent contractor relationship is that the independent contractor has the ability to direct and control where, when and how they perform their work.

In order to establish an independent contractor relationship, the following is a list of the types of activities that should be avoided:

- Requiring the worker perform the services during set work hours.
- Requiring the worker perform the services at a specific location.
- Making attendance at staff meetings mandatory.
- Providing training to the worker.
- Supplying tools and materials to the worker.

6. **Since worker classification is often dependent on the level of control an employer exerts over a worker, does this mean that brokers should not supervise their independent contractor salespeople?**

No. In fact, according to real estate licensing laws brokers *must* maintain a certain amount of supervision over their salespeople. Brokers must therefore make sure that they are balancing their state real estate license laws’ supervision requirements with the applicable requirements in state and federal worker classification laws.

INDEPENDENT CONTRACTOR STATUS

FREQUENTLY ASKED QUESTIONS

LEGAL AFFAIRS DEPARTMENT

7. Do federal income taxes have to be withheld from a real estate professional's earnings?

No, if the independent contractor meets the three elements of the IRS's carve out. The IRS recognizes the unique nature of the real estate industry and created a statutory non-employee status for real estate professionals, provided three elements are met: 1) the individual is a licensed real estate professional; 2) substantially all of their payments be directly related to sales or other output, rather than number of hours worked; and 3) their services are performed under a written contract providing that they will not be treated as employees for federal tax purposes. If these three elements are met, no federal income taxes need to be withheld from the real estate professional's earnings.

8. Does qualifying as a statutory independent contractor under IRS rules also mean that state income taxes do not have to be withheld from a real estate professional's earnings?

No, qualifying as a statutory independent contractor under IRS rules applies *only* to federal income taxes. The question of whether state income taxes must be withheld from a real estate professional's earnings is a question of state law. Brokers should check the applicable state law where they operate.

9. Can a broker provide its independent contractors with benefits such as health insurance and 401K participation?

The provision of employee-type benefits, such as health insurance, vacation pay and 401k participation, can be factors pointing to an employer-employee relationship, rather than that of an independent contractor. The provision of these types of benefits may compromise the argument that the relationship with the worker is that of an independent contractor.

10. What happens if a broker misclassifies an employee as an independent contractor?

Improper classification of workers can cause businesses a number of tax and other legal problems. At the federal level, the IRS may levy unpaid payroll taxes against a business it believes is misclassifying its workers, as well as interest and other penalties. In addition, the United States Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Agency have an interest in a business's classification of its workers, and may pursue penalties and legal action against businesses believed to be engaging in worker misclassification.

INDEPENDENT CONTRACTOR STATUS

FREQUENTLY ASKED QUESTIONS

LEGAL AFFAIRS DEPARTMENT

At the state level, businesses may face fines and penalties for violations of state workers' compensation laws, tax laws, and state unemployment compensation laws. Improper classification can also expose businesses to private causes of action and costly litigation.

11. What resources are available to help further guide real estate professionals on this topic?

A number of resources on this topic are available on www.REALTOR.org's Independent Contractor resources page: <http://www.realtor.org/topics/independent-contractor>. These resources include:

- ["Ten Ways to Successfully Manage Your Independent Contractor Relationships"](#)
- [Legal Affairs video on recent worker classification litigation](#)
- [Chart detailing various state labor laws approach to classifying real estate professionals](#)
- Coming soon - Sample independent contractor agreement

Outside resources include:

- [The IRS website's guide to worker classification](#)
- [U.S. Department of Labor – Wage and Hour Division guidance on worker classification](#)
- Your state's Department of Labor website
- Your state's real estate licensing authority's website.



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EQUAL HOUSING OPPORTUNITY

1. **Buyer:** _____ ("Buyer")

2. **Broker:** _____ acting through _____
FIRM NAME

3. **Agent:** _____ ("Broker").
AGENT'S NAME AGENT'S NAME

4. **Agreement:** This Buyer-Broker Exclusive Employment Agreement ("Agreement") is between Buyer and Broker. In consideration of
5. Broker's agreement to assist Buyer to locate, negotiate and facilitate the purchase of a property, Buyer gives Broker the exclusive
6. and irrevocable right to represent Buyer in the purchase of a property during the term.

7. Buyer acknowledges that signing more than one Buyer-Broker Exclusive Employment Agreement or similar agreement(s) could
8. make Buyer liable to compensate multiple brokers.

9. **Term:** This Agreement shall commence on _____ and expire at 11:59 p.m. Mountain Standard Time, on
10. _____ ("Expiration Date").

11. **Employment:** Broker agrees to:

12. a. locate Property meeting the following general description:

13. ☐ Residential ☐ Land ☐ Commercial ☐ Other: _____ ("Property") within
14. the following geographical area(s): _____;

15. b. negotiate at Buyer's direction to obtain acceptable terms and conditions for the purchase, exchange, or option of the Property;

16. c. assist Buyer during the transaction within the scope of Broker's expertise and licensing.

17. **Agency Relationship:** The agency relationship between Buyer and Broker shall be:

18. ☐ as set forth in the Real Estate Agency Disclosure and Election form.

19. ☐ Other: _____

20. **Property Viewings:** Buyer agrees to work exclusively with Broker and be accompanied by Broker on Buyer's first visit to any Property.

21. **If Broker does not accompany Buyer on the first visit to any Property, including a model home, new home/lot or "open**
22. **house" held by a builder, seller or other real estate broker, Buyer acknowledges that the builder, seller or seller's broker may**
23. **refuse to compensate Broker, which will eliminate any credit against the agreed upon Broker Compensation below.**

24. **Buyer agrees to review the Arizona Department of Real Estate Buyer Advisory to assist in Buyer's inspections and investigations.**

25. **BROKER COMPENSATION IS NOT SET BY LAW, NOR BY ANY BOARD, ASSOCIATION OF REALTORS®, MULTIPLE LISTING**
26. **SERVICE OR IN ANY MANNER OTHER THAN AS FULLY NEGOTIATED BETWEEN BROKER AND BUYER IN THIS AGREEMENT.**

27. (BUYER'S INITIALS) _____ / _____

28. **Retainer Fee:** (Check if applicable) ☐ Buyer agrees to pay Broker a non-refundable retainer fee in the amount of \$ _____,
29. within five (5) days or _____ days of execution of this Agreement, which is earned when paid, for initial consultation,
30. research and other services. This fee ☐ shall ☐ shall not be credited against the Broker Compensation below.

31. **Broker Compensation:** If Buyer, or any entity owned or controlled by Buyer, closes escrow on a transaction for the purchase,
32. exchange, or option of a Property, Buyer agrees to compensate Broker as follows ("Broker Compensation"):

33. **(CHECK ONLY ONE AND FILL IN THE COMPENSATION WHICH MUST BE A FIXED AMOUNT OR RATE):**

34. ☐ _____ % of the full purchase price or exchange value; or

35. ☐ \$ _____; or

36. ☐ other: _____

60

37. The Broker Compensation shall be in U.S. currency and paid at the time of and as a condition of closing for purchase or
 38. exchange or as otherwise agreed upon in writing.

39. a. **Compensation from seller or seller's broker:** A seller or seller's broker may offer compensation to Broker. Buyer
 40. authorizes Broker to accept compensation from seller or seller's broker, which shall be credited against Broker Compensation.

41. If seller or seller's broker's offer of compensation is greater than the Broker Compensation, Broker shall be paid the Broker
 42. Compensation and the balance shall be credited to Buyer (to the extent allowed by Buyer's lender). Broker will not receive
 43. any amount greater than Broker Compensation from any source for services provided in this Agreement.

44. If seller or seller's broker's offer of compensation is less than the Broker Compensation, Buyer may request seller to pay the
 45. Broker Compensation as part of an offer to purchase the Property. Any Broker Compensation not paid by seller or seller's
 46. broker shall be paid by Buyer.

47. **Notice:** Unless modified by VA regulations, VA financed transactions shall be conditioned upon the Broker
 48. Compensation being paid by the seller or seller's broker.

49. b. **Failure to Complete:** Once an acceptable Property is located, Buyer agrees to act in good faith to acquire the Property
 50. and conduct any inspections/investigations of the Property that Buyer deems material and/or important. If completion of any
 51. transaction is prevented by Buyer's breach or with the consent of Buyer other than as provided in the purchase contract, the
 52. Broker Compensation shall be due and payable by Buyer.

53. c. **Compensation After Expiration Date:** After the Expiration Date of this Agreement, Buyer agrees to pay Broker
 54. Compensation if: (i) within _____ calendar days after the Expiration Date, Buyer enters into an agreement to purchase,
 55. exchange, or option any Property shown or negotiated by Broker on behalf of Buyer during the Term of this Agreement; or (ii)
 56. Buyer closes escrow on a Property pursuant to a purchase contract that was executed during the Term of this Agreement; or
 57. (iii) Buyer closes escrow on a Property for which escrow was opened during the Term of this Agreement.

58. **Listings:** Broker shall show property listings that fit Buyer's criteria regardless of the compensation offered to Broker by seller
 59. or seller's broker unless instructed otherwise by Buyer in writing. If necessary, Buyer instructs Broker to negotiate Broker
 60. Compensation be paid by seller or seller's broker. These negotiations shall not jeopardize, delay, or interfere with the initiation,
 61. processing or finalizing of a transaction.

62. **Notice:** If Buyer decides they do not wish to view property listings unless the seller or seller's broker has
 63. offered adequate compensation to Broker, the Buyer must make that instruction to Broker in writing.

64. **Equal Housing Opportunity:** Broker's policy is to abide by all local, state, and federal laws prohibiting discrimination against any
 65. individual or group of individuals. Broker may not disclose the racial, ethnic, or religious composition of any neighborhood,
 66. community, or building, nor whether persons with disabilities are housed in any home or facility, except that Broker may identify
 67. housing facilities meeting the needs of a disabled buyer. For more information, consult Fair Housing Advisory.

68. **Other Potential Buyers:** Buyer consents and acknowledges that other potential buyers represented by Broker may consider,
 69. make offers on, or acquire an interest in the same or similar properties as Buyer is seeking.

70. **Release of Broker:** Buyer recognizes, acknowledges, and agrees that Broker is not qualified, nor licensed to offer advice on financial,
 71. legal or tax matters regarding real estate transactions ("Related Services"). Broker, if requested, may provide Buyer the names of third-
 72. party professionals who claim to perform Related Services. Buyer is instructed to independently investigate all potential third-party
 73. professionals and use their sole discretion in selecting which third-party professionals to hire, if any. **Buyer expressly releases, holds**
 74. **harmless, and indemnifies Broker from any and all liability and responsibility regarding Buyer's selection and use of third-**
 75. **party professionals to perform Related Services or Buyer's election not to use the services of such third-party professionals.**

76. (BUYER'S INITIALS) _____ / _____

77. **Additional Terms and Conditions:**

78. _____
 79. _____
 80. _____

81. **Alternative Dispute Resolution ("ADR"):** Buyer and Broker (the "Parties") agree to mediate any dispute or claim arising out of
 82. or relating to this Agreement in accordance with the mediation procedures of the applicable state or local REALTOR® association

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83. or as otherwise agreed. All mediation costs shall be paid equally by the Parties. In the event that mediation does not resolve
 84. all disputes or claims, the unresolved disputes or claims shall be submitted for binding arbitration. In such event, the Parties
 85. shall agree upon an arbitrator and cooperate in the scheduling of an arbitration hearing. If the Parties are unable to agree on an
 86. arbitrator, the dispute shall be submitted to the American Arbitration Association ("AAA") in accordance with the AAA Arbitration
 87. Rules for the Real Estate Industry. The decision of the arbitrator shall be final and non-appealable. Judgment on the award
 88. rendered by the arbitrator may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, either Party may
 89. opt out of binding arbitration within thirty (30) days after the conclusion of the mediation conference by notice to the other and in
 90. such event either Party shall have the right to resort to court action.

91. The Parties agree that any and all disputes or claims will be brought in the Parties' individual capacity, and not as a plaintiff or class
 92. member in any purported class, collective, representative, or other consolidated proceeding. The Parties hereby waive their right to
 93. commence, become a party to or remain a participant in any group, representative, class collective or hybrid class/collective action
 94. in any proceeding and the arbitrator shall not preside over any form of a group, representative or class collective proceeding.

95. (BUYER'S INITIALS) _____ / _____

96. **Attorney Fees and Costs:** In any non-REALTOR® association proceeding to enforce the compensation due to Broker pursuant
 97. to this Agreement, the prevailing party shall be awarded their reasonable attorney fees and arbitration costs.

98. **Arizona Law:** This Agreement shall be governed by Arizona law and jurisdiction is exclusively conferred on the State of Arizona.

99. **Copies and Counterparts:** This Agreement may be executed by facsimile or other electronic means and in any number of
 100. counterparts. A fully executed facsimile or electronic copy of the Agreement shall be treated as an original Agreement.

101. **Entire Agreement:** This Agreement, and any addenda and attachments, shall constitute the entire agreement between Buyer
 102. and Broker, and shall supersede any other written or oral agreements between Buyer and Broker and can be modified only by a
 103. writing signed by Buyer and Broker. Invalidity or unenforceability of one or more provisions of this Agreement shall not affect any
 104. other provisions of this Agreement.

105. **Capacity:** Buyer warrants that Buyer has the legal capacity, full power and authority to enter into this Agreement and consummate
 106. the transaction contemplated hereby on Buyer's own behalf or on behalf of the party Buyer represents, as appropriate.

107. **Acceptance:** Buyer hereby agrees to all of the terms and conditions herein and acknowledges receipt of a copy of this Agreement.

108. _____
 ^ BUYER'S SIGNATURE MO/DA/YR ^ BUYER'S SIGNATURE MO/DA/YR

109. _____
 ^ BUYER'S NAME PRINTED ^ BUYER'S NAME PRINTED

110. _____
 ADDRESS CITY STATE ZIP CODE

111. _____
 TELEPHONE EMAIL ADDRESS

112. _____
 FIRM NAME

113. _____
 ADDRESS CITY STATE ZIP CODE

114. _____
 ^ AGENT'S SIGNATURE MO/DA/YR ^ AGENT'S SIGNATURE MO/DA/YR

For Broker Use Only:

Brokerage File/Log No. _____ Manager's Initials _____ Broker's Initials _____ Date _____
 MO/DA/YR

Appendix II to Part Ten

Arbitration Guidelines

(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

A key element in the practice of real estate is the contract. Experienced practitioners quickly become conversant with the elements of contract formation. Inquiry, invitation, offer, counteroffer, contingency, waiver, acceptance, rejection, execution, breach, rescission, reformation, and other words of art become integral parts of the broker's vocabulary.

Given the significant degree to which Article 3's mandate for cooperation—coupled with everyday practicality, feasibility, and expediency—make cooperative transactions facts of life, it quickly becomes apparent that in virtually every real estate transaction there are actually several contracts which come into play. Setting aside ancillary but still important contracts for things such as mortgages, appraisals, inspections, title insurance, etc., in a typical residential transaction (and the same will be true in many commercial transactions as well) there are at least three (and often four) contracts involved, and each, while established independently of the others, soon appears to be inextricably intertwined with the others.

First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be subagents, buyer agents, or acting in some other capacity.

Second, there is the contract between the listing broker and cooperating brokers. While this may be created through an offer published through a multiple listing service or through some other method of formalized cooperative effort, it need not be. Unlike the bilateral listing contract (where generally the seller agrees to pay a commission in return for the listing broker's production of a ready, willing, and able purchaser), the contract between the listing broker and the cooperating broker is unilateral in nature. This simply means that the listing broker determines the terms and conditions of the offer to potential cooperating brokers (and this offer may vary as to different potential cooperating brokers or as to cooperating brokers in different categories). This type of contract differs from a bilateral contract also in that there is no contract formed between the listing broker and the potential cooperating brokers upon receipt of the listing broker's offer. The contract is formed only when accepted by the cooperating broker, and acceptance occurs only through performance as the procuring cause of the successful transaction. (*Revised 11/97*)

Third, there is the purchase contract—sometimes referred to as the purchase and sale agreement. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other than the seller or

buyer is referenced in the purchase contract does not make him/her a party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. Similar in many ways to the listing contract, this bilateral contract establishes the duties of the purchaser and the broker as well as the terms and conditions of the broker's compensation.

These contracts are similar in that they are created through offer and acceptance. They vary in that acceptance of a bilateral contract is through a reciprocal promise (e.g., the purchaser's promise to pay the agreed price in return for the seller's promise to convey good title), while acceptance of a unilateral contract is through performance (e.g., in producing or procuring a ready, willing, and able purchaser).

Each of these contracts is subject to similar hazards in formation and afterward. The maker's (offeror's) offer in any of these scenarios may be accepted or rejected. The intended recipient of the offer (or offeree) may counteroffer. There may be questions as to whether a contract was formed—e.g., was there an offer, was it accepted, was the acceptance on the terms and conditions specified by the maker of the offer—or was the "acceptance" actually a counteroffer (which, by definition, rejects the first offer). A contract, once formed, may be breached. These and other questions of contract formation arise on a daily basis. There are several methods by which contractual questions (or "issues" or "disputes") are resolved. These include civil lawsuits, arbitration, and mediation.

Another key contract is the one entered into when a real estate professional joins a local Board of REALTORS® and becomes a REALTOR®. In return for the many benefits of membership, a REALTOR® promises to abide by the duties of membership including strict adherence to the Code of Ethics. Among the Code's duties is the obligation to arbitrate, established in Article 17. Article 17 is interpreted through four Standards of Practice among which is Standard of Practice 17-4 which enumerates four situations under which REALTORS® agree to arbitrate specified non-contractual disputes. (*Adopted 11/96*)

Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS®. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and the rules and procedures of Boards and Associations of REALTORS® require that certain types of disputes must be arbitrated if either party so requests. (Information on

“mandatory” and “voluntary” arbitration is found elsewhere in the *Code of Ethics and Arbitration Manual*.) (Revised 11/96)

While issues between REALTORS® and their clients—e.g., listing broker/seller (or landlord) or buyer broker/buyer (or tenant)—are subject to mandatory arbitration (subject to the client’s agreement to arbitrate), and issues between sellers and buyers may be arbitrated at their mutual agreement, in many cases such issues are resolved in the courts or in other alternative dispute resolution forums (which may also be administered by Boards or Associations of REALTORS®). The majority of arbitration hearings conducted by Boards and Associations involve questions of contracts between REALTORS®, most frequently between listing and cooperating brokers, or between two or more cooperating brokers. These generally involve questions of procuring cause, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute. While awards are generally for the full amount in question (which may be required by state law), in exceptional cases, awards may be split between the parties (again, except where prohibited by state law). Split awards are the exception rather than the rule and should be utilized only when Hearing Panels determine that the transaction would have resulted only through the combined efforts of both parties. It should also be considered that questions of representation and entitlement to compensation are separate issues. (Revised 11/98)

In the mid-1970s, the NATIONAL ASSOCIATION OF REALTORS® established the Arbitration Guidelines to assist Boards and Associations in reaching fair and equitable decisions in arbitration; to prevent the establishment of any one, single rule or standard by which arbitrable issues would be decided; and to ensure that arbitrable questions would be decided by knowledgeable panels taking into careful consideration all relevant facts and circumstances.

The Arbitration Guidelines have served the industry well for nearly two decades. But, as broker-to-broker cooperation has increasingly involved contracts between listing brokers and buyer brokers and between listing brokers and brokers acting in nonagency capacities, the time came to update the Guidelines so they remained relevant and useful. It is to this end that the following is intended.

Procuring Cause

As discussed earlier, one type of contract frequently entered into by REALTORS® is the listing contract between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in *Black’s Law Dictionary*, Fifth Edition, definition of procuring cause:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with “efficient cause.”

A broker will be regarded as the “procuring cause” of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner’s terms. Mohamed v. Robbins, 23 Ariz. App. 195, 531 p.2d 928, 930.

See also Producing cause; Proximate cause.

Disputes concerning the contracts between listing brokers and cooperating brokers, however, are addressed by the National Association’s Arbitration Guidelines promulgated pursuant to Article 17 of the Code of Ethics. While guidance can be taken from judicial determinations of disputes between sellers and listing brokers, procuring cause disputes between listing and cooperating brokers, or between two cooperating brokers, can be resolved based on similar though not identical principles. While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by Boards and Associations of REALTORS®, procuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction. Or, in other words, what “caused” the successful transaction to come about. “Successful transaction,” as used in these Arbitration Guidelines, is defined as “a sale that closes or a lease that is executed.” Many REALTORS®, Executive Officers, lawyers, and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no “typical” real estate transaction any more than there is “typical” real estate or a “typical” REALTOR®. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association’s Board of Directors, in 1973, adopted Official Interpretation 31 of Article I, Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR® in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership.

The explanation of Interpretation 31 goes on to provide, in part:

. . . [T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises

as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants make blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease). While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional,* the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Revised 11/98)

*Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Part One, G. Commission/Cooperative Compensation Offers, Section 1, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®, *Handbook on Multiple Listing Policy*. (Adopted 11/98)

Factors for Consideration by Arbitration Hearing Panels

The following factors are recommended for consideration by Hearing Panels convened to arbitrate disputes between brokers, or between brokers and their clients or their customers. This list is not all-inclusive nor can it be. Not every factor will be applicable in every instance. The purpose is to guide panels as to facts, issues, and relevant questions that may aid them in reaching fair, equitable, and reasoned decisions.

Factor #1. No predetermined rule of entitlement

Every arbitration hearing is considered in light of all of the relevant facts and circumstances as presented by the parties and their witnesses. "Rules of thumb," prior decisions by other panels in other matters, and other predeterminants are to be disregarded.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. (Adopted 4/95)

Factor #2. Arbitrability and appropriate parties

While primarily the responsibility of the Grievance Committee, arbitration Hearing Panels may consider questions of whether an arbitrable issue actually exists and whether the parties named are appropriate to arbitration. A detailed discussion of these questions can be found in Appendix I to Part Ten, Arbitrable Issues.

Factor #3. Relevance and admissibility

Frequently, Hearing Panels are asked to rule on questions of admissibility and relevancy. While state law, if applicable, controls, the general rule is that anything the Hearing Panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.

Arbitration Hearing Panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the Hearing Panel looks with disfavor on the potential recipient's manner of doing business or even that the panel believes that unethical conduct may have occurred. To prevent any appearance of bias, arbitration Hearing Panels and procedural review panels shall make no referrals of ethical concerns to the Grievance Committee. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the Grievance Committee rests with the parties and others with firsthand knowledge. At the same time, evidence or testimony is not inadmissible simply because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to "punish" a

perceived “wrongdoer”, it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award. (*Amended 11/96*)

Factor #4. Communication and contact—abandonment and estrangement

Many arbitrable disputes will turn on the relationship (or lack thereof) between a broker (often a cooperating broker) and a prospective purchaser. Panels will consider whether, under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity, or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker and purchaser; the issue then becomes whether the broker's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker. (*Revised 11/99*)

Factor #5. Conformity with state law

The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in strict conformity with the law. In such matters, the advice of Board legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in Board-conducted arbitration is a preponderance of the evidence, and the initial burden of proof rests with the party requesting arbitration (see Professional Standards Policy Statement 26). This does not, however, preclude panel members from asking questions of the parties or witnesses to confirm their understanding of testimony presented or to ensure that panel members have a clear understanding of the events that led to the transaction and to the request for arbitration. Since each transaction is unique, it is impossible to develop a comprehensive list of all issues or questions that panel members may want to consider in a particular hearing. Panel members are advised to consider the following, which are representative of the issues and questions frequently involved in arbitration hearings.

Nature and status of the transaction

- (1) What was the nature of the transaction? Was there a residential or commercial sale/lease?
- (2) Is or was the matter the subject of litigation involving the same parties and issues as the arbitration?

Nature, status, and terms of the listing agreement

- (1) What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open, or some other form of agreement?
- (2) Was the listing agreement in writing? If not, is the listing agreement enforceable?
- (3) Was the listing agreement in effect at the time the sales contract was executed?
- (4) Was the property listed subject to a management agreement?
- (5) Were the broker's actions in accordance with the terms and conditions of the listing agreement?
 - (a) Were all conditions of the listing agreement met?
 - (b) Did the final terms of the sale meet those specified in the listing agreement?
 - (c) Did the transaction close? (Refer to Appendix I to Part Ten, Arbitrable Issues)
 - (d) Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to Part Ten, Arbitrable Issues)

Nature, status, and terms of buyer representation agreements

- (1) What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in, e.g., agent, legally-recognized non-agent, other?
- (2) Was the buyer representation agreement(s) in writing? Is it enforceable?
- (3) What were the terms of compensation established in the buyer representation agreement(s)?
- (4) Was the buyer representative(s) a broker or firm to which an offer of compensation was made by the listing broker?
- (5) Was the buyer representative(s) actions in accordance with the terms and conditions of the buyer representation agreement(s)?
- (6) At what point in the buying process was the buyer representation relationship established? (*Revised 5/03*)

Nature, status, and terms of the offer to compensate

- (1) Was an offer of cooperation and compensation made in writing? If not, how was it communicated?
- (2) Is the claimant a party to whom the listing broker's offer of compensation was extended?
- (3) Were the broker's actions in accordance with the terms and conditions of the offer of cooperation and compensation (if any)? Were all conditions of the agreement met?

Roles and relationships of the parties

- (1) Who was the listing broker?
- (2) Who was the cooperating broker or brokers?
- (3) Were any of the brokers acting as subagents? As buyer brokers? In another legally recognized capacity?

- (4) Did the cooperating broker(s) have an agreement, written or otherwise, to act as agent or in another legally recognized capacity on behalf of any of the parties?
- (5) Were any of the brokers (including the listing broker) acting as a principal in the transaction?
- (6) What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?
 - (a) Was the buyer represented by a party with whom the broker had previously dealt?
 - (b) Is the primary shareholder of the buyer-corporation a party with whom the broker had previously dealt?
 - (c) Was a prior prospect a vital link to the buyer?
- (7) Are all appropriate parties to the matter joined?
(Revised 5/03)

Initial contact with the purchaser

- (1) Who first introduced the purchaser or tenant to the property?
- (2) When was the first introduction made?
 - (a) Was the introduction made when the buyer had a specific need for that type of property?
 - (b) Was the introduction instrumental in creating the desire to purchase?
 - (c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - (d) Were there previous dealings between the buyer and the seller?
 - (e) Did the buyer find the property on his own?
- (3) How was the first introduction made?
 - (a) Was the property introduced as an open house?
 - (b) What subsequent efforts were made by the broker after the open house? (Refer to Factor #1)
 - (c) Was the introduction made to a different representative of the buyer?
 - (d) Was the "introduction" merely a mention that the property was listed?
 - (e) What property was first introduced?

Conduct of the brokers

- (1) Were all required disclosures complied with?
- (2) Was there a faithful exercise of the duties a broker owes to his client/principal?
- (3) If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
- (4) Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (Refer to Factor #4)
- (5) Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction—that is, did the broker perform services which assisted the buyer in making his decision to purchase? (Refer to Factor #4)
 - (a) Did the broker make preparations to show the property to the buyer?

- (b) Did the broker make continued efforts after showing the property?
- (c) Did the broker remove an impediment to the sale?
- (d) Did the broker make a proposal upon which the final transaction was based?
- (e) Did the broker motivate the buyer to purchase?
- (6) How do the efforts of one broker compare to the efforts of another?
 - (a) What was the relative amount of effort by one broker compared to another?
 - (b) What was the relative success or failure of negotiations conducted by one broker compared to the other?
- (7) If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment and estrangement)

- (1) What was the length of time between the broker's efforts and the final sales agreement?
- (2) Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?
 - (a) Did the buyer terminate the relationship with the broker? Why? (Refer to Factor #4)
 - (b) Did negotiations break down?
- (3) If there was an interruption or break in the original series of events, how was it caused, and by whom?
 - (a) Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?
 - (b) Did the purchaser's motive for purchasing change?
 - (c) Was there interference in the series of events from any outside or intervening cause or party?
- (4) Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?
- (5) Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

Conduct of the buyer

- (1) Did the buyer make the decision to buy independent of the broker's efforts/information?
- (2) Did the buyer negotiate without any aid from the broker?
- (3) Did the buyer seek to freeze out the broker?
 - (a) Did the buyer seek another broker in order to get a lower price?
 - (b) Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
 - (c) Did the contract provide that no brokers or certain brokers had been involved?

Conduct of the seller

- (1) Did the seller act in bad faith to deprive the broker of his commission?
 - (a) Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?
 - (b) Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?
 - (c) Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?
- (2) Was there bad faith evident from the fact that the seller told the broker he would not sell on certain terms, but did so via another broker or via the buyer directly?

Leasing transactions

- (1) Did the cooperating broker have a tenant representation agreement?
- (2) Was the cooperating broker working with the "authorized" staff member of the tenant company?
- (3) Did the cooperating broker prepare a tenant needs analysis?
- (4) Did the cooperating broker prepare a market analysis of available properties?
- (5) Did the cooperating broker prepare a tour book showing alternative properties and conduct a tour?
- (6) Did the cooperating broker show the tenant the property leased?
- (7) Did the cooperating broker issue a request for proposal on behalf of the tenant for the property leased?
- (8) Did the cooperating broker take an active part in the lease negotiations?
- (9) Did the cooperating broker obtain the tenant's signature on the lease document?
- (10) Did the tenant work with more than one broker; and if so, why? (*Revised 11/96*)

Other information

Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

These questions are typical, but not all-inclusive, of the questions that may assist Hearing Panels in understanding the issues before them. The objective of a panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.

Sample Fact Situation Analysis

The National Association's Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the

arbitrators' award. Among the reasons for this are the fact that arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute; that the issues considered by Hearing Panels are often myriad and complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and that the inclusion of written findings of fact or rationale (or both) would conceivably result in attempts to use such detail as "precedent" in subsequent hearings which might or might not involve similar facts. The end result might be elimination of the careful consideration of the entire course of events and conduct contemplated by these procedures and establishment of local, differing arbitration "templates" or predeterminants of entitlement inconsistent with these procedures and Interpretation 31.

Weighed against these concerns, however, was the desire to provide some model or sample applications of the factors, questions, and issues set forth in these Arbitration Guidelines. The following "fact situations" and analyses are provided for informational purposes and are not intended to carry precedential weight in any hearing.

Fact Situation #1

Listing Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Broker L with a signed purchase agreement, which was accepted by the seller. Subsequently, Broker Z requested arbitration with Broker L, claiming to be the procuring cause of sale.

Analysis: While Broker Z may have been the procuring cause of sale, Broker L's offer of compensation was made only to members of the MLS. Broker L never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Situation #2

Same as #1, except Broker Z is the buyer's agent.

Analysis: Same result, since there was no contractual relationship between Broker L and Broker Z and no issue to arbitrate.

Fact Situation #3

Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A (a subagent) wrote an offer to purchase on behalf of Buyer #1 which was presented to the seller by Broker L and which was accepted. At closing, subagency compensation is paid to Broker A. Broker S subsequently filed an arbitration request against Broker A, claiming to be the procuring cause of sale.

Analysis: Broker S's claim could have been brought against Broker A (pursuant to Standard of Practice 17-4) or against Broker L (the listing broker), who had promised to compensate the procuring cause of sale, thus arguably creating a contractual relationship between Broker L and Broker S. (*Amended 11/96*)

Fact Situation #4

Same as #3, except Broker S filed the arbitration request against Broker L (the listing broker).

Analysis: This is an arbitrable matter, since Broker L promised to compensate the procuring cause of sale. Broker L, to avoid the possibility of having to pay two cooperating brokers in the same transaction, should join Broker A in arbitration so that all competing claims can be resolved in a single hearing. The Hearing Panel will consider, among other things, why Buyer #1 made the offer to purchase through Broker A instead of Broker S. If it is determined that Broker S initiated a series of events which were unbroken in their continuity and which resulted in the sale, Broker S will likely prevail.

Fact Situation #5

Same as #3, except Broker L offered compensation only to subagents. Broker B (a buyer agent) requested permission to show the property to Buyer #1, wrote an offer which was accepted, and subsequently claimed to be the procuring cause of sale.

Analysis: Since Broker L did not make an offer of compensation to buyer brokers, there was no contractual relationship between Broker L and Broker B and no arbitrable issue to resolve.

If, on the other hand, Broker L had offered compensation to buyer brokers either through MLS or otherwise and had paid Broker A, then arbitration could have been conducted between Broker B and Broker A pursuant to Standard of Practice 17-4. Alternatively, arbitration could occur between Broker B and Broker L.

Fact Situation #6

Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1, who appeared uninterested. Broker S made no effort to further contact Buyer #1. Six weeks later, Broker B (a buyer broker) wrote an offer on the property on behalf of Buyer #1, presented it to Broker L, and it was accepted. Broker S subsequently filed for arbitration against Broker L, claiming to be the procuring cause. Broker L joined Broker B in the request so that all competing claims could be resolved in one hearing.

Analysis: The Hearing Panel will consider Broker S's initial introduction of the buyer to the property, the period of time between Broker S's last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S's last contact with the buyer, the fact that Broker S had

made no subsequent effort to contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the Hearing Panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

Same as #6, except that Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer broker). At the arbitration hearing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that "I needed a buyer agent to be sure that I got the best deal."

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S's efforts were primarily responsible for bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (*Amended 11/99*)

Fact Situation #8

Similar to #6, except Buyer #1 asked Broker S for a comparative market analysis as the basis for making a purchase offer. Broker S reminded Buyer #1 that he (Broker S) had clearly disclosed his status as subagent, and that he could not counsel Buyer #1 as to the property's market value. Broker B based his claim to entitlement on the grounds that he had provided Buyer #1 with information that Broker S could not or would not provide.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had made early and timely disclosure of his status as a subagent; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's inability to provide a comparative market analysis of the property had clearly broken the chain of events leading to the sale. If the panel determines that the buyer did not have cause to leave Broker S for Broker B, they may conclude that the series of events initiated by Broker S remained unbroken, and Broker S will likely prevail.

Fact Situation #9

Similar to #6, except Broker S made no disclosure of his status as subagent (or its implications) until faced with Buyer #1's request for a comparative market analysis.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis; whether

adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's belated disclosure of his agency status (and its implications) clearly broke the chain of events leading to the sale. If the panel determines that Broker S's failure to disclose his agency status was a reasonable basis for Buyer #1's decision to engage the services of Broker B, they may conclude that the series of events initiated by Broker S had been broken, and Broker B will likely prevail.

Fact Situation #10

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A, acting as a subagent, showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B, also acting as a subagent but independent of Broker A, showed the same property to the chairman of ABC Corporation, whom he had known for more than fifteen (15) years. The chairman liked the property and instructed Broker B to draft and present a lease on behalf of ABC Corporation to Broker L, which was accepted by the owner/landlord. Subsequent to the commencement of the lease, Broker A requested arbitration with Broker L, claiming to be the procuring cause.

Analysis: This is an arbitrable matter as Broker L offered compensation to the procuring cause of the sale or lease. To avoid the possibility of having to pay two commissions, Broker L joined Broker B in arbitration so that all competing claims could be resolved in a single hearing. The Hearing Panel considered both brokers' introductions of the property to ABC Corporation. Should the Hearing Panel conclude that both brokers were acting independently and through separate series of events, the Hearing Panel may conclude that Broker B was directly responsible for the lease and should be entitled to the cooperating broker's portion of the commission. (*Adopted 11/96*)

Fact Situation #11

Broker A, acting as the agent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering compensation to both subagents and buyer/tenant agents. Over a period of several months, Broker A made the availability of the property known to XYZ Company and, on three (3) separate occasions, showed the property to various operational staff of XYZ Company. After the third showing, the vice president of finance asked Broker A to draft a lease for his review with the president of XYZ Company and its in-house counsel. The president, upon learning that Broker A was the listing agent for the property, instructed the vice president of finance to secure a tenant representative to ensure that XYZ Company was getting "the best deal." One week later, tenant representative Broker T presented Broker A with the same lease that Broker A had previously drafted and the president of XYZ Company had signed. The lease was accepted by the out-of-state corporation. Upon payment of the lease commission to Broker A, Broker A denied compensation to Broker T and Broker T immediately requested arbitration claiming to be the procuring cause.

Analysis: The Hearing Panel should consider Broker A's initial introduction of XYZ Company to the property, Broker A's contact with XYZ Company on an on-going basis, and whether Broker A initiated the series of events which led to the successful lease. Given the above facts, Broker A will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #12

Broker A has had a long-standing relationship with Client B, the real estate manager of a large, diversified company. Broker A has acquired or disposed of twelve (12) properties for Client B over a five (5) year period. Client B asks Broker A to locate a large warehouse property to consolidate inventories from three local plants. Broker A conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Client B, and identifies four (4) possible properties that seem to meet most of Client B's needs. At Client B's request, he arranges and conducts inspections of each of these properties with several operations level individuals. Two (2) of the properties were listed for sale exclusively by Broker C. After the inspections, Broker A sends Broker C a written registration letter in which he identifies Client B's company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Broker C responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Broker A on either of the properties. Six (6) weeks after the inspections, Client B selects one of the properties and instructs Broker A to initiate negotiations with Broker C. After several weeks the negotiations reach an impasse. Two (2) weeks later, Broker A learns that Broker C has presented a proposal directly to Client B for the other property that was previously inspected. Broker A then contacts Broker C, and demands to be included in the negotiations. Broker C refuses, telling Broker A that he has "lost control of his prospect," and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property. Broker A files a request for arbitration against Broker C.

Analysis: This would be an arbitrable dispute as a compensation agreement existed between Broker A and Broker C. The Hearing Panel will consider Broker A's introduction of the property to Client B, the property reports prepared by Broker A, and the time between the impasse in negotiations on the first property and the sale of the second property. If the Hearing Panel determines that Broker A initiated the series of events that led to the successful sale, Broker A will likely prevail. (*Adopted 11/96*)

111TJF

LEXSEE 550 P.2d 1104

**Clifton C. MORLEY and Mary E. Morley, husband and wife,
Appellants, v. J. PAGEL REALTY & INSURANCE, a corporation and
Shirley Tripett, Appellees**

No. 2 CA-CIV 2099

Court of Appeals of Arizona, Division Two

550 P.2d 1104; 1976 Ariz. App. LEXIS 538; 27 Ariz. App. 62

June 22, 1976

SUBSEQUENT HISTORY:

[**1]

Rehearing Denied July 16, 1976. Review
Denied September 14, 1976.

COUNSEL:

Miller, Pitt & Feldman, P. C., by Jeffrey H.
Schwartz and Stanley G. Feldman, Tucson, for
appellants.

Russo, Cox, Dickerson & Cartin, P. C., by
Thomas G. Cox, Tucson, for appellees.

JUDGES:

Krucker, Judge. Howard, C. J. and
Hathaway, J., concurring.

OPINIONBY:

KRUCKER

OPINION:

[***62] [*1104] OPINION

This was an action by appellants, Clifton
and Mary Morley, against appellees, J. Pagel
Realty & Insurance (Pagel Realty), Shirley

Tripett, a real estate salesperson employed by
Pagel Realty, and Western Surety Co., the
surety on Pagel Realty's bond. Also named as
defendants were Lawrence P. Hayden, dba Old
West Realty and Lawrence P. Hayden and
JoAnne Hayden, husband and wife. n1 From an
adverse judgment rendered by the trial court on
stipulated facts, appellants have perfected this
appeal. We reverse.

n1 The Haydens and Old West Realty
are not before this court on appeal.

Appellants owned a three-bedroom home in
the Warren area of Bisbee, [**2] Arizona.
[***63] [*1105] On March 28, 1973, they
listed their property for sale with Pagel Realty
through appellee Shirley Tripett. The asking
price was \$ 15,000, payable as follows:
"DOWNTERMS \$ 3,000 will carry at 8%
interest with 15 yr Stop." Pagel Realty's
commission was to be six percent.

In April of 1973, Tripett obtained a written
offer from Lawrence and JoAnne Hayden. It
provided for a purchase price of \$ 15,000, with a

\$ 2,500 down payment and the balance payable as follows:

"\$ 12,500.00 by buyers executing in favor of sellers a demand note payable at not less than \$ 100.00 per month. Buyers reserve the right to pay more than \$ 100 per month on said note without penalty. Interest rate on the note will be 8%. The note will be all due and payable 10 years from date of closing."

Tripett showed the written offer to appellants without giving them any advice concerning its contents. On April 20, 1973, appellants signed the written offer.

The closing took place on May 14, 1973. On that date Lawrence and JoAnne Hayden executed a promissory note for \$ 12,500, naming appellants as payees. The form used for the note included the words "This note is [**3] secured by a mortgage on real property," but these words were crossed out.

Sometime during the next six months the Haydens deeded the property to a third party for cash, defaulted on the note, and went bankrupt. Appellants thereafter brought this action against Pagel Realty and Tripett, alleging that they had breached their fiduciary duty to appellants, had negligently represented appellants in the sale of their land, and were grossly negligent in failing to protect appellants' interests.

On January 15, 1975, counsel for the parties submitted the case to the trial court on the following stipulation of facts:

"That the defendant Triplett [sic], a licensed real estate salesman, acting as agent for the defendant, Pagel, carried a Deposit Receipt and Agreement, which is in evidence, to the plaintiffs, Worley [sic] and delivered it to them without giving any advice concerning the contents of the agreement."

Counsel also stipulated that the only legal issue was:

"... does the issue of giving advice by the defendant, or any of them, to the plaintiffs, to the effect that the promissory note should be secured by a realty mortgage constitute the illegal practice of law; [**4] and, if so, is that a complete defense to the plaintiff's claim?"

Counsel also stipulated that if appellees were held liable, the amount of damages would be \$ 11,900.00.

On June 3, 1975, the trial court ruled in favor of appellees by minute entry. On September 17, 1975, formal judgment was entered which stated:

"... the court concludes and finds that the giving of advice by the defendants, or any of them, to the plaintiffs, to the effect that the promissory note should be secured by a Realty Mortgage, would constitute the illegal practice of law."

This appeal presents two distinct question for our consideration: (1) independent of any question of unauthorized practice of law, whether a real estate agent who shows his clients a written realty purchase offer that contemplates satisfaction of a substantial portion of the purchase price with an unsecured promissory note has a duty to tell his clients that the purchase price should be secured by a mortgage; and (2) whether a real estate agent who tells his clients that the purchase price of their property should be secured by a mortgage thereby engages in the unauthorized practice of law.

We recently discussed the duties [**5] of a seller's real estate broker in *Vivian Arnold* [***64] [*1106] *Realty Co. v. McCormick*, 19 Ariz.App. 289, 506 P.2d 1074 (1973):

"A real estate agent owes a duty of utmost good faith and loyalty to the principal, and one employed to sell property has the specific duty

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of exercising reasonable due care and diligence to effect a sale to the best advantage of the principal -- that is, on the best terms and at the best price possible. *Haymes v. Rogers*, 70 Ariz. 257, 219 P.2d 339 (1950); 12 Am.Jur.2d Brokers § 96 (1964). He is also under a duty to disclose to his client information he possesses pertaining to the transaction in question. *Jennings v. Lee*, 105 Ariz. 167, 461 P.2d 161 (1969)." 19 Ariz.App. at 293-94, 506 P.2d at 1078.

See, *Ledirk Amusement Co. v. Schechner*, 133 N.J.Eq. 602, 33 A.2d 894 (1943), *aff'd*, 135 N.J.Eq. 209, 37 A.2d 823 (1944); *Bonanza Real Estate, Inc. v. Crouch*, 10 Wash.App. 380, 517 P.2d 1371 (1974).

No Arizona decisions have delineated the exact extent of a real estate broker's duty to his client in a situation like the one that occurred here. n2 However, several analogous decisions from other jurisdictions [**6] suggest what that duty should be. The Oregon courts have said that a real estate broker must make a full and understandable explanation to his client before having him sign any contract. *Starkweather v. Shaffer*, 262 Or. 198, 497 P.2d 358 (1972) (dictum). As the court stated in *Prall v. Gooden*, 226 Or. 554, 360 P.2d 759 (1961):

"The broker should make his explanation commensurate with the education and understanding of the people he is dealing with, and if he is unable to give competent advice he should allow them to obtain it elsewhere." 360 P.2d at 762.

n2 Cf., *Leigh v. Loyd*, 74 Ariz. 84, 244 P.2d 356 (1952), in which a vendor's broker was held liable in damages for intentionally remaining silent while his client signed certain legal instruments under a serious misapprehension of their true nature.

In *Duncan v. Barbour*, 188 Va. 53, 49 S.E.2d 260 (1948), a real estate broker submitted an amended purchase offer to his client without disclosing that it failed to accord with the client's [**7] wishes in three crucial respects. The court upheld denial of the broker's commission. It stated:

"... it was the duty of the agent to disclose to his principal the vital differences in the terms and conditions of sale contemplated by the parties. This duty was not discharged by simply handing to the owner an unsigned contract and directing his attention to one specific change. It was his duty to inform his principal of all facts which might influence his principal in accepting or rejecting the offer." 49 S.E.2d at 265.

In *Reese v. Harper*, 8 Utah 2d 119, 329 P.2d 410 (1958), defendant was a farmer with little business acumen. He owned a farm that was subject to \$ 15,000 in liens. He listed the farm for sale with plaintiff, a real estate broker, and asked \$ 45,000 for it. Plaintiff showed defendant a third party's written offer of \$ 30,000, which stated on a separate line that there were to be no encumbrances. Defendant understood that the purchaser would pay him \$ 30,000 and also pay off the liens; in fact, the offer required defendant to discharge the liens out of the \$ 30,000 purchase price. Plaintiff did not explain the terms of the offer, and defendant signed [**8] it after cursorily examining it. Defendant later refused to go through with the deal, and plaintiff sued for his commission. The court affirmed judgment for defendant. It rejected plaintiff's argument that he had no duty to "coddle and spoonfeed" defendant, holding that plaintiff violated his duty to:

"... apply his abilities and knowledge to the advantage of the man he serves; and to make full disclosure of all facts which his principal should know in transacting the business." 329 P.2d at 412.

[**65] [*1107] From *Prall* and *Starkweather* we learn that a real estate broker must make some kind of explanation of the offer he procures for his client. *Duncan* tells us that if the offer varies from the terms of the listing the broker must so inform his client. And from *Reese* we discover that a person acting as broker for an inexperienced client must employ all his professional ability and knowledge to make sure the client understands the "facts" that will materially affect his desire to sell in accordance with the terms of a purchase offer. Cf., *Burien Motors, Inc. v. Balch*, 9 Wash.App. 573, 513 P.2d 582 (1973). In the case at bench, appellants [**9] seek to hold appellees liable for failing to inform them that the Haydens' offer contemplated no security and that a mortgage should be required. Although this information might be beyond the average person, it is common knowledge in the real estate business. We think that as part of appellees' duty to effect a sale for appellants on the best terms possible and to disclose to them all the information they possessed that pertained to the prospective transaction, appellees were bound to inform appellants that they should require security for the Haydens' performance.

The second question we are faced with is whether a real estate broker who tells his client he should require a mortgage thereby engages in the unauthorized practice of law. In *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), supplemented, 91 Ariz. 293, 371 P.2d 1020 (1962), our Supreme Court gave the following general definition:

"... those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute 'the practice of law.'" 90 Ariz. at 87, 366 P.2d at 9.

In the *State* [**10] *Bar* case the court said such acts include the direct or indirect giving of advice relative to legal rights and liabilities.

In determining what constitutes "legal advice" or "acts ... which lawyers customarily have carried on from day to day throughout the centuries," the following language from *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951) is helpful:

"The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field.

***The development of any practical criterion, as well as its subsequent application, must be closely related to the purpose for which lawyers are licensed as the exclusive occupants of their field. That purpose is to protect the public from the intolerable evils which are brought upon people by those who assume to practice law without having the proper qualifications." 48 N.W.2d at 794.

Appellees intimate that appellants would require real estate brokers to discuss with their clients the merits of [**11] all the various available security devices. We do not read appellants' argument so broadly. The only duty appellants contend for is a duty to warn the untutored vendor that he should require some form of security in the contract of sale. The giving of such banal advice by real estate brokers creates no danger to the public. We hold that under the circumstances that arose in this case, a real estate broker would not engage in the unauthorized practice of law by telling his clients that the purchase price of their property should be secured by a mortgage. n3 Our holding today is a narrow one and should not be read to extend beyond the situation presented by the facts [**66] [*1108] of this case. It is reinforced by Art. 26, § 1 of the Arizona Constitution. Having achieved, by virtue of this provision, the right to prepare any and all instruments incident to the sale of real property, including promissory notes, real estate brokers

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and salesmen also bear the responsibility and duty of explaining to the persons involved the implications of these documents. Failure to do so may constitute real estate malpractice.

constituted the unauthorized practice of law would bar appellants' claim.

[**12]

n3 Accordingly, we need not decide whether a determination that such advice

Reversed and remanded with directions to enter a judgment in favor of appellants in the amount of \$ 11,900, plus costs.

REAL ESTATE AGENCY DISCLOSURE AND ELECTION

Document updated:
November 2024

This document is not an employment agreement



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.



1. Firm Name ("Broker") _____
2. acting through _____

LICENSEE'S NAME
LICENSEE'S NAME
3. hereby makes the following disclosure.

DISCLOSURE

4. Before a **Seller or Landlord (hereinafter referred to as "Seller")** or a **Buyer or Tenant (hereinafter referred to as**
5. **"Buyer")** enters into a discussion with a real estate broker or licensee affiliated with a broker, the Seller and the Buyer
6. should understand what type of agency relationship or representation they will have with the broker in the transaction.
7. **I. Buyer's Broker:** A broker other than the Seller's broker can agree with the Buyer to act as the broker for the Buyer. In
8. these situations, the Buyer's broker is not representing the Seller, even if the Buyer's broker is receiving compensation
9. for services rendered, either in full or in part, from the Seller or through the Seller's broker:
10. a) A Buyer's broker has the fiduciary duties of loyalty, obedience, disclosure, confidentiality, and accounting in dealings
11. with the Buyer.
12. b) Other potential Buyers represented by broker may consider, make offers on, or acquire an interest in the same or
13. similar properties as Buyer is seeking.
14. **II. Seller's Broker:** A broker under a listing agreement with the Seller acts as the broker for the Seller only:
15. a) A Seller's broker has the fiduciary duties of loyalty, obedience, disclosure, confidentiality, and accounting in dealings
16. with the Seller.
17. b) Other potential Sellers represented by broker may list properties that are similar to the property that Seller is
18. selling.
19. **III. Broker Representing both Seller and Buyer (Limited Representation Broker):** A broker, either acting directly or
20. through one or more licensees within the same brokerage firm, can legally represent both the Seller and the Buyer in a
21. transaction, but only with the knowledge and informed consent of both the Seller and the Buyer. In these situations, the
22. Broker, acting through its licensee(s), represents both the Buyer and the Seller, with limitations of the duties owed to the
23. Buyer and the Seller:
24. a) The broker will not, without written authorization, disclose to the other party that the Seller will accept a price or terms
25. other than stated in the listing or that the Buyer will accept a price or terms other than offered.
26. b) There will be conflicts in the duties of loyalty, obedience, disclosure and confidentiality. Disclosure of confidential
27. information may be made only with written authorization.
28. Regardless of who the Broker represents in the transaction, the Broker shall exercise reasonable skill and care in the
29. performance of the Broker's duties and shall be truthful and honest to both the Buyer and Seller and shall disclose all known
30. facts which materially and adversely affect the consideration to be paid by any party. Pursuant to A.R.S. §32-2156, Sellers,
31. Lessors and Brokers are not obligated to disclose that a property is or has been: (1) the site of a natural death, suicide,
32. homicide, or any crime classified as a felony; (2) owned or occupied by a person exposed to HIV, or diagnosed as having
33. AIDS or any other disease not known to be transmitted through common occupancy of real estate; or (3) located in the vicinity
34. of a sex offender. Sellers or Sellers' representatives may not treat the existence, terms, or conditions of offers as confidential
35. unless there is a confidentiality agreement between the parties.
36. **THE DUTIES OF THE BROKER IN A REAL ESTATE TRANSACTION DO NOT RELIEVE THE SELLER OR THE BUYER**
37. **FROM THE RESPONSIBILITY TO PROTECT THEIR OWN INTERESTS. THE SELLER AND THE BUYER SHOULD**
38. **CAREFULLY READ ALL AGREEMENTS TO ENSURE THAT THE DOCUMENTS ADEQUATELY EXPRESS THEIR**
39. **UNDERSTANDING OF THE TRANSACTION.**

>>

*Real Estate Agency Disclosure and Election >>***ELECTION****40. AGENCY ELECTION DOES NOT ESTABLISH BROKER COMPENSATION.**

41. Compensation paid by a Buyer or Seller to their Broker is not set by law, is always fully negotiable and the amount
 42. chosen shall be documented in a separate written employment agreement after discussion with their Broker. Should
 43. a Seller also choose to offer compensation to a Buyer's Broker, the offered amount is also not set by law, is fully
 44. negotiable and agreed upon after discussion with Seller's Broker.

45. (BUYER OR SELLER INITIALS REQUIRED) _____ / _____

46. **Buyer or Tenant Election** (Complete this section only if you are the Buyer.) The undersigned elects to have the Broker
 47. (check any that apply):

48. ☐ represent the Buyer as Buyer's Broker.
 49. ☐ represent the Seller as Seller's Broker.
 50. ☐ show Buyer properties listed with Broker's firm and Buyer agrees that Broker shall act as agent for both Buyer and
 51. Seller provided that the Seller consents to limited representation. In the event of a purchase, Buyer's and Seller's
 52. informed consent should be acknowledged in a separate writing other than the purchase contract.

53. **Seller or Landlord Election** (Complete this section only if you are the Seller.) The undersigned elects to have the Broker
 54. (check any that apply):

55. ☐ represent the Buyer as Buyer's Broker.
 56. ☐ represent the Seller as Seller's Broker.
 57. ☐ show Seller's property to Buyers represented by Broker's firm and Seller agrees that Broker shall act as agent for both
 58. Seller and Buyer provided that Buyer consents to the limited representation. In the event of a purchase, Buyer's and
 59. Seller's informed consent should be acknowledged in a separate writing other than the purchase contract.

60. The undersigned ☐ Buyer(s) or ☐ Seller(s) acknowledge that this document is a disclosure of duties.

61. I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE.

^ PRINT NAME ^ PRINT NAME
 ^ SIGNATURE MO/DA/YR ^ SIGNATURE MO/DA/YR

CONSENT TO LIMITED REPRESENTATION ("CONSENT")

BROKER REPRESENTS BOTH SELLER AND BUYER OR BOTH LANDLORD AND TENANT

Document updated:
November 2024



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.



1. Buyer/Tenant ("Buyer"): _____
2. Seller/Landlord ("Seller"): _____
3. Subject Property: _____
4. Firm Name ("Broker"): _____

5. **Consent:** Buyer and Seller consent that Broker, acting through the Licensee(s) named below, will represent both parties in the transaction.

6. ☐ One Licensee: _____ (NAME)
7. ☐ Two Licensees: _____, who, through the Broker, has been representing the Buyer;
(NAME)
8. _____ and _____, who, through the Broker, has been representing the Seller.
(NAME)

9. **Duties and Limitations:** The Broker now represents both Buyer and Seller and both parties understand that neither Broker nor Broker's Licensee(s) can represent the interests of one party to the exclusion or detriment of the other party. The parties understand and further consent to the following:

10. a) The Licensee or each Licensee represents both the Buyer and the Seller with limitations of the duties owed to the Buyer and the Seller, such as:
11. 1) The Licensee(s) will not, without written authorization, disclose to the other party that the Seller will accept a price or terms other than stated in the listing or that the Buyer will accept a price or terms other than offered;
12. 2) There will be conflicts in the duties of loyalty, obedience, disclosure and confidentiality. Disclosure of confidential information may be made only with written authorization. This does not relieve each Licensee of any legal obligation to disclose all known facts which materially and adversely affect the consideration to be paid by any party to the transaction.
13. 3) Pursuant to A.R.S. §32-2156, Sellers, Lessors and Broker/Licensee(s) are not obligated to disclose that the Subject Property is or has been: (1) the site of a natural death, suicide, homicide, or any crime classified as a felony; (2) owned or occupied by a person exposed to HIV, or diagnosed as having AIDS or any other disease not known to be transmitted through common occupancy of real estate; or (3) located in the vicinity of a sex offender.
14. b) The Licensee(s) shall exercise reasonable skill and care in the performance of their duties.
15. c) The Licensee(s) shall be obligated at all times to deal honestly with all parties.
16. d) The duties of the Licensee(s) in this transaction do not relieve the Seller or the Buyer from the responsibility to protect their own interests.

17. **Compensation:** Compensation to the Broker is not set by law, is fully negotiable, and shall be paid pursuant to separate agreement(s).

18. **Prior Agreements:** Seller and Buyer understand this Consent does not replace prior agreements entered into with Broker and such agreements shall remain in effect. However, to the extent that the terms of this Consent contradict or conflict with the terms of prior agreements, this Consent shall supersede.

19. **Termination:** If the Seller and Buyer do not enter into a contract relating to the Subject Property or if the transaction between the Seller and the Buyer fails to close, the parties agree that this Consent is terminated, and the parties shall have no further rights or obligations pursuant to this Consent.

20. **Indemnification:** Seller and Buyer agree to indemnify and hold Broker harmless against any and all claims, damages, losses, expenses or liabilities including attorneys' fees and costs incurred by Broker in any defense thereof arising from Broker's role of limited representation.

21. THE UNDERSIGNED PARTIES ACKNOWLEDGE THAT THEY HAVE THOROUGHLY READ, UNDERSTOOD AND APPROVED THIS CONSENT AND ACKNOWLEDGE RECEIPT OF A COPY.

22. _____ MO/DA/YR _____ MO/DA/YR
^ BUYER'S SIGNATURE ^ BUYER'S SIGNATURE

23. _____ MO/DA/YR _____ MO/DA/YR
^ SELLER'S SIGNATURE ^ SELLER'S SIGNATURE

ARTICLE 11. PROFESSIONAL CONDUCT

R4-28-1101. Duties to Client

- A. A licensee owes a fiduciary duty to the client and shall protect and promote the client's interests. The licensee shall also deal fairly with all other parties to a transaction.
- B. A licensee participating in a real estate transaction shall disclose in writing to all other parties any information the licensee possesses that materially or adversely affects the consideration to be paid by any party to the transaction, including:
 - 1. Any information that the seller or lessor is or may be unable to perform;
 - 2. Any information that the buyer or lessee is, or may be, unable to perform;
 - 3. Any material defect existing in the property being transferred; and
 - 4. The existence of a lien or encumbrance on the property being transferred.
- C. A licensee shall expeditiously perform all acts required by the holding of a license. A licensee shall not delay performance, either intentionally or through neglect.
- D. A licensee shall not allow a controversy with another licensee to jeopardize, delay, or interfere with the initiation, processing, or finalizing of a transaction on behalf of a client. This prohibition does not obligate a licensee to agree to alter the terms of any employment or compensation agreement or to relinquish the right to maintain an action to resolve a controversy.
- E. 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:
 - 1. Salesperson or broker has a license and is acting as a principal;
 - 2. Purchaser or seller is a member of the salesperson's, broker's, or designated broker's immediate family;
 - 3. Purchaser or seller is the salesperson's or broker's employing broker, or owns or is employed by the salesperson's or broker's employing broker; or
 - 4. Salesperson or broker, or a member of the salesperson's or broker's immediate family, has a financial interest in the transaction other than the salesperson's or broker's receipt of compensation for the real estate services.
- F. A salesperson or broker shall not accept compensation from or represent more than one party to a transaction without the prior written consent of all parties.
- G. 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 acknowledgement of the compensation. This prohibition does not apply to compensation paid to a broker by a broker who represents a party in the transaction.
- H. The services that a salesperson or broker provides to a client or a customer shall conform to the standards of practice and competence recognized in the professional community for the specific real estate discipline in which the salesperson or broker engages. A salesperson or broker shall not undertake to provide 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 the salesperson or broker.

- I. A salesperson or broker shall exercise reasonable care in ensuring that the salesperson or broker obtains information material to a client's interests and relevant to the contemplated transaction and accurately communicates the information to the client. A salesperson or broker is not required to have expertise in subject areas other than those required to obtain the salesperson's or broker's license. A salesperson or broker shall take reasonable steps to assist a client in confirming the accuracy of information relevant to the transaction.
- J. A salesperson or broker shall not:
 - 1. Permit or facilitate occupancy in a person's real property by a third party without prior written authorization from the person; or
 - 2. Deliver possession prior to closing unless expressly instructed to do so by the owner of the property or property interest being transferred.
- K. A salesperson or broker shall recommend to a client 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.

Historical Note

Adopted effective May 1, 1980 (Supp. 80-3). Former Section R4-28-27 renumbered without change as Section R4-28-1101 (Supp. 87-1). Section R4-28-1101 amended by final rulemaking at 5 A.A.R. 650, effective February 3, 1999 (Supp. 99-1). Amended by final rulemaking at 8 A.A.R. 3640, effective August 6, 2002 (Supp. 02-3). Amended by final rulemaking at 11 A.A.R. 506, effective March 5, 2005 (Supp. 05-1).

Short Title: Agent Responsibility to Client

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under ARS 41-1033 for a review of the statement.

Description of Practice/Procedure: A licensee is a real estate professional with a fiduciary duty to his or her client to act in the client's best interests as described in R4-28-1101(I). Reasonable care or competence may include recommending that a client seek professional or technical advice when the matter is beyond the expertise of the agent.

Licensees are expected to take reasonable steps to assist their clients in confirming or verifying information under circumstances in which a reasonably prudent real estate professional has reason to question the accuracy of the information being provided in a transaction, or where the client has questioned the accuracy of the information.

These considerations are intended to provide a reasonable standard for licensees to follow in complying with their duties and obligations under statute and rule.

Authority: Commissioner's Rule R4-28-1101 describes a licensee's "professional duties" and A.R.S. § 32-2153(A)(3) and (22) identify violation of rules and negligence as grounds for disciplinary action against a licensee.

Policy Program: Enforcement

Effective Date: Revised 6/1/2001; revised and renumbered 5/28/04, revised and renumbered 4/8/2005.

Persons with disabilities who need this document in an alternate format should contact Business Services at 602.468.1414, ext. 160, or IADA@re.state.az.us, to make your needs known.

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111TJF

TAREK ARANKI and OLIVIA ARANKI, husband and wife, Plaintiffs-Appellants,
v. RKP INVESTMENTS, INC., an Arizona corporation; ROY POWELL and KIM-
BERLY POWELL, husband and wife; HERB GLICKSTON; FRANK J.
ZISKOVSKY dba RIDGECREST REALTY; REALTY EXECUTIVES, INC., an
Arizona corporation; ROGER MALCOLM and STACEY MALCOLM, husband
and wife; DAVIS OLASON and LYNN OLASON, husband and wife; JOHN
FOLTZ and MARIE FOLTZ, husband and wife, Defendants-Appellees.

1 CA-CV 98-0375

COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT D

194 Ariz. 206; 979 P.2d 534; 1999 Ariz. App. LEXIS 65; 293 Ariz. Adv. Rep. 37

April 22, 1999, Filed

SUBSEQUENT HISTORY: [***1] Amended By
Order Dated May 3, 1999.

PRIOR HISTORY: Appeal from the Superior Court
of Maricopa County. Cause No. CV 95-12017. The Ho-
norable Donald F. Daughton, Judge.

DISPOSITION: AFFIRMED IN PART; REVERSED
AND REMANDED IN PART.

LexisNexis(R) Headnotes

*Civil Procedure > Summary Judgment > Appellate Re-
view > Standards of Review*

*Civil Procedure > Summary Judgment > Standards >
General Overview*

*Civil Procedure > Appeals > Standards of Review > De
Novo Review*

[HN1] The court's standard of review for a grant of
summary judgment is de novo for both factual and legal
determinations.

*Civil Procedure > Summary Judgment > Standards >
General Overview*

[HN2] Summary judgment should be granted if the facts
produced in support of the claim or defense have so little
probative value, given the quantum of evidence required,
that reasonable people could not agree with the conclu-
sion advanced by the proponent of the claim or defense.

*Civil Procedure > Summary Judgment > Burdens of
Production & Proof > General Overview*

[HN3] The court views the evidence and reasonable infe-
rences in the light most favorable to the non-moving
party.

*Torts > Business Torts > Fraud & Misrepresentation >
Negligent Misrepresentation > General Overview*

[HN4] One who, in the course of his business, profession
or employment, or in any other transaction in which he
has a pecuniary interest, supplies false information for
the guidance of others in their business transactions, is
subject to liability for pecuniary loss caused to them by
their justifiable reliance upon the information, if he fails
to exercise reasonable care or competence in obtaining or
communicating the information.

*Real Property Law > Purchase & Sale > Remedies >
Duty to Disclose*

*Torts > Business Torts > Fraud & Misrepresentation >
Negligent Misrepresentation > General Overview*

[HN5] The duty of fair dealing does not include investi-
gations to discover defects in the sellers' property.

*Business & Corporate Law > Agency Relationships >
Agents Distinguished > General Overview*

*Business & Corporate Law > Agency Relationships >
Causes of Action & Remedies > Burdens of Proof
Governments > Fiduciary Responsibilities*

[HN6] The law does not, for example require escrow
agents, who act as fiduciaries for buyers and sellers alike,
to investigate on behalf of their principals; such agents
are merely bound to disclose circumstances that a rea-
sonable agent would perceive as evidence of fraud. Ariz.
Admin. Code R4-28-1101(B)(3).

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Real Property Law > Brokers > Fiduciary Responsibilities

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

[HN7] A sellers' real estate brokers and agents are not liable to the 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.

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN8] To succeed on a motion for summary judgment, defendants need only demonstrate an absence of evidence for an essential element of the complaint. They are not required to affirmatively establish the negative of a necessary element.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

[HN9] The law disfavors contractual provisions by which one party seeks to immunize himself against the consequences of his own torts. Although there are exceptions to the principle disfavoring attempts to gain immunity, they are narrowly drawn and posit that certain conditions are met--that there is no public policy impediment to the limitation, and that the parties did, in fact, bargain for the limitation.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Waiver & Preservation

Civil Procedure > Summary Judgment > Standards > General Overview

[HN10] See Ariz. Sup. Ct. R. IV(b).

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Waiver & Preservation

Civil Procedure > Parties > Joinder > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

[HN11] Ariz. Sup. Ct. R. IV(b) is not mandatory.

COUNSEL: Francis P. Smith, Attorney for Appellants, Phoenix.

Snell & Wilmer, L.L.P. by Lisa M. Coulter and Martha E. Gibbs, Attorneys for Appellees Realty Executives, Inc., John Foltz, Roger Malcolm and David Olason, Phoenix.

O'Connor, Cavanagh, Anderson, Killingsworth & Be-shears, P.A. by Patrick D. White and Christopher Rob-bins, Attorneys for Appellees Ridgcrest Realty, Inc., Herb Glickston and Frank J. Ziskovsky, Phoenix.

Stoops & Kloberdanz, P.L.C. by Thomas A. Stoops and William A. Kozub, Attorneys for Appellee RKP Invest-ments, Inc., Phoenix.

JUDGES: Rudolph J. Gerber, Judge Michael D. Ryan, Presiding Judge. Thomas C. Kleinschmidt, Judge.

OPINION BY: Rudolph J. Gerber

OPINION

[*207] [**535] **OPINION**

GERBER, Judge

P1 Tarek and Olivia Aranki [***2] (the "plaintiffs") appeal from the trial court's summary judgment in favor of the named defendants. We affirm the judgment as to some defendants and reverse as to others.

P2 In their complaint filed in 1995, the plaintiffs sought damages in tort and contract and under various recovery statutes in connection with their purchase of a single family home in Cave Creek, Arizona. The com-plaint alleges that they discovered many latent defects and problems with the home after the sale closed.

P3 Defendants Powell and RKP Investments, Inc., a corporation formed by the Powells, (collectively "the Powell defendants" or "the sellers") sold the property to plaintiffs. Ziskovsky, doing business as Ridgcrest Real-ty, was the buyers' broker, for whom Glickston acted as agent.

P4 Defendant Realty Executives, Inc. is the real es-tate company that represented the Powells and for whom defendant Foltz served as the designated broker. Defen-dants Malcolm and Olason are real estate agents affi-liated with Realty Executives. We refer to Realty Execu-tives, Inc., Foltz, Malcolm and Olason collectively as "the Realty Executives defendants."

[*208] [**536] P5 The Realty Executives [***3] defendants moved for summary judgment on two grounds: (1) lack of evidence that they knew or reasona-bly should have known of the problems with the home and a corresponding lack of duty to discover and disclose such problems, and (2) an exculpatory clause in the sales contract releasing brokers from liability for the condition

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of the premises. The Powell defendants joined in the motion without advancing any other theories. Ziskovsky and Glickston joined in the motion on the contractual ground only. The trial court granted the motion as to all defendants and entered final judgment against plaintiffs.

P6 [HN1] Our standard of review for a grant of summary judgment is *de novo* for both factual and legal determinations. See *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 139, 927 P.2d 796, 799 (App. 1996). [HN2] Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). [HN3] We view the evidence [***4] and reasonable inferences in the light most favorable to the non-moving party. See *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992).

The Realty Executives Defendants

P7 The single count against the Realty Executives defendants appears to be a tort claim based on negligent misrepresentation. Arizona recognizes the tort of negligent misrepresentation as set forth in the Restatement (Second) of Torts:

[HN4] One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1); see *St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 312, 742 P.2d 808, 813 (1987). The Realty Executives defendants argue that they owed no duty to investigate the representations provided by the Powell [***5] defendants and were unaware that the alleged problems existed in the house.

P8 As agents of the sellers, the Realty Executives defendants owed a duty to the buyers different from the "full and frank disclosure" they owed to their principals, the sellers. See *Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 748 P.2d 1209 (App. 1987). Their duty was to "deal fairly with all other parties to a transaction." *Ariz.*

Admin. Code ("A.A.C.") R4-28-1101(A); Brown v. Arizona Dep't of Real Estate, 181 Ariz. 320, 328-29, 890 P.2d 615, 623-24 (App. 1995).¹

1 The duty of fair dealing in the administrative code apparently applies to misrepresentation claims based on real estate purchases. *Baker v. Leight*, 91 Ariz. 112, 116-18, 370 P.2d 268, 271-72 (1962) (rules of Arizona Real Estate Department are material in determining whether seller's broker was liable for making false or fraudulent representations to the buyer); *Brown*, 181 Ariz. at 328-29, 890 P.2d at 623-24 (equating California standard of "honesty and fairness to all parties in real estate transactions," applicable in tort actions by real estate purchasers against sellers' brokers, with duty of fair dealing set forth in Arizona Administrative Code) (citing *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (Cal. 1959)).

[***6]

P9 [HN5] The duty of fair dealing does not include investigations to discover defects in the sellers' property. [HN6] The law does not, for example, require escrow agents, who act as fiduciaries for buyers and sellers alike, to investigate on behalf of their principals; such agents are merely bound to disclose circumstances that a reasonable agent would perceive as evidence of fraud. See *Burkons v. Titor Title Ins. Co.*, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991); *A.A.C. R4-28-1101(B)(3)*. Thus, the misrepresentation claim would be proved here only if plaintiffs could establish that the Realty Executives defendants knew or should have known of the defects giving rise to this litigation and failed to disclose such information. [HN7] The sellers' real estate brokers and agents are not [**537] [*209] liable to the 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. See *Lopata v. Miller*, 122 Md. App. 76, 712 A.2d 24, 27-31 (Md. App. 1998); *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 876 P.2d 609, 618 (Kan. 1994); see also *Restatement (Second) of Torts* § 552(1) (negligent misrepresentation).

P10 Here, the plaintiffs identify nothing in the record to show that the Realty Executives defendants were unreasonable or incompetent in failing to discover defects. To the contrary, their only evidence calls their own reliance into question: plaintiffs hired a professional inspection service for the purpose of revealing defects, and this report identified at least some of the problems that form the basis of plaintiffs' damages claim.

P11 In short, plaintiffs presented no evidence that these defendants knew or should have known of these

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problems. Plaintiffs concede that Realty Executives defendant Roger Malcolm, who personally dealt with them, did not make any representations concerning the condition of the property and that they had no evidence that Malcolm knew of or concealed any problems with the house.

P12 [HN8] To succeed on a motion for summary judgment, the Realty Executives defendants need only demonstrate an absence of evidence for an essential element of the complaint. See *Orme School*, 166 Ariz. at 310, 802 P.2d at 1009. They are not required to affirmatively establish the negative of [***8] a necessary element. See *id.* Since the plaintiffs did not respond to the summary judgment motion with any evidence that would create a genuine issue of fact, the Realty Executives defendants are not required to present any evidence that establishes they neither knew nor should have known about the misrepresentations. We therefore affirm the summary judgment as to the Realty Executives defendants.

Ziskovsky and Glickston

P13 Ziskovsky and Glickston were acting as the plaintiffs' broker and agent respectively. Plaintiffs sought recovery against them on a negligent misrepresentation theory arising from (1) their failure to discover and disclose to plaintiffs the defective condition of the house, (2) permitting plaintiffs to waive the Powells' warranties and amend the purchase contract to buy the property "as is," (3) advising plaintiffs that the defects were "merely cosmetic," and (4) advising plaintiffs that \$ 2,000 was adequate to correct any defects in the house.

P14 Ziskovsky and Glickston moved for summary judgment on the ground that plaintiffs waived tort claims against them under the exculpatory clauses in the purchase contract. Specifically, [***9] they rely on a pre-printed provision under which plaintiffs expressly released "all brokers . . . from any and all liability and responsibility regarding the condition" of the property, and another pre-printed provision under which plaintiffs represented that they would "conduct[] all desired independent investigations of any and all matters concerning this purchase" prior to closing. They argue that these clauses released them from any liability regarding the condition of the premises. The trial court granted the motion on this ground.

P15 Plaintiffs now contend that these exculpatory clauses are unenforceable because they are part of a form contract rather than terms negotiated between the parties at arm's length. They rely primarily on *Salt River Project Agriculture Improvement and Power District v. Westinghouse Electric Corporation*, 143 Ariz. 368, 694 P.2d 198 (1984), and *Morganteen v. Cowboy Adventures, Inc.*, 190

Ariz. 463, 949 P.2d 552 (App. 1997). Plaintiffs appear to be correct:

[HN9] The law disfavors contractual provisions by which one party seeks to immunize himself against the consequences of his own torts. Although there are exceptions to the principle [***10] disfavoring attempts to gain immunity, they are narrowly drawn and posit that certain conditions are met--that there is no public policy impediment to the limitation, and that the parties did, *in fact*, bargain for the limitation.

Salt River Project, 143 Ariz. at 383, 694 P.2d at 213 (citations omitted; emphasis in original). The exculpatory provisions appear in six lines on the sixth page of a seven page [**538] [*210] standard form contract "approved" by the Arizona Association of Realtors. The parties did not initial this provision. There is no evidence that this provision was discussed or negotiated. There may be evidence to the contrary but, at this point, we do not know what proof exists as to this material fact issue.

P16 Defendants attempt to distinguish this case from *Salt River Project* and *Morganteen* on the ground that the brokers and agents were not parties to the sales contract. This position is untenable for two reasons. Ziskovsky apparently supplied the form contract and Glickston filled it in; the Arizona Association of Realtors (of which Ziskovsky and Glickston are members) drafted the contract; the "received by" box on page one bears Glickston's [***11] name, and Ziskovsky initialed the contract on its last page. Furthermore, the distinction is immaterial. Ziskovsky and Glickston offer no reason why the nature of the exculpatory clauses should vary depending upon whether they are parties or third party beneficiaries, and no such reason is readily apparent to us.

P17 We conclude that these release provisions do not immunize Ziskovsky and Glickston from liability because they do not appear to be negotiated terms. Plaintiffs still have the burden of producing evidence that Ziskovsky and Glickston breached a duty to them. Plaintiffs alleged in their complaint that these defendants knew or should have known of the defects at the time of the sale and that they misled plaintiffs in other material respects. Ziskovsky and Glickston denied these allegations. We cannot resolve this question because neither party presented any evidence relating to these allegations in their summary judgment motions.

P18 We also recognize important distinctions between the claims against the Realty Executives defendants and the claims against Ziskovsky and Glickston.

Unlike the Realty Executives defendants, Ziskovsky and Glickston owed [***12] a fiduciary duty to plaintiffs. Furthermore, the claim against the Realty Executives defendants rests solely on the fact of non-disclosure and does not attribute any misleading statements or actions to those defendants. In contrast, plaintiffs alleged that Glickston induced them to waive warranties, assured them that \$ 2,000 would be adequate to correct any problems, and stated that the defects in the home were merely cosmetic. Such statements may be actionable. Finally, the selling broker and agents submitted deposition testimony in support of their motion for summary judgment in which plaintiffs conceded a lack of evidence as to whether the sellers' broker and agents knew or should have known of the defects prior to the sale. There is no such concession regarding the summary judgment motion filed by Ziskovsky and Glickston, who simply joined in the motion filed by the Realty Executives defendants. We therefore reverse the judgment as to Ziskovsky and Glickston because there may be disputed issues of material fact, including whether the parties actually bargained for the exculpatory waiver provisions, whether Ziskovsky and Glickston fraudulently induced plaintiffs to waive warranties, [***13] whether Glickston negligently induced plaintiffs to waive contract liability in exchange for inadequate consideration, and whether Glickston negligently misstated the nature and extent of the defects.

The Sellers

P19 The complaint alleged that the sellers were liable under a variety of theories: breach of warranty, fraud, breach of the implied covenant of good faith and fair dealing, violation of the Arizona consumer fraud statute, *A.R.S. section 44-1522(A)*, violation of Arizona's contractor licensing statutes, *A.R.S. section 32-1101 et seq.*, and violation of Arizona's organized crime and fraud statutes, *A.R.S. section 13-2301 et seq.* The factual basis underlying these claims was the allegation that the sellers concealed defects in the house and misrepresented the true condition of the house prior to the sale.

P20 The sellers simply joined in the Realty Executives defendants' motion without raising any other legal issues. Neither the exculpatory clause nor the lack of duty to the buyers, the only two matters raised in the Realty Executives defendants' motion for summary judgment, applied to the sellers. The exculpatory clause was limited to [***14] the brokers. The Realty Executives defendants [**539] [*211] had no knowledge of the defects in the home, whereas plaintiffs contend that the sellers personally performed the substandard work that resulted in the hidden defects and concealed those defects from the plaintiffs.

P21 The plaintiffs did not specifically respond to the sellers' joinder in the Realty Executives defendants' motion for summary judgment, although they responded separately to Ziskovsky and Glickston's joinder in the Realty Executives defendants' motion. On appeal, plaintiffs address only the contract and duty issues in their opening brief.

P22 The sellers argue that summary judgment was proper because plaintiffs failed to separately respond to their joinder in the Realty Executives defendants' motion for summary judgment. They rely entirely on Rule IV(b) of the Uniform Rules of Practice of the Superior Court of Arizona, which states in relevant part:

[HN10] If the opposing party does not serve and file the required answering memorandum . . . such non-compliance may be deemed a consent to the . . . granting of the motion.

Thus, the sellers assert that the trial court deemed plaintiffs' failure [***15] to separately respond to their joinder as consent to the granting of the motion for summary judgment as to them. They also assert that plaintiffs cannot be heard on appeal because they waived all arguments by failing to respond.

P23 We disagree with both assertions. [HN11] Uniform Rule IV(b) is not mandatory, and we decline to attach such significance to a minute entry and judgment that do not even refer to plaintiffs' failure to respond separately to the sellers' joinder in the motion. Moreover, given that the Realty Executives defendants' summary judgment motion rested on legal and factual assertions wholly irrelevant to the claims against the sellers, such a ruling would be a manifest abuse of discretion. *See Arnold v. Van Ornum*, 4 Ariz. App. 89, 91, 417 P.2d 723, 725 (1966). Such a ruling is particularly egregious in light of the fact that the sellers' joinder raised no additional facts or arguments pertaining to their own role in the transaction.²

2 Contrary to sellers' contention at oral argument, their joinder in the motion for summary judgment did not refer to the "as is" clause in the contract.

[***16]

P24 Therefore, we limit our review to issues raised in the Realty Executives defendants' motion for summary judgment because it is identical to the sellers' joinder motion. We conclude that summary judgment as to the sellers was incorrect because the only grounds advanced

194 Ariz. 206, *; 979 P.2d 534, **;
1999 Ariz. App. LEXIS 65, ***; 293 Ariz. Adv. Rep. 37

in support of this summary judgment were legally and factually inapplicable to the claims against the sellers.

CONCLUSION

P25 We affirm summary judgment for the Realty Executives defendants. We reverse the trial court's grant of summary judgment for defendants Ziskovsky, Glickston, and the Powells. We remand to the trial court for further proceedings.

Rudolph J. Gerber, Judge

CONCURRING:

Michael D. Ryan, Presiding Judge

Thomas C. Kleinschmidt, Judge

LEXSEE 116 Ariz. 522

Gilbert E. OLSON and Hedwig Olson, his wife, Appellants, v. William G. NEALE
and Martha H. Neale, husband and wife, dba Neale & Associates, Appellees

No. 1 CA-CIV 3193

Court of Appeals of Arizona, Division One, Department B

116 Ariz. 522; 570 P.2d 209; 1977 Ariz. App. LEXIS 470

August 30, 1977

SUBSEQUENT HISTORY:

[***1]

Rehearing Denied September 28, 1977. Review
Denied October 18, 1977.

PRIOR HISTORY:

Appeal from the Superior Court of Maricopa County
Cause No. C-238922
The Honorable Frederic W. Heineman, Judge.

DISPOSITION:

Reversed and remanded.

COUNSEL:

Mariscal, Weeks, McIntyre & Friedlander, P. A. by
Phillip Weeks, Phoenix, for appellants.

Bellamak & Mitchell by Ferris W. Bellamak,
Scottsdale, for appellees.

JUDGES:

Eubank, Judge. Wren, Acting P. J., and Froeb, C.
J., concur.

OPINION BY:

EUBANK

OPINION:

[*523] [**210] OPINION

This is an action for broker's commission arising from the sale of real property. The principal question raised by the parties on appeal is whether an extant broker's listing agreement is a condition precedent to recovery of a sales commission. We hold that a valid agreement must be in force.

The facts of this case are as follows: On March 6, 1965, Gilbert and Hedwig Olson, gave to William G. Neale and Martha H. Neale, d/b/a Neale & Associates (hereinafter "Neale") a written non-exclusive listing to sell the Olson ranch. The listing provided for a "broker's commission," "fixed at five percent (5%) of the purchase price, to be paid as the land is released and paid for." By its terms [***2] the listing expired July 15, 1965. On three separate occasions the listing agreement was extended, as follows:

| Listing Contract | |
|-------------------|------------------|
| Commencement Date | Termination Date |
| 3-6-65 | 7-15-65 |
| 7-27-65 | 1-1-66 |
| 12-29-66 | 5-31-67 |
| 5-31-67 | 11-1-67 |

116 Ariz. 522, *, 570 P.2d 209, **;
1977 Ariz. App. LEXIS 470, ***

A sale was ultimately consummated in September, 1969, to Recreation Leisure Land through an agent, A. A. McCollum, who had first seen the property through Neale during the summer of 1967. McCollum, however, was an officer (and agent) of an entirely different corporation in 1969 than in 1967, as he was representing Development Services, Inc. in 1967 and Recreation Leisure Land in 1969.

Appellees assert that the Olsons waived any requirement of a listing contract by continuing to meet with Neale and McCollum on four separate occasions in 1968 for the purpose of furthering the ultimate sale. We refuse to accept the doctrine of implied waiver.

Arizona has a Statute of Frauds requirement for brokerage contracts which has been strictly enforced. A.R.S. § 44-101.7 states:

No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, [***3] is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized:

***7. Upon an agreement authorizing or employing an agent or broker to purchase [*524] [**211] or sell real property, or mines, for compensation or a commission.

Cases interpreting that statute have said that neither partial nor complete performance will take an oral contract between broker and seller out of the Statute of Frauds, *Gibson v. W.D. Parker Trust*, 22 Ariz.App. 342, 527 P.2d 301 (1974); a real estate broker is presumed to know that an oral contract of employment for rendition of services in negotiating a sale of real estate for compensation or a commission is invalid, *Gray v. Kohlhasse*, 18 Ariz.App. 368, 502 P.2d 169 (1972); and that Arizona does not recognize the applicability of the doctrine of estoppel to real estate listing agreements, see *Gibson v. W. D. Parker Trust*, *supra*. While these cases do not pertain to the specific question at hand, they are indicative of the strict requirements placed upon Arizona real estate brokers who seek their commissions.

The listing contract terminating on November 1, 1967, involved in this case, [***4] is set forth in the Appendix attached hereto. The contract does not purport to grant commissions to the broker following termination of the contract and is therefore distinguishable from the contracts in *Hyde Park-Lake Park, Inc. v. Tucson Realty & Trust Co.*, 18 Ariz.App. 140, 500 P.2d 1128 (1972) and *Limberopoulos v. Tom Fannin and Associates*, 17 Ariz.App. 35, 495 P.2d 475 (1972) both of which provided that in the event a sale

was made within 90 days after expiration of an exclusive agreement to a party whose name had been submitted to the vendor in writing during the term of the listing agreement, the commission would be earned.

This situation *sub judice* is also distinguishable from the situation in *Mohamed v. Robbins*, 23 Ariz.App. 195, 531 P.2d 928 (1975). In *Mohamed* the real estate contract contained a protective clause, under which the defendant agreed to pay a commission if the property was sold to any person with whom the plaintiff was negotiating or dealing upon expiration of the listing. No time period was specified as to the duration of the clause and it was held that a period in excess of one year was not so unreasonable as to preclude recovery. The [***5] court found that the broker was the "procuring cause" of the sale and therefore was entitled to the commission. Here, however, there is no purported agreement giving the broker a commission after termination of the listing contract and so the question of whether the broker was the "procuring cause" is irrelevant.

This case is also distinguishable from other cases which have held the vendor liable for the commission upon finding that the broker was the "procuring cause" of the sale. In those cases the vendor had either deliberately bypassed the broker, e. g., *Bowser v. Sandige*, 74 Ariz. 397, 250 P.2d 589 (1952), *Fornara v. Wolpe*, 26 Ariz. 383, 226 P. 203 (1924); or the action involved a contest between two brokers for the right to a commission, e. g., *Garver v. Thoman*, 15 Ariz. 38, 135 P. 724 (1913), *Leadville Mining Co. v. Hemphill*, 17 Ariz. 146, 149 P. 384 (1915), *Fink v. Williamson*, 62 Ariz. 379, 158 P.2d 159 (1945), *Porter v. Ploughe*, 77 Ariz. 33, 266 P.2d 749 (1954). See also *Hearrold v. Gries and Realty Executives*, 115 Ariz. 560, 566 P.2d 1036 (filed July 7, 1977).

Moreover, even though McCollum was the acting purchaser's agent for both the ultimate [***6] purchaser and the original prospective party, we feel that appellees cannot be considered the procuring cause when the ultimate purchaser of the property was a different entity from the original prospective party.

The sole question then, is whether the owner of the property waived his right to rely on the expiration date of the listing agreement, or stated another way, whether an extant contract is a condition precedent to receipt of the broker's commission. While many other states have adopted the principle of waiver by conduct (see 27 A.L.R.2d 1348), we refuse to do so. We feel that the policy of this state with respect to real estate brokers was properly stated in *Gray v. Kohlhasse*, *supra*:

Although denial of a commission to a broker who has procured a purchaser of property and has expended time

116 Ariz. 522, *, 570 P.2d 209, **;
1977 Ariz. App. LEXIS 470, ***

and effort [*525] [**212] on behalf of the seller may seem harsh, we believe the answer to real estate brokers and agents is found in the following statement in *Pac. Southwest Dev. Corp. v. Western Pac. R.R. Co.*, 47 Cal.2d 62, 301 P.2d 825 (1956):

"Plaintiff is a licensed real estate broker and, as such, is presumed to know that contracts for real estate [***7] commissions are invalid and unenforceable unless put in writing and subscribed by the person to be charged.

Nevertheless, plaintiff failed to secure proper written authorization to protect itself in the transaction. Rather it assumed the risk of relying upon claimed oral promises of defendant, and it has no cause for complaint if its efforts go unrewarded." [citations omitted] 301 P.2d at 831. n1

This position is further supported by the rules of the Real Estate Commission which, in part, read:

R4-28-15. Documents

A. All real estate listings shall be in writing. A listing agreement is a contract for the personal services of the licensee. Such agreement may not be assigned to another licensed entity without the express written consent of the client.

B. A broker or salesman shall deliver a duplicate of the original of any instrument to any party or parties executing the same immediately upon the execution of same by the party or parties; where such instrument has been prepared by the broker or his salesman and relates to the employment of the broker as agent or pertains to consummation of the leasing, purchase, sale or exchange of real property in [***8] which he may participate as broker or salesman, the broker shall retain a copy of same in his office for future use or inspection. It is the responsibility of the broker or salesman to prepare sufficient copies of such instruments in order that the above may be accomplished. Nothing herein shall be construed to permit the broker or salesman to withhold such delivery in order to obtain other signatures on such instruments. Each listing agreement shall fully set forth its terms and have a definite expiration date. It shall not contain any provision requiring the seller to notify the broker of his intention to cancel, but shall be deemed to cancel as of the expiration date shown therein.

Taken together, it seems to us that the public policy of this State is that brokers, in order to collect a commission, must have a written listing, that the listing must contain a definite expiration date, and the listing agreement shall be deemed to cancel automatically on that date. n2 The only exception being that described in

Mohamed v. Robbins, supra. This conclusion is inescapable in light of the extensive statutory qualifications required of licensees (A.R.S. § 32-2124), and article [***9] 26, § 1 of the Arizona Constitution which authorizes brokers and salesmen to engage in limited law practice involving real property transactions. If a broker can practice law in the area of real property sales, it is reasonable to hold him to a full understanding of the implications and ramifications of the Statute of Frauds.

n1 18 Ariz.App. at 371, 502 P.2d at 172.

n2 Restatement (Second) of Agency § 446 (1958) is in accord:

§ 446. Compensation Dependent upon Specified Result in Limited Time

An agent whose compensation is conditional upon his performance of specified services or his accomplishment of a specified result within a specified time is not entitled to the agreed compensation unless he renders the services or achieves the result within such time, unless the principal, in bad faith, has prevented him from doing so.

No question of bad faith has been raised in these proceedings.

For the foregoing reasons, the judgment in favor of the appellees as to their claim for a commission [***10] is reversed. Having decided that appellees are not entitled to a commission, other issues raised by appellants need not be considered.

Judgment reversed, and case remanded for entry of judgment in favor of appellant.

[*526] [**213] APPENDIX A

NEALE & ASSOCIATES
REAL ESTATE AND DEVELOPMENT

PHONE: (602) 955-6432 * 4724 NORTH 35th WAY *
PHOENIX, ARIZONA 85018

May 31, 1967

Mr. Gilbert E. Olson
110 Mountain Shadows West
Scottsdale, Arizona

Dear Mr. Olson:

116 Ariz. 522, *; 570 P.2d 209, **;
1977 Ariz. App. LEXIS 470, ***

Our listing on Mountain Shadows of Colorado expires as of today. I am taking the liberty of typing that last listing in the context of this letter and your extension of that listing will be approved by you when you attach your signature below.

"I hereby give you an open, non-exclusive listing to sell the Olson Ranch, known as Mountain Shadows of Colorado located at Rustic, Colorado.

The price on this ranch is one million one hundred eighty-five thousand dollars, (\$ 1,185,000.00)

Broker's commission is fixed at 5% (Five Per Cent) of the purchase price, to be paid as the land is released and paid for.

Participation of any other broker is to be the responsibility of NEALE & [***11] ASSOCIATES, when they are successful in creating said sale.

This agreement and listing is valid until November 1, 1967."

Very truly yours,

William G. Neale
NEALE & ASSOCIATES
Phoenix, Arizona ACCEPTED: Gilbert E. Olson /s/
Gilbert E. Olson

MORTGAGES AND INVESTMENTS - BROKER
AND AGENT

R4-28-1103. Broker Supervision and Control

- A. An employing broker and a designated broker shall exercise reasonable supervision and control over the activities of brokers, salespersons, and others in the employ of the broker. Reasonable supervision and control includes the establishment and enforcement of written policies, procedures, and systems to:
1. Review and manage:
 - a. Transactions requiring a salesperson's or broker's license; and
 - b. Use of disclosure forms and contracts and, if a real estate broker, real estate employment agreements under A.R.S. § 32-2151.02;
 2. Manage:
 - a. Filing, storing, and maintaining documents pertaining to transactions under subsection (A)(5)(a);
 - b. Handling of trust funds; and
 - c. Use of unlicensed assistants by a salesperson or broker;
 3. Oversee delegation of authority to others to act on behalf of the broker;
 4. Familiarize salespersons and associate brokers with the requirements of federal, state, and local laws relating to the practice of real estate, or the sale of cemetery property or membership camping contracts; and
 5. Review and inspect:
 - a. Documents that may have a material effect upon the rights or obligations of a party to a transaction; and
 - b. Advertising and marketing by the broker and by salespersons, brokers, and others in the broker's employ.
- B. A designated broker shall establish a system for monitoring compliance with statutes, rules, and the employing broker's policies, procedures, and systems.
- C. A designated broker shall supervise associate brokers, salespersons, and employees of the employing broker and shall exercise reasonable supervision and control over activities by the employing broker for which a license is required.
- D. An employing broker is responsible for the acts of all associate brokers, salespersons, and other employees acting within the scope of their employment.
- E. A designated broker may use the services of employees to assist in administering the provisions of this Section but shall not relinquish overall responsibility for supervision and control of the acts of the employing broker's employees.
- F. A designated broker who, upon learning of a violation of real estate statutes or rules by a salesperson or associate broker under the broker's supervision, immediately reports the violation to the Department is not subject to disciplinary action by the Department for failure to supervise the salesperson or broker.
- G. If an employing broker maintains one office and employs a designated broker, no more than one other licensed person, and no more than one unlicensed person, the employing broker and designated broker are not required to develop and maintain written policies, procedures, and systems as described in subsection (A).

Historical Note

New Section made by final rulemaking at 8 A.A.R. 3640, effective August 6, 2002 (Supp. 02-3). Amended by final rulemaking at 11 A.A.R. 506, effective March 5, 2005 (Supp. 05-1). Amended by final rulemaking at 11 A.A.R. 1496, effective June 4, 2005 (Supp. 05-2).

Broker-Salesperson Commission Disputes

By K. Michelle Lind

Posted: January 2009

On occasion, a broker and salesperson will get into a dispute over the payment of commissions. These disputes often occur when the salesperson leaves the brokerage firm or when the brokerage firm ceases doing business.

Only the Broker May Be Paid a Commission from a Client

Under Arizona law, only a real estate broker, not a salesperson, may directly earn a commission from a real estate transaction. *See, Sherman v. First Am. Title Ins. Co.*, 201 Ariz. 564, 38 P.3d 1229 (2002). Further, pursuant to A.R.S. § 32-2155(A), a real estate salesperson may accept compensation "only from the legally licensed broker to whom the licensee is licensed." *See also* A.R.S. § 32-2153 (A) (7) (*allowing suspension or revocation of salesperson's license for accepting compensation "from any person other than the licensed broker to whom the licensee is licensed."*) Additionally, the broker is generally liable for the business activities of the salesperson and the broker is required to supervise all salespeople and is liable for their business activities. A.A.C. R4-28-1103(A) states in part: "An employing broker and a designated broker shall exercise reasonable supervision and control over the activities of brokers, salespersons, and others in the employ of the broker."

These laws reflect that there is a "hybrid" relationship between a broker and salesperson. The relationship is an independent contractor for some purposes, an employer-employee relationship for others and "statutory non employees" for tax and worker's compensation purposes. *See, www.aaronline.com/documents/ind_contr.aspx* for more information on this issue.

One of the requirements for the tax and workers compensation and "statutory non employee" exemption is a written contract with the employing broker that provides that the salesperson will not be treated as an employee for these purposes. Thus, most real estate salespeople enter

into an independent contractor agreement with their employing broker.

The Independent Contractor Agreement Generally Governs the Payment of Commissions from the Broker to the Salesperson

Independent contractor agreements (ICAs) vary widely from broker to broker. ICAs generally address the obligations of the salesperson to the broker and the broker to the salesperson. These provisions generally include the obligation of the employing broker to compensate the salesperson. The ICA may also address the payment of commissions on pending transactions upon departure of the salesperson. If the ICA addresses these issues, the ICA will govern if there is a commission dispute. If the ICA does not address these issues, the payment of commissions may have to be determined by the employing broker's policy manual, the course of dealings in the past, and verbal agreements. Obviously, to avoid ambiguity and disputes, an ICA should be specific in regards to commission payment issues.

Resolving a Broker-Salesperson Commission Dispute

In the event of a commission dispute between the employing broker and salesperson, the parties must read the ICA and understand their rights and obligations before taking any action. The parties should also consider consulting legal counsel. Attorneys may be located through the State Bar at www.azbar.org/LegalResources/findlawyer.cfm (search "labor & employment" or "real estate/property").

Some ICAs contain an alternative dispute resolution (ADR) provision requiring the parties to mediate or arbitrate any dispute. The ADR provision may require mediation or arbitration within the brokerage firm, through the Arizona Association of REALTORS® (AAR) or other third party ADR provider. These ADR provisions are generally binding and enforceable, but if in doubt, consult legal counsel. If the ICA does not contain an ADR provision, and both parties agree, AAR or another third party can still facilitate a voluntary mediation or voluntary arbitration. For more information on AAR mediation and arbitration, go to www.aaronline.com/Disputes.

If mediation or arbitration is not an option, litigation may be the only alternative. If an employing broker fails to pay wages due, the salesperson may be entitled to file a wage claim and potentially recover treble the amount of unpaid wages in a civil action. See, A.R.S. § 23-350 *et seq.* Commissions are wages for purposes of the wage statutes. A.R.S. §23-350(5) states: "[w]ages' means nondiscretionary compensation . . . for labor or services rendered . . . whether determined by a time, task, piece, commission or other method of calculation. Wages include . . . commissions" See, *Sanborn v. Brooker & Wake Property Management*, 178 Ariz. 425; 874 P.2d 982 (App. 1994).

In the unfortunate event that the employing broker files for bankruptcy, the salesperson will be required to file a claim in bankruptcy court. For information on bankruptcy claims, go to www.azb.uscourts.gov/default.aspx?PID=14.

K. Michelle Lind, Esq.

K. Michelle Lind is General Counsel/Assistant CEO to the Arizona Association of REALTORS® (AAR). She serves as the primary legal advisor to the association. Michelle oversees AAR's Risk Management Committee, which includes professional standards administration for twenty of the state's local REALTOR® associations, and the development of standard real estate forms. She is the author of Arizona Real Estate: A Professional's Guide to Law & Practice and a regular contributor to the Arizona REALTOR® and the Arizona Journal of Real Estate & Business. Please note that 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.

Procuring Cause and MLS Co-Brokerage Commission Agreements between Brokers

BY AAR GENERAL COUNSEL K. MICHELLE LIND

After a listing broker enters into a listing agreement with the seller, the broker generally enters the listing information in the multiple listing service ("MLS") of which the broker is a participant. The MLS is a means by which broker participants make blanket unilateral offers of compensation to other broker participants. A cooperating broker is entitled to a commission from the listing broker pursuant to the MLS offer of compensation when the cooperating broker is the "procuring cause of the sale (or lease)." See *NATIONAL ASSOCIATION OF REALTORS® ("NAR") MLS Handbook, Statement 7.56*.

A broker is the procuring cause of a sale and entitled to the commission if the broker's efforts are the foundation on which the negotiations resulting in a sale are begun. See *NAR Code of Ethics and Arbitration Manual ("Manual"), Appendix II to Part Ten*. There are several definitions of procuring cause and many factors that may ultimately enter into any determination of procuring cause in an arbitration. However, procuring cause is most clearly defined as the uninterrupted series of causal events that results in the successful transaction. Or, in other words, it is what "caused" the successful transaction. "Successful transaction" is defined as "a sale that closes or a lease that is executed." See *Manual, Appendix II to Part Ten*.

Because there is no definitive rule to determine who the procuring cause is in a transaction, disputes occasionally arise. In the event of a procuring cause dispute, if the brokers cannot resolve the issue informally or through mediation, REALTOR® brokers are obligated to arbitrate. See *NAR Code of Ethics, Article 17*. Unfortunately, determining which broker is the procuring cause is not a simple task for an arbitration hearing panel. Some of the factors an arbitration hearing panel will consider in determining which broker is the procuring cause of a sale include:

- **Who first introduced the buyer to the property?**
The broker who introduced the buyer to the property is not automatically the procuring cause of an ensuing sale, but who initially introduced the property to the buyer is generally an important factor in determining procuring cause.
- **Was the introduction of the property to the buyer instrumental in creating the desire to purchase?**
Merely alerting a buyer to the fact that a property is available does not usually constitute procuring cause.
- **Did the introduction of the buyer to the property start an uninterrupted series of events leading to the sale, or was the series of events interrupted in some way?** If there was an interruption or break in the original series of events, a hearing panel will look at how the interruption was caused and by whom. For example, if a broker becomes aware that another's efforts have broken down, steps in and finalizes a sale by removing an impediment, a hearing panel will consider whether the transaction would have occurred without the assistance of the second broker. If not, the second broker is the procuring cause. However, if a broker is aware of another's continuing

efforts and in bad faith interferes with the transaction, the second broker will not be the procuring cause.

- **Did the broker who made the initial introduction to the property engage in conduct or fail to take some action that caused the buyer to utilize the services of another broker (estrangement or abandonment)?** If the initial broker said or did something the broker shouldn't have, which caused the buyer to decide not to use the broker, that constitutes estrangement, which would break the uninterrupted chain of events. A broker not maintaining contact, not following up or not providing requested information to the buyer in a timely manner would be considered abandonment, which would also break the series of events. The second broker who steps in to assist a buyer to achieve a successful transaction after estrangement or abandonment of the buyer by the initial broker would be considered the procuring cause of the sale.
- **Did the seller, buyer or other broker act in bad faith to attempt to deprive the initial broker of the commission?** For example, if the initial broker introduced the property to the buyer and brought the negotiations to a point where the buyer had made the decision to purchase, the initial broker is the procuring cause. The initial broker would prevail in a hearing even if the buyer and seller, with or without a second broker, conspired to take the property off the market and consummate the sale without the initial broker or otherwise "froze" the initial broker out of the transaction.

Further, in determining which broker is the procuring cause, a hearing panel will consider only facts directly related to the sale of property at issue. The panel will not consider a broker's prior relationship with the buyer, the fact that the broker showed the buyer numerous other properties or anything that happened after the buyer decided to make an offer.

Given the factors listed above and the myriad other factors outlined in the Manual, procuring cause disputes are best resolved informally or through mediation, which currently has a 70%+ success rate at the Arizona Association of REALTORS®. As with any potential dispute, communication is key. If you believe that you have a procuring cause issue in any transaction, talk to your broker or manager as soon as possible.



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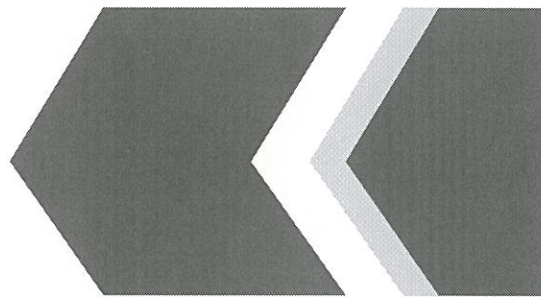
AAR General Counsel Michelle Lind is a State Bar of Arizona board certified real estate specialist and the author of Arizona Real Estate: A Professional's Guide to Law and Practice.

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CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS®

Effective January 1, 2025



Where the word REALTORS® is used in this Code and Preamble, it shall be deemed to include REALTOR ASSOCIATE®s.

While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Preamble

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. REALTORS® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which REALTORS® should dedicate themselves, and for which they should be diligent in preparing themselves. REALTORS®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow REALTORS® a common responsibility for its integrity and honor.

In recognition and appreciation of their obligations to clients, customers, the public, and each other, REALTORS® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. REALTORS® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of REALTORS®. (Amended 1/00)

Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, REALTORS® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where REALTORS® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain.

The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of this obligation, REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever ye would that others should do to you, do ye even so to them."

Accepting this standard as their own, REALTORS® pledge to observe its spirit in all of their activities whether conducted personally, through associates or others, or via technological means, and to conduct their business in accordance with the tenets set forth below. (Amended 1/07)

Duties to Clients and Customers

Article 1

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. (Amended 1/01)

• Standard of Practice 1-1

REALTORS®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics. (Amended 1/93)

• Standard of Practice 1-2

The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.

The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities.

As used in this Code of Ethics, "client" means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®'s firm has an agency or legally recognized non-agency relationship; "customer" means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®'s firm; "prospect" means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or REALTOR®'s firm; "agent" means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and "broker" means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. (Adopted 1/95, Amended 1/07)

• Standard of Practice 1-3

REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

- **Standard of Practice 1-4**

REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the REALTOR®'s services. (Amended 1/93)

- **Standard of Practice 1-5**

REALTORS® may represent the seller/landlord and buyer/tenant in the same transaction only after full disclosure to and with informed consent of both parties. (Adopted 1/93)

- **Standard of Practice 1-6**

REALTORS® shall submit offers and counter-offers objectively and as quickly as possible. (Adopted 1/93, Amended 1/95)

- **Standard of Practice 1-7**

When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. Upon the written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide, as soon as practical, a written affirmation to the cooperating broker stating that the offer has been submitted to the seller/landlord, or a written notification that the seller/landlord has waived the obligation to have the offer presented. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease. (Amended 1/20)

- **Standard of Practice 1-8**

REALTORS®, acting as agents or brokers of buyers/tenants, shall submit to buyers/tenants all offers and counter-offers until acceptance but have no obligation to continue to show properties to their clients after an offer has been accepted unless otherwise agreed in writing. Upon the written request of the listing broker who submits a counter-offer to the buyer's/tenant's broker, the buyer's/tenant's broker shall provide, as soon as practical, a written affirmation to the listing broker stating that the counter-offer has been submitted to the buyers/tenants, or a written notification that the buyers/tenants have waived the obligation to have the counter-offer presented. REALTORS®, acting as agents or brokers of buyers/tenants, shall recommend that buyers/tenants obtain the advice of legal counsel if there is a question as to whether a pre-existing contract has been terminated. (Adopted 1/93, Amended 1/22)

- **Standard of Practice 1-9**

The obligation of REALTORS® to preserve confidential information (as defined by state law) provided by their clients in the course of any agency relationship or non-agency relationship recognized by law continues after termination of agency relationships or any non-agency relationships recognized by law. REALTORS® shall not knowingly, during or following the termination of professional relationships with their clients:

- 1) reveal confidential information of clients; or
- 2) use confidential information of clients to the disadvantage of clients; or
- 3) use confidential information of clients for the REALTOR®'s advantage or the advantage of third parties unless:
 - a) clients consent after full disclosure; or
 - b) REALTORS® are required by court order; or
 - c) it is the intention of a client to commit a crime and the information is necessary to prevent the crime; or
 - d) it is necessary to defend a REALTOR® or the REALTOR®'s employees or associates against an accusation of wrongful conduct.

Information concerning latent material defects is not considered confidential information under this Code of Ethics. (Adopted 1/93, Amended 1/01)

- **Standard of Practice 1-10**

REALTORS® shall, consistent with the terms and conditions of their real estate licensure and their property management agreement, competently manage the property of clients with due regard for the rights, safety and health of tenants and others lawfully on the premises. (Adopted 1/95, Amended 1/00)

- **Standard of Practice 1-11**

REALTORS® who are employed to maintain or manage a client's property shall exercise due diligence and make reasonable efforts to protect it against reasonably foreseeable contingencies and losses. (Adopted 1/95)

- **Standard of Practice 1-12**

When entering into listing contracts, REALTORS® must advise sellers/landlords of:

- 1) the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
- 2) the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
- 3) any potential for listing brokers to act as disclosed dual agents, e.g., buyer/tenant agents. (Adopted 1/93, Renumbered 1/98, Amended 1/03)

- **Standard of Practice 1-13**

When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:

- 1) the REALTOR®'s company policies regarding cooperation;
- 2) the amount of compensation to be paid by the client;
- 3) the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
- 4) any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc.; and
- 5) the possibility that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties. (Adopted 1/93, Renumbered 1/98, Amended 1/06)

- **Standard of Practice 1-14**

Fees for preparing appraisals or other valuations shall not be contingent upon the amount of the appraisal or valuation. (Adopted 1/02)

- **Standard of Practice 1-15**

REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, disclose the existence of offers on the property. Where disclosure is authorized, REALTORS® shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. (Adopted 1/03, Amended 1/09)

- **Standard of Practice 1-16**

REALTORS® shall not access or use, or permit or enable others to access or use, listed or managed property on terms or conditions other than those authorized by the owner or seller. (Adopted 1/12)

Article 2

REALTORS® shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. REALTORS® shall not, however, be obligated to discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency or non-agency relationships as defined by state law. (Amended 1/00)

- **Standard of Practice 2-1**
REALTORS® shall only be obligated to discover and disclose adverse factors reasonably apparent to someone with expertise in those areas required by their real estate licensing authority. Article 2 does not impose upon the REALTOR® the obligation of expertise in other professional or technical disciplines. (Amended 1/96)
- **Standard of Practice 2-2**
(Renumbered as Standard of Practice 1-12 1/98)
- **Standard of Practice 2-3**
(Renumbered as Standard of Practice 1-13 1/98)
- **Standard of Practice 2-4**
REALTORS® shall not be parties to the naming of a false consideration in any document, unless it be the naming of an obviously nominal consideration.
- **Standard of Practice 2-5**
Factors defined as “non-material” by law or regulation or which are expressly referenced in law or regulation as not being subject to disclosure are considered not “pertinent” for purposes of Article 2. (Adopted 1/93)

Article 3

REALTORS® shall cooperate with other brokers except when cooperation is not in the client’s best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker. (Amended 1/95)

- **Standard of Practice 3-1**
REALTORS®, acting as exclusive agents or brokers of sellers/landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation. (Amended 1/99)
- **Standard of Practice 3-2**
Any change in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time that REALTOR® submits an offer to purchase/lease the property. After a REALTOR® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction. (Amended 1/14)
- **Standard of Practice 3-3**
Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation. (Adopted 1/94)
- **Standard of Practice 3-4**
REALTORS®, acting as listing brokers, have an affirmative obligation to disclose the existence of dual or variable rate commission arrangements (i.e., listings where one amount of commission is payable if the listing broker’s firm is the procuring cause of sale/lease and a different amount of commission is payable if the sale/lease results through the efforts of the seller/landlord or a cooperating broker). The listing broker shall, as soon as practical, disclose the existence of such arrangements to potential cooperating brokers and shall, in response to inquiries from cooperating brokers, disclose the differential that would result in a cooperative transaction or in a sale/lease that results through the efforts of the seller/landlord. If the cooperating broker is a buyer/tenant representative, the buyer/tenant representative must disclose such information to their client before the client makes an offer to purchase or lease. (Amended 1/02)
- **Standard of Practice 3-5**
It is the obligation of subagents to promptly disclose all pertinent facts to the principal’s agent prior to as well as after a purchase or lease agreement is executed. (Amended 1/93)

- **Standard of Practice 3-6**
REALTORS® shall disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation. (Adopted 5/86, Amended 1/04)
- **Standard of Practice 3-7**
When seeking information from another REALTOR® concerning property under a management or listing agreement, REALTORS® shall disclose their REALTOR® status and whether their interest is personal or on behalf of a client and, if on behalf of a client, their relationship with the client. (Amended 1/11)
- **Standard of Practice 3-8**
REALTORS® shall not misrepresent the availability of access to show or inspect a listed property. (Amended 11/87)
- **Standard of Practice 3-9**
REALTORS® shall not provide access to listed property on terms other than those established by the owner or the seller. (Adopted 1/10, Amended 1/23)
- **Standard of Practice 3-10**
The duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords. (Adopted 1/11)
- **Standard of Practice 3-11**
REALTORS® may not refuse to cooperate on the basis of a broker’s race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. (Adopted 1/20, Amended 1/23)

Article 4

REALTORS® who have a present ownership interest in property for sale or lease, or contemplated interest to purchase or lease property, must disclose in writing the existence of such interest to all parties to the transaction prior to a party signing any agreement. (Amended 1/25)

- **Standard of Practice 4-1**
The present ownership interest in property for sale or lease, or contemplated interest to purchase or lease property, includes transactions in which REALTORS®:
 - 1) represent themselves
 - 2) represent a member of their immediate family
 - 3) represent their firm or any broker or agent thereof
 - 4) represent an entity in which the REALTOR® or member of their immediate family has a legal interest. (Adopted 2/86, Amended 1/25)
- **Standard of Practice 4-2**
REALTORS® are not required to disclose the identity of the client or customer, nor the specific nature of the interest referred to in Article 4, but must disclose that an interest exists. (Adopted 1/25)

Article 5

REALTORS® shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

Article 6

REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client’s knowledge and consent.

When recommending real estate products or services (e.g., homeowner’s insurance, warranty programs, mortgage financing, title insurance, etc.), REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the REALTOR® or REALTOR®’s firm may receive as a direct result of such recommendation. (Amended 1/99)

- **Standard of Practice 6-1**

REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. (Amended 5/88)

Article 7

In a transaction, REALTORS® shall not accept compensation from more than one party, even if permitted by law, without disclosure to all parties and the informed consent of the REALTOR®'s client or clients. (Amended 1/93)

Article 8

REALTORS® shall keep in a special account in an appropriate financial institution, separated from their own funds, monies coming into their possession in trust for other persons, such as escrows, trust funds, clients' monies, and other like items.

Article 9

REALTORS®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing. (Amended 1/04)

- **Standard of Practice 9-1**

For the protection of all parties, REALTORS® shall use reasonable care to ensure that documents pertaining to the purchase, sale, or lease of real estate are kept current through the use of written extensions or amendments. (Amended 1/93)

- **Standard of Practice 9-2**

When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, etc.) electronically, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party. (Adopted 1/07)

Duties to the Public

Article 10

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. (Amended 1/23)

REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. (Amended 1/23)

- **Standard of Practice 10-1**

When involved in the sale or lease of a residence, REALTORS® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood nor shall they engage in any activity which may result in panic selling, however, REALTORS® may provide other demographic information. (Adopted 1/94, Amended 1/06)

- **Standard of Practice 10-2**

When not involved in the sale or lease of a residence, REALTORS® may provide demographic information related to a property, transaction or professional assignment to a party if such demographic information is (a) deemed by the REALTOR® to be needed to assist with or complete, in a manner consistent with Article 10, a real estate transaction or professional

assignment and (b) is obtained or derived from a recognized, reliable, independent, and impartial source. The source of such information and any additions, deletions, modifications, interpretations, or other changes shall be disclosed in reasonable detail. (Adopted 1/05, Renumbered 1/06)

- **Standard of Practice 10-3**

REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. (Adopted 1/94, Renumbered 1/05 and 1/06, Amended 1/23)

- **Standard of Practice 10-4**

As used in Article 10 "real estate employment practices" relates to employees and independent contractors providing real estate-related services and the administrative and clerical staff directly supporting those individuals. (Adopted 1/00, Renumbered 1/05 and 1/06)

- **Standard of Practice 10-5**

REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity. (Adopted and effective November 13, 2020, Amended 1/23)

Article 11

The services which REALTORS® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage; specifically, residential real estate brokerage, real property management, commercial and industrial real estate brokerage, land brokerage, real estate appraisal, real estate counseling, real estate syndication, real estate auction, and international real estate.

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. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth. (Amended 1/10)

- **Standard of Practice 11-1**

When REALTORS® prepare opinions of real property value or price they must:

- 1) be knowledgeable about the type of property being valued,
- 2) have access to the information and resources necessary to formulate an accurate opinion, and
- 3) be familiar with the area where the subject property is located

unless lack of any of these is disclosed to the party requesting the opinion in advance.

When an opinion of value or price is prepared other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, the opinion shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

- 1) identification of the subject property
- 2) date prepared
- 3) defined value or price
- 4) limiting conditions, including statements of purpose(s) and intended user(s)
- 5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
- 6) basis for the opinion, including applicable market data
- 7) if the opinion is not an appraisal, a statement to that effect

- 8) disclosure of whether and when a physical inspection of the property's exterior was conducted
 - 9) disclosure of whether and when a physical inspection of the property's interior was conducted
 - 10) disclosure of whether the REALTOR® has any conflicts of interest (Amended 1/14)
- **Standard of Practice 11-2**
The obligations of the Code of Ethics in respect of real estate disciplines other than appraisal shall be interpreted and applied in accordance with the standards of competence and practice which clients and the public reasonably require to protect their rights and interests considering the complexity of the transaction, the availability of expert assistance, and, where the REALTOR® is an agent or subagent, the obligations of a fiduciary or the applicable agency duties required by law. (Amended 1/25)
 - **Standard of Practice 11-3**
When REALTORS® provide consultative services to clients which involve advice or counsel for a fee (not a commission), such advice shall be rendered in an objective manner and the fee shall not be contingent on the substance of the advice or counsel given. If brokerage or transaction services are to be provided in addition to consultative services, a separate compensation may be paid with prior agreement between the client and REALTOR®. (Adopted 1/96)
 - **Standard of Practice 11-4**
The competency required by Article 11 relates to services contracted for between REALTORS® and their clients or customers; the duties expressly imposed by the Code of Ethics; and the duties imposed by law or regulation. (Adopted 1/02)

Article 12

REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)

- **Standard of Practice 12-1**
REALTORS® must not represent that their brokerage services to a client or customer are free or available at no cost to their clients, unless the REALTOR® will receive no financial compensation from any source for those services. (Amended 1/22)
- **Standard of Practice 12-2**
(Deleted 1/20)
- **Standard of Practice 12-3**
The offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the REALTOR® making the offer. However, REALTORS® must exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or otherwise benefiting from the REALTOR®'s offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. The offering of any inducements to do business is subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. (Amended 1/95)
- **Standard of Practice 12-4**
REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord. (Amended 1/93)
- **Standard of Practice 12-5**
REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or

listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner either in the advertisement or in electronic advertising via a link to a display with all required disclosures. (Adopted 11/86, Amended 1/16)

- **Standard of Practice 12-6**
REALTORS®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as REALTORS® or real estate licensees. (Amended 1/93)
- **Standard of Practice 12-7**
Only REALTORS® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have "sold" the property. Prior to closing, a cooperating broker may post a "sold" sign only with the consent of the listing broker. (Amended 1/96)
- **Standard of Practice 12-8**
The obligation to present a true picture in representations to the public includes information presented, provided, or displayed on REALTORS® websites. REALTORS® shall use reasonable efforts to ensure that information on their websites is current. When it becomes apparent that information on a REALTOR®'s website is no longer current or accurate, REALTORS® shall promptly take corrective action. (Adopted 1/07)
- **Standard of Practice 12-9**
REALTOR® firm websites shall disclose the firm's name and state(s) of licensure in a reasonable and readily apparent manner.

Websites of REALTORS® and non-member licensees affiliated with a REALTOR® firm shall disclose the firm's name and that REALTOR®'s or non-member licensee's state(s) of licensure in a reasonable and readily apparent manner. (Adopted 1/07)
- **Standard of Practice 12-10**
REALTORS®' obligation to present a true picture in their advertising and representations to the public includes Internet content, images, and the URLs and domain names they use, and prohibits REALTORS® from:
 - 1) engaging in deceptive or unauthorized framing of real estate brokerage websites;
 - 2) manipulating (e.g., presenting content developed by others) listing and other content in any way that produces a deceptive or misleading result;
 - 3) deceptively using metatags, keywords or other devices/methods to direct, drive, or divert Internet traffic; or
 - 4) presenting content developed by others without either attribution or without permission; or
 - 5) otherwise misleading consumers, including use of misleading images. (Adopted 1/07, Amended 1/18)
- **Standard of Practice 12-11**
REALTORS® intending to share or sell consumer information gathered via the Internet shall disclose that possibility in a reasonable and readily apparent manner. (Adopted 1/07)
- **Standard of Practice 12-12**
REALTORS® shall not:
 - 1) use URLs or domain names that present less than a true picture, or
 - 2) register URLs or domain names which, if used, would present less than a true picture. (Adopted 1/08)
- **Standard of Practice 12-13**
The obligation to present a true picture in advertising, marketing, and representations allows REALTORS® to use and display only professional designations, certifications, and other credentials to which they are legitimately entitled. (Adopted 1/08)

Article 13

REALTORS® shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal

counsel be obtained when the interest of any party to the transaction requires it.

Article 14

If charged with unethical practice or asked to present evidence or to cooperate in any other way, in any professional standards proceeding or investigation, REALTORS® shall place all pertinent facts before the proper tribunals of the Member Board or affiliated institute, society, or council in which membership is held and shall take no action to disrupt or obstruct such processes. (Amended 1/99)

- **Standard of Practice 14-1**

REALTORS® shall not be subject to disciplinary proceedings in more than one Board of REALTORS® or affiliated institute, society, or council in which they hold membership with respect to alleged violations of the Code of Ethics relating to the same transaction or event. (Amended 1/95)

- **Standard of Practice 14-2**

REALTORS® shall not make any unauthorized disclosure or dissemination of the allegations, findings, or decision developed in connection with an ethics hearing or appeal or in connection with an arbitration hearing or procedural review. (Amended 1/92)

- **Standard of Practice 14-3**

REALTORS® shall not obstruct the Board's investigative or professional standards proceedings by instituting or threatening to institute actions for libel, slander, or defamation against any party to a professional standards proceeding or their witnesses based on the filing of an arbitration request, an ethics complaint, or testimony given before any tribunal. (Adopted 11/87, Amended 1/99)

- **Standard of Practice 14-4**

REALTORS® shall not intentionally impede the Board's investigative or disciplinary proceedings by filing multiple ethics complaints based on the same event or transaction. (Adopted 11/88)

Duties to REALTORS®

Article 15

REALTORS® shall not knowingly or recklessly make false or misleading statements about other real estate professionals, their businesses, or their business practices. (Amended 1/12)

- **Standard of Practice 15-1**

REALTORS® shall not knowingly or recklessly file false or unfounded ethics complaints. (Adopted 1/00)

- **Standard of Practice 15-2**

The obligation to refrain from making false or misleading statements about other real estate professionals, their businesses, and their business practices includes the duty to not knowingly or recklessly publish, repeat, retransmit, or republish false or misleading statements made by others. This duty applies whether false or misleading statements are repeated in person, in writing, by technological means (e.g., the Internet), or by any other means. (Adopted 1/07, Amended 1/12)

- **Standard of Practice 15-3**

The obligation to refrain from making false or misleading statements about other real estate professionals, their businesses, and their business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading. (Adopted 1/10, Amended 1/12)

Article 16

REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients. (Amended 1/04)

- **Standard of Practice 16-1**

Article 16 is not intended to prohibit aggressive or innovative business practices which are otherwise ethical and does not prohibit disagreements with other REALTORS® involving commission, fees, compensation or other forms of payment or expenses. (Adopted 1/93, Amended 1/95)

- **Standard of Practice 16-2**

Article 16 does not preclude REALTORS® from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another REALTOR®. A general telephone canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed "general" for purposes of this standard. (Amended 1/04)

Article 16 is intended to recognize as unethical two basic types of solicitations:

First, telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another REALTOR® and

Second, mail or other forms of written solicitations of prospects whose properties are exclusively listed with another REALTOR® when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, "for sale" or "for rent" signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other REALTORS® under offers of subagency or cooperation. (Amended 1/04)

- **Standard of Practice 16-3**

Article 16 does not preclude REALTORS® from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements. However, information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other REALTORS® to whom such offers to provide services may be made. (Amended 1/04)

- **Standard of Practice 16-4**

REALTORS® shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the REALTOR®, refuses to disclose the expiration date and nature of such listing, i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the REALTOR® may contact the owner to secure such information and may discuss the terms upon which the REALTOR® might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing. (Amended 1/94)

- **Standard of Practice 16-5**

REALTORS® shall not solicit buyer/tenant agreements from buyers/tenants who are subject to exclusive buyer/tenant agreements. However, if asked by a REALTOR®, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the REALTOR® may contact the buyer/tenant to secure such information and may discuss the terms upon which the REALTOR® might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement. (Adopted 1/94, Amended 1/98)

- **Standard of Practice 16-6**

When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not

directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement. (Amended 1/98)

- **Standard of Practice 16-7**

The fact that a prospect has retained a REALTOR® as an exclusive representative or exclusive broker in one or more past transactions does not preclude other REALTORS® from seeking such prospect's future business. (Amended 1/04)

- **Standard of Practice 16-8**

The fact that an exclusive agreement has been entered into with a REALTOR® shall not preclude or inhibit any other REALTOR® from entering into a similar agreement after the expiration of the prior agreement. (Amended 1/98)

- **Standard of Practice 16-9**

REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. (Amended 1/04)

- **Standard of Practice 16-10**

REALTORS®, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord's representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's representative or broker not later than execution of a purchase agreement or lease. (Amended 1/04)

- **Standard of Practice 16-11**

On unlisted property, REALTORS® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. (Amended 1/04)

REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact. (Amended 1/98)

- **Standard of Practice 16-12**

REALTORS®, acting as representatives or brokers of sellers/landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement. (Amended 1/04)

- **Standard of Practice 16-13**

All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects. (Adopted 1/93, Amended 1/04)

- **Standard of Practice 16-14**

REALTORS® are free to enter into contractual relationships or to negotiate with sellers/landlords, buyers/tenants or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent. (Amended 1/98)

- **Standard of Practice 16-15**

In cooperative transactions REALTORS® shall compensate cooperating REALTORS® (principal brokers) and shall not

compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with other REALTORS® without the prior express knowledge and consent of the cooperating broker.

- **Standard of Practice 16-16**

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation. (Amended 1/04)

- **Standard of Practice 16-17**

REALTORS®, acting as subagents or as buyer/tenant representatives or brokers, shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker. (Amended 1/04)

- **Standard of Practice 16-18**

REALTORS® shall not use information obtained from listing brokers through offers to cooperate made through multiple listing services or through other offers of cooperation to refer listing brokers' clients to other brokers or to create buyer/tenant relationships with listing brokers' clients, unless such use is authorized by listing brokers. (Amended 1/02)

- **Standard of Practice 16-19**

Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on property without consent of the seller/landlord. (Amended 1/93)

- **Standard of Practice 16-20**

REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. (Adopted 1/98, Amended 1/10)

Article 17

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.

The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award. (Amended 1/12)

- **Standard of Practice 17-1**

The filing of litigation and refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate. (Adopted 2/86)

- **Standard of Practice 17-2**

Article 17 does not require REALTORS® to mediate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to mediate through the Board's facilities. The fact that all parties decline to participate in mediation does not relieve REALTORS® of the duty to arbitrate.

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board

in writing that they choose not to arbitrate before the Board.
(Amended 1/12)

• **Standard of Practice 17-3**

REALTORS®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other REALTORS® absent a specific written agreement to the contrary.
(Adopted 1/96)

• **Standard of Practice 17-4**

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

- 1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97, Amended 1/07)
- 2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the seller or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction.
(Adopted 1/97, Amended 1/07)
- 3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such

cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)

- 4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. (Adopted 1/97)
- 5) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, claims to be the procuring cause of sale or lease. In such cases arbitration shall be between the listing broker and the buyer or tenant representative and the amount in dispute is limited to the amount of the reduction of commission to which the listing broker agreed. (Adopted 1/05)

• **Standard of Practice 17-5**

The obligation to arbitrate established in Article 17 includes disputes between REALTORS® (principals) in different states in instances where, absent an established inter-association arbitration agreement, the REALTOR® (principal) requesting arbitration agrees to submit to the jurisdiction of, travel to, participate in, and be bound by any resulting award rendered in arbitration conducted by the respondent(s) REALTOR®'s association, in instances where the respondent(s) REALTOR®'s association determines that an arbitrable issue exists.
(Adopted 1/07)

Explanatory Notes

The reader should be aware of the following policies which have been approved by the Board of Directors of the National Association:

In filing a charge of an alleged violation of the Code of Ethics by a REALTOR®, the charge must read as an alleged violation of one or more Articles of the Code. Standards of Practice may be cited in support of the charge.

The Standards of Practice serve to clarify the ethical obligations imposed by the various Articles and supplement, and do not substitute for, the Case Interpretations in Interpretations of the Code of Ethics.

Modifications to existing Standards of Practice and additional new Standards of Practice are approved from time to time. Readers are cautioned to ensure that the most recent publications are utilized.



430 North Michigan Avenue | Chicago, IL 60611-4087
800.874.6500 | www.nar.realtor

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166-288-25 (01/25 VG)

