



**April 2008**  
**Volume 2, Issue 2**

**Inside this issue:**

Short Sales and Commissions	1
AAR's New CEO	2
ZIPFORM Update	2
AAR's Podcasts	3
New Substantive Policy Statement	3
Transaction Management	3
Arizona Real Estate book	3
CRMS Program Dates	4
Foreclosure Resources	4

**K. Michelle Lind, Esq.**

Arizona Association of REALTORS®

255 E. Osborn Rd., #200  
 Phoenix, AZ 85012  
 602.248.7787  
 602.351.2474 (fax)

## FAQs on Short Sales & Commissions

*By AAR General Counsel Michelle Lind*

The increase in the number of short sales has resulted in many questions pertaining to the unique nature of these transactions. Many of these questions concern commission issues. The following Q&A will answer some of the most common questions. For purposes of this article, assume the following facts:

The property is listed in the MLS as a short sale subject to lender approval. The buyer submits an offer through the buyer's broker. The listing broker submits the offer and short sale package to the lender. The lender responds that it will approve the short sale if the total commission is reduced by 2%. Both buyer and seller demand that the brokers reduce their commission to allow the transaction to close escrow.

**Must the listing broker agree to reduce their commission to allow the transaction to close?** No. The listing broker has no fiduciary duty to the seller to reduce the commission to allow the transaction to close.

**Must the buyer's broker agree to reduce the commission to allow the transaction to close?** No. The buyer's broker has no fiduciary duty to the buyer to reduce the commission to allow the transaction to close.

**If the listing broker agrees to reduce their commission, must the buyer's broker agree to split the reduction?** No. The buyer's broker has no obligation to agree to split the reduction in commission. The buyer's broker is entitled to the cooperative compensation offered in the MLS at the time the broker produced the offer. Standard of Practice 3-2, which requires the listing broker to communicate any changes in offers of compensation before an offer to purchase is produced, states:

REALTORS® shall, with respect to offers of compensation to another REALTOR®, timely communicate any change of compensation for cooperative services to the other REALTOR® prior to the time such REALTOR® produces an offer to purchase/lease the property. (Amended 1/94)

**What if the listing broker and buyer's broker get into a dispute over the lender's refusal to approve the short sale unless the commission is reduced?** A.A.C. R4-28-1101(D) states: "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." However, the Rule is clear that "[t]his 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." Therefore, this Rule does not apply to a dispute arising from a refusal to reduce the agreed upon commission; it applies primarily to procuring cause disputes. Thus, if the brokers can not reach an

*(continued on page 2)*

## FAQs on Short Sales & Commissions (cont'd.)

agreement, neither will reduce their commission by the full amount demanded by the lender, and the lender will not approve the short sale without the commission reduction, the transaction simply will not close.

**If the listing broker agrees to reduce the listing commission and instructs the escrow company to reduce the buyer's broker's commission as well, can the buyer's broker agree, allow the transaction to close, accept the lower commission and then pursue the listing broker for the reduction amount?** No. If the buyer's broker agrees to accept a reduced commission amount, the buyer's broker is bound by that agreement.

**Isn't the buyer's broker in the above situation accepting the lowered commission under duress?** The buyer's broker may be under duress in that the broker wants or needs to be paid, but that does not constitute the type of economic duress that would invalidate the agreement to accept the reduced commission amount. As an Arizona Court explained: "[a] charge of economic duress or business compulsion must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim, or on his fear of what a third person might do, and the mere fact that a person entered into a contract with reluctance, or as a result of the pressure of business circumstances, financial embarrassment, or economic necessity does not, of itself, constitute business compulsion or economic duress invalidating the contract . . . Unless wrongful, unlawful or unconscionable pressure is applied there is no business compulsion amounting to duress . . ." *USLife Title Co. v. Gutkin*, 152 Ariz. 349, 732 P.2d 579 (1986).

**Could the listing broker have avoided this issue by offering a split of the commission approved by the lender (for example, 50/50), instead of offering a specific percentage of compensation for buyers' brokers when posting the listing in the MLS?** No, offering a split would conflict with MLS Rules. The NAR Model MLS Policy requires that the compensation specified be a percentage of the gross selling price or a definite dollar amount. Therefore, the listing broker could not offer to split the commission 50/50.

## AAR's New CEO... Tom Farley!



The Arizona Association of REALTORS® is pleased to announce that effective April 1, 2008, Tom Farley assumed the position of Chief Executive Officer for the association. Farley served the association as Vice President of Governmental Affairs.

"Mr. Farley's proven record of success representing AAR's public policy vision and his significant contribution to the association's political influence growth during his 11-year tenure has earned our collective confidence and respect," said 2008 AAR President John Gall. "I want to acknowledge the diligence of the CEO Search Committee, chaired by 2005 AAR President Tim Hatlestad, and the professional assistance from the Leonard Pfeiffer Co., Washington, D.C. in the conduct of this important search and decision."

"I look forward to continuing the vision that Ty Strout and the AAR leadership and staff have worked diligently to provide in partnership with our 21 local associations for the REALTOR® membership," said Tom Farley. "Together, we can build on our past successes by moving forward with innovative technology tools, advance our professional development efforts, and provide strong advocacy for the benefit of our members and their clients."

## ZIPFORM - It's That Time Again

The annual purge of members who are no longer active with the Arizona Association of REALTORS® has begun. If you have an agent that is no longer active with AAR, they will lose access to their ZipForm Online program effective April 15. The ZipForm Desktop users will start getting notices on April 15 that they have 30 days to renew their annual subscription. If the agent is no longer a member of AAR, they will not be able to renew their subscription. If you or one of your agents has a problem with the renewal process, please contact AAR at 602-248-7787 and ask for ZipForm assistance.

## AAR Podcasts

### What Is a Podcast?

Despite the name, you don't need an iPod to listen to a podcast. A podcast is simply an audio program that listeners can subscribe to via a podcast reader (i.e. an RSS aggregator). They can be downloaded to any computer device capable of playing audio files: desktop computer, laptop, MP3 player, iPod, PDA, cell phone, etc. Windows XP and Vista already have audio reader software installed. They offer a convenient way to distribute, download, and listen to Internet audio "broadcasts," whenever and wherever the listener chooses.

**Short Sales and Commission:** [www.aaronline.com/PodCast/Default.aspx](http://www.aaronline.com/PodCast/Default.aspx)

**Professionalism Podcast with Frank Dickens:** [www.aaronline.com/PodCast/FrankProfBroker.mp3](http://www.aaronline.com/PodCast/FrankProfBroker.mp3)

Listen to a quick overview of AAR's newest program, Road to Professionalism...your comprehensive web resource to help you find what you need to succeed in this business; whether you are a broker, manager, owner or agent.

### New Substantive Policy

The Commissioner has promulgated several new Substantive Policy Statements (SPS). For example, SPS 2008.02 sets forth when a subsequent owner of 6 or more lots located within an existing platted subdivision for which a Public Report was previously issued may qualify for a Special Order of Exemption from the requirement to obtain a new Public Report. See [www.re.state.az.us/LAW\\_BOOK/Documents/SPS\\_Documents/SPS\\_2008.02\\_Subsequent\\_Owners\\_Public\\_Reports.pdf](http://www.re.state.az.us/LAW_BOOK/Documents/SPS_Documents/SPS_2008.02_Subsequent_Owners_Public_Reports.pdf)

Several other new SPS are anticipated in the near future. Make sure you receive notice by signing up for Late Breaking News by visiting the ADRE website and clicking "Sign Up for Late Breaking News" under "Quick Links." [www.re.state.az.us/](http://www.re.state.az.us/)

### The Wait is Over

**AAR Transaction Management powered by SureClose is ready for you! Online registration is now open.**

Just log on to [www.aaronline.com](http://www.aaronline.com) and click on the TM logo to sign up. One of the AAR TM team members will email you a confirmation to schedule your training.

Questions? Contact the TM team at 866-833-7357 or go to [www.aaronline.com](http://www.aaronline.com).

Reduce the risk of claims and experience increased productivity and improved communication with all your transaction parties.

**Register today!**

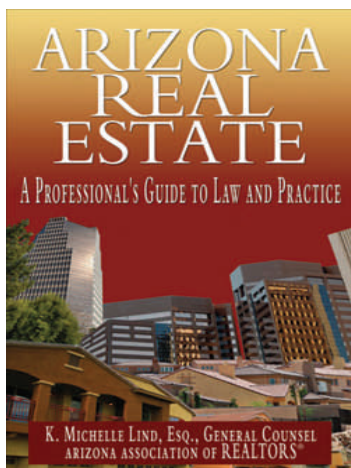
### Arizona Real Estate:

#### A Professional's Guide to Law and Practice

Get answers to the most common real estate questions in an easy to read reference for REALTORS®, other real estate practitioners and attorneys involved in the industry.

Order this comprehensive risk management resource today by calling AAR at 602-248-7787 or toll free at 800-426-7274. Get your order form online at [www.aaronline.com/documents/MLind.pdf](http://www.aaronline.com/documents/MLind.pdf)

*For bulk and volume prices, contact Christina Smalls at [csmall@aaronline.com](mailto:csmall@aaronline.com).*





Help your agents increase their knowledge and allow them to successfully manage real estate transactions for clients while reducing exposure to risk. AAR's newest program is designed to enhance members' success.

REALTORS<sup>®</sup> who earn this certification go the extra mile to protect their client's interests as well as their own. They recognize that in today's litigious society, good REALTORS<sup>®</sup> need to anticipate the pitfalls in a real estate transaction for their clients and themselves, and be well prepared to avoid them.

### Upcoming Classes

#### **April 23-24: Mastering the Commercial Transaction (\$199)**

Master the complexities of the commercial real estate transaction and business brokerage transaction from offer to closing, including drafting the AAR Commercial Real Estate Contract and related addenda.

[www.aaronline.com/documents/042408.pdf](http://www.aaronline.com/documents/042408.pdf)

#### **April 29: Disclosure and Due Diligence (\$150)**

Explore how to fulfill the disclosure obligations in a real estate transaction and the due diligence responsibilities of the parties. [www.aaronline.com/documents/042908.pdf](http://www.aaronline.com/documents/042908.pdf)

*For more information on the CRMS program contact Barb Freestone or Christina Smalls at 602-248-7787.*

## **Foreclosure Resources**

With the growing number of homeowners facing foreclosure, there are numerous agencies that have been established to help these homeowners. In March, the state received \$1.45 million in federal funding as part of the National Foreclosure Mitigation Counseling Program. This money is solely dedicated to assist in foreclosure prevention. Earlier this year the Arizona Supreme Court announced a new statewide initiative, Lawyers Helping Homeowners, which is comprised of volunteer lawyers. The Lawyers Helping Homeowners program will provide informational clinics for homeowners who may be facing foreclosure, answer individual questions that are posted to the program website, meet with eligible homeowners who may be faced with pending foreclosure and tenants who may lose their housing due to their landlord's foreclosure.

**Lawyers Helping Homeowners:** [www.azlawhelp.org/](http://www.azlawhelp.org/)

**HOPE Now:** 1-888-995-4673 / [www.hopenow.com/](http://www.hopenow.com/)

**Homeownership Preservation Foundation:** [www.995hope.org/](http://www.995hope.org/)

**NeighborWorks America:** [www.nw.org/network/home.asp](http://www.nw.org/network/home.asp)