

Hot Topics in Broker Risk Reduction

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WIRE FRAUD (<https://www.nar.realtor/topics/wire-fraud>)

- a. Criminals are hacking into email accounts and using information in those accounts to dupe homebuyers into a fraudulent wire transfer. These hackers send homebuyers an email that is spoofed to look like it comes from the real estate agent, title representative, or attorney involved in the transaction. The email is sent right before closing and claims that there has been a last-minute change to the wiring instructions. Following these new instructions, the homebuyer will wire funds directly to the hacker's account. As real estate transactions become increasingly digital, cybercriminals continue to get more and more creative in their efforts. It is important that borrowers and the industry remain vigilant, protect their data, and follow best practices in sharing personal and financial information.
- b. Risk Reduction Tips
 - i. Alert homebuyers at the outset of the transaction. Many brokers are requiring signed disclosures. <http://www.realtor.org/videos/wire-fraud-alert-for-buyers>
 - ii. Instruct homebuyers to call wire recipient using an independently-verified phone number.
 - iii. Avoid sending wire instructions (and any sensitive financial information) via email.
 - iv. Use a secure transaction management platform to share documents and information.
 - v. Use good email security practices – never open unsolicited links or attachments, keep operating system and anti-virus updated, and use strong passwords and two-factor authentication.
 - vi. Immediately report suspected fraud to the bank from which the funds were transferred.
 - vii. Get to know your local FBI field office and contact them immediately if fraud is suspected.
 - viii. Report fraud incidents to www.ic3.gov.
- c. Resources
 - i. RE Fraud Prevention Coalition tips and tools: <https://stopwirefraud.org/protect-your-money/>
 - ii. How to Avoid Wire Fraud video: <https://www.nar.realtor/window-to-the-law/how-to-avoid-wire-fraud-in-transactions>
 - iii. Video Alert for Buyers: <https://www.nar.realtor/videos/videowire-fraud-alert-for-buyers>
 - iv. Client alert handout: <https://narfocus.com/billdatabase/clientfiles/172/13/3450.pdf>
 - v. Directory of Local FBI Field Offices: <https://www.fbi.gov/contact-us/field-offices>
 - vi. Data Security: <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
 - vii. Cyber Insurance: <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>

TEXTING AND CALLING (TELEPHONE CONSUMER PROTECTION ACT AND DO NOT CALL LAWS)

- a. Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate companies have violated the TCPA and DNC laws by sending text messages and making phone calls without the recipient's consent. The TCPA requires prior express consent before using autodialing equipment to send telemarketing messages to wireless numbers. Because the TCPA defines autodialing equipment broadly, it is likely that all text messages sent by a business will fall under the TCPA. Prior express written consent requires a signed agreement clearly and conspicuously disclosing the text recipient's permission to receive text messages from the sender. DNC laws prohibit individuals from contacting phone numbers contained in the DNC registry.
- b. Follow these tips to reduce risk of violating TCPA
 - i. Obtain written consent before using an autodialer to send a commercial message. Consent should be clearly stated, well documented and preserved.
 - ii. Include language on consent forms stating that recipients who submit wireless numbers agree to receive text messages from or on behalf of sender.
 - iii. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE")
 - iv. Set email alerts to document when subscribers opt-out.
 - v. Upon receiving an opt-out request, promptly remove the person from your messaging lists.
 - vi. Record the opt-out date and date when person was removed.
 - vii. Talk to your vendor about compliance and indemnification.
- c. Follow these tips to reduce risk of violating DNC
 - i. Create an office policy for compliance with Do Not Call rules. <https://www.nar.realtor/legal/complying-with-federal-regulations/do-not-call-registry/creating-an-office-policy>
 - ii. Obtain an updated DNC list monthly and cross reference with your company CRM. <https://www.nar.realtor/legal/complying-with-federal-regulations/do-not-call-registry/accessing-the-registry>
- d. Resources:
 - i. *TCPA and Texting Window to the Law video*: <https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-tcpa-and-texting>
 - ii. *Do You Know Who You Are Calling?:* <https://magazine.realtor/law-and-ethics/feature/article/2019/07/do-you-know-who-you-are-calling>
 - iii. *National Do Not Call Registry*. <https://www.donotcall.gov/>
 - iv. *Chinitz v. Nrt W.*, Case No. 18-cv-06100-NC 2019 U.S. Dist. LEXIS 148699 (N.D. Cal. Aug. 30, 2019)

ADA WEBSITE ACCESSIBILITY (<https://www.nar.realtor/accessibility>)

- a. Americans with Disabilities Act (ADA) website accessibility claims are on the rise, with a 177% increase in website accessibility lawsuits filed from 2017 to 2018, and a 131% increase in Q1 2019 filings as compared to Q1 2018. Businesses across industries, including real estate, have seen an increase in demand letters and litigation, alleging that the business operates an inaccessible website in violation of the ADA. While the ADA is silent on its application to electronic spaces, an overwhelming body of case law has developed holding that a business' ADA obligations extend to their electronic spaces. Despite the fact that the DOJ issued notices of proposed rulemaking in 2010 and 2016, but has withdrawn its proposed rulemaking after nearly eight years of review, thus indicating unwillingness to issue additional guidance any time in the near future.

b. Risk Reduction Tips

- i. Ask your website provider about your site's accessibility and indemnification in contracts.
- ii. Consult a website accessibility expert to create a plan for addressing website accessibility issues.
- iii. Include an accessibility statement on your website, along with contact info, where individuals with disabilities may report difficulty accessing the website and seek additional assistance accessing information or services. Feel free review and copy: <https://www.nar.realtor/accessibility>

c. Resources:

- i. Window to the Law: ADA and Website Accessibility Update: <https://www.nar.realtor/window-to-the-law/ada-and-website-accessibilityupdate>
- ii. Window to the Law: Accessible Websites and the ADA: <https://www.nar.realtor/videos/window-to-the-law-accessible-websites-andthe-ada>

FAIR HOUSING (<https://www.nar.realtor/fair-housing>)

a. Fair housing laws prohibit a refusal to rent or sell real property based on a protected characteristic. Steering, blockbusting, and refusing to provide equal services to all clients are obvious ways that fair housing laws are violated by real estate professionals. Liability also arises when a policy or action disproportionately harms a protected class. An investigation in Long Island [published in 2019 by *Newsday*](#) revealed that 49% of Black testers were not provided equal services, 39% of Hispanics, and 19% of Asians. It's imperative that all real estate professionals incorporate fair housing compliance and implicit bias training into their strategic plans and regular training.

b. Risk Reduction Tips

- i. Implement an Equal Services Report and Checklist for all customer interactions.
- ii. Make any prerequisites consistent and objective.
- iii. Focus on objective characteristics of the property and avoid giving personal opinions about a community or area.
- iv. Discourage use of Buyer Love Letters and avoid reviewing them when clients insist on using.
- v. Take implicit bias and fair housing compliance training at least annually.

c. Resources

- i. NAR's Fair Housing Resource site: <https://www.nar.realtor/fair-housing>
- ii. Real Estate Brokerage Essentials: Chapter on Fair Housing with training materials: <https://www.nar.realtor/fair-housing/excerpt-from-real-estate-brokerage-essentials>
- iii. Video: Implicit Bias Override: <https://www.nar.realtor/videos/bias-override-overcoming-barriers-to-fair-housing>
- iv. At Home with Diversity Certification: <https://www.nar.realtor/education/designations-and-certifications/ahwd>
- v. A Snapshot of Race and Homebuying in America: <https://www.nar.realtor/research-and-statistics/research-reports/a-snapshot-of-race-and-homebuying-in-america>
- vi. REALTOR® Fair Housing Declaration: <https://www.nar.realtor/fair-housing/fair-housing-program/fair-housing-declaration>
- vii. The Color of Law: A Forgotten History of How Our Government Segregated America, by Richard Rothstein (2017): <https://www.nar.realtor/blogs/culture-scan/uncovering-the-government-s-role-in-the-history-of-u-s-segregation>
- viii. Fair Housing social media assets available via Photofy: <https://www.nar.realtor/thats-who-we-r/fair-housing-assets>

MULTIPLE OFFERS (<https://www.nar.realtor/multiple-offers>)

- a. Presenting and negotiating multiple offers brings the potential for misunderstanding and missed opportunities. But, by adhering to a few fundamental principles, real estate professionals can avoid complaints and fair housing issues, while helping both the seller and buyer understand their options.
- b. Risk Reduction Tips
 - i. Know your state laws and regulations regarding duties owed to clients, timeframes for presenting offers, and what may be disclosed to the other party in a multiple offer situation.
 - ii. Article 1 requires REALTORS® to promote the interest of their client while treating all parties honestly.
 - iii. Avoid Buyer Love Letters because they can trigger fair housing violations.
 - iv. Discuss the potential for multiple offers at the listing interview; explain the options available to the seller and get the seller's instruction for handling multiple offers.
 - v. Discuss the pros and cons before using escalation clauses or addendums.
- c. Resources
 - i. NAR's Multiple Offer Resources: <https://www.nar.realtor/multiple-offers>
 - ii. Window to the Law video: How to Handle Multiple Offers: <https://www.nar.realtor/videos/window-to-the-law/how-to-handle-multiple-offers>
 - iii. NAR Professional Standards Manual, Part 4, Appendix IX – Presenting and Negotiating Multiple Offers: <https://www.nar.realtor/about-nar/policies/professional-standards-and-code-of-ethics/a-buyers-and-sellers-guide-to-multiple-offer-negotiations>
 - iv. A Buyer's and Seller's Guide to Multiple Offer Negotiations: <https://www.nar.realtor/about-nar/policies/professional-standards-and-code-of-ethics/a-buyers-and-sellers-guide-to-multiple-offer-negotiations>

COVID-19 GUIDANCE (<https://www.nar.realtor/coronavirus>)

- a. The COVID-19 pandemic is impacting members in unprecedented ways, and raises numerous unique and novel issues for the real estate industry. Through this guidance, NAR aims to respond to commonly asked questions, and to empower members to successfully navigate their real estate businesses during these challenging, and continually evolving, circumstances.
- b. Risk Reduction Tips
 - i. Adhere to all required and recommended best practices for protecting your and others' health and safety while reducing the risk of contracting COVID-19.
 - ii. Use virtual showing and limit in-person activity when possible.
 - iii. Implement a preparedness plan and discuss protocol with clients before any in person interactions.
 - iv. Adapt your plans and protocols as necessary to react to changing risk levels in your local community.
 - v. Clearly communicate with and train staff and independent contractors about your workplace reentry plans.

c. Resources

- i. Showing Guidance: <https://www.nar.realtor/coronavirus-a-guide-for-realtors>
- ii. Window to the Law: Showing Guidance During a Pandemic: <https://www.nar.realtor/window-to-the-law/showing-guidance-during-a-pandemic>
- iii. Guidance for Fair Housing Compliance During the Pandemic: <https://www.nar.realtor/coronavirus-a-guide-for-realtors#guidance-for-fair-housing-compliance-during-the-covid-19-pandemic>
- iv. Workplace Re-entry Checklist: <https://www.nar.realtor/covid-19-workplace-re-entry-checklist>
- v. Sample Preparedness Plan: <https://www.nar.realtor/sample-preparedness-plan-for-circumstances-relating-to-covid-19>
- vi. Coronavirus Guidance: Commercial Real Estate: <https://www.nar.realtor/coronavirus-guidance-commercial-real-estate>

CLEAR COOPERATION POLICY LITIGATION

- a. Top Agent Network v. National Association of REALTORS®, California Association of REALTORS®, and San Francisco Association of REALTORS®, Case No. 3:20-cv-03198 (N.D. Cal., 2020), filed May 11, 2020.
- b. The PLS.com, LLC v. National Association of REALTORS®, CRMLS, MRED, and Bright MLS, Case No. 2:20-cv-04790 (C.D. Cal., 2020), filed May 28, 2020.

Plaintiffs in both cases allege that NAR's Clear Cooperation Policy is anticompetitive. The Clear Cooperation Policy was passed by the NAR Board of Directors in November, 2019, and ensures greater transparency and competition between real estate listings and between brokers, while still addressing privacy concerns. The policy requires listing brokers who are participants in a multiple listing service to submit their listing to the MLS within one business day of marketing the property to the public.

Importantly, the policy only applies to listings that are publicly marketed and has no impact on properties that are sold exclusively within a brokerage. In those instances, the REALTOR® has concluded cooperation with other MLS participants is in their client's interests and enables the listing to be shared with the widest group of potential buyers. This benefits both sellers and buyers and promotes equal opportunity for all.

The Clear Cooperation Policy is still in effect and is not altered in any way by these lawsuits.

c. Resources

- i. MLS Clear Cooperation Policy Resources: <https://www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy>
- ii. Window to the Law: Understanding the MLS Clear Cooperation Policy: <https://www.nar.realtor/window-to-the-law/understanding-the-mls-clear-cooperation-policy>

CLASS ACTION ANTITRUST LITIGATION

- a. *Moehrl v. The National Association of REALTORS®*, *Realogy Holdings Corp.*, *HomeServices of America, Inc.*, *RE/MAX Holdings, Inc.*, and *Keller Williams Realty, Inc.* (U.S. Dist. Ct. N.D. Ill., Case No. 1:19-cv-01610), filed March 6, 2019 (consolidated with *Sawbill Strategic, Inc. v. The National Association of REALTORS®*, *HomeServices of America, Inc.*, *Keller Williams Realty, Inc.*, *Realogy Holdings Corp.*, and *RE/MAX Holdings, Inc.* (U.S. Dist. Ct. N.D. Ill., Case No. 1:19-cv-02544), filed April 15, 2019).
- b. *Sitzer and Winger v. NAR et al.* (U.S. Dist. Ct. W.D. Mo., Case No. 4:19-cv-00332), filed April 29, 2019.

Plaintiffs filed a putative class action lawsuit against NAR and four real estate corporations alleging home sellers unfairly pay the commissions of buyers' brokers. The complaints mischaracterize NAR rules and MLS policy and question the value buyers' brokers deliver in the home buying and selling process. NAR intends to demonstrate to the courts how the MLS system creates competitive, efficient markets that benefit home buyers and sellers as well as small business brokerages. And buyers' brokers play a very real and critical role in the home buying and selling process.

Discussions regarding these lawsuits should be grounded in the bigger picture of the value of REALTORS® and the MLS system to both buyers and sellers.

REALTORS® provide great value to their clients and communities.

- Every REALTOR® must adhere to a strict code of ethics, which is based on professionalism, consumer protection, and the golden rule of treating others the way we wish to be treated.
- REALTORS® use their unmatched knowledge of local markets and industry expertise to help buyers and sellers navigate and negotiate through what are often the most complicated and lengthy financial transactions of their lives.
- REALTORS® are engaged community members and neighbors, committed to building and enhancing the neighborhoods they serve.

MLSs create efficient markets that benefit home buyers and sellers.

- With the vast amount of real estate information available today, it is more crucial than ever to have trained, local brokers helping consumers navigate their options in order to arrive at the best possible decision.
- MLSs create vibrant markets with numerous opportunities for residential buyers and sellers by enabling cooperation between listing and buying brokers.
- With all of this information in one place, MLSs are able to safeguard and manage market information, allowing all parties to complete real estate transactions with confidence and efficiency.

MLSs are pro-competitive and pro-consumer.

- MLSs benefit both buyers and sellers by providing increased exposure for sellers' properties while allowing buyers access to all MLS-listed properties through one broker of their choice.
- Because broker commissions are subject to negotiation, this system creates highly competitive, free markets, which ensure consumers receive superior service.
- Over many years, courts across this country have validated the legality, efficacy and value of the MLS system.