

Hot Topics in Broker Risk Reduction

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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 help both the seller and buyer understand their options, and avoid complaints and fair housing issues.
- b. Risk Reduction Tips
 - i. Discuss the potential for multiple offers at the listing interview; explain the available options to the seller upfront and get the seller's instruction for handling multiple offers in advance.
 - ii. Know your state laws regarding duties owed to clients, timeframes for presenting offers, and what may be disclosed to the other party in a multiple offer situation.
 - iii. Remember - Article 1 requires REALTORS® to promote the interest of their client while treating all parties honestly.
 - iv. Keep in mind that poorly drafted Buyer Love Letters can trigger fair housing violations for both the real estate professional and the seller.
 - v. Discuss the pros and cons of escalation clauses or addendums with buyers.
- 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/code-of-ethics-and-arbitration-manual/part-4-appendix-ix-%E2%80%94-presenting-and-negotiating-multiple-offers>
 - 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>

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 fair housing violations, but liability may also arise when a policy or action disproportionately harms a protected class. An 2019 investigation on Long Island [published *Newsday*](#) revealed that 49% of Black testers, along with 39% of Hispanic and 19% of Asian testers, were not provided equal services. It's imperative that all real estate professionals incorporate fair housing compliance and implicit bias training into their strategic plans.
- b. Risk Reduction Tips
 - i. Implement an Equal Services Report and Checklist for all customer interactions.
 - ii. Ensure any prerequisites are consistent and objective.
 - iii. Focus on objective characteristics of the property and avoid giving personal opinions about a neighborhood or community.
 - iv. Warn of fair housing concerns related to poorly drafted letters Buyer Love Letters, and avoid reviewing them should clients insist on using them.
 - v. Incorporate regular implicit bias and fair housing compliance into your ongoing training plans.
- 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>
 - ix. Fairhaven: A Fair Housing Simulation: <https://www.nar.realtor/fair-housing/fairhaven>
 - x. Window to the Law Video: Creating a Diversity, Equity & Inclusion Policy: <https://www.nar.realtor/window-to-the-law/creating-diversity-equity-inclusion-policy>
 - xi. Window to the Law Video: NAR's Fair Housing Action Plan: <https://www.nar.realtor/videos/window-to-the-law/nars-fair-housing-action-plan>
 - xii. Window to the Law: Fair Housing Update: <https://www.nar.realtor/window-to-the-law/fair-housing-update>

ADA WEBSITE ACCESSIBILITY

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

- a. Americans with Disabilities Act (ADA) website accessibility claims continue to be filed in large numbers, with claims remaining stable from 2019 to 2020. Businesses across industries, including real estate, have seen waves of demand letters alleging a business' website is inaccessible in violation of the ADA. While the issue of the ADA's application to websites remains unresolved, businesses celebrated a major victory in the 11th Circuit case, *Gil v. Winn-Dixie, Inc.* In *Gil*, the 11th Circuit held that websites are not places of public accommodation under Title III of the ADA, and thus not subject to the ADA's accessibility requirements. While this decision does not settle the issue of the ADA's application to websites, it's a step in the right direction. It also highlights the growing conflict among Circuits, which increases the potential that the Supreme Court could take up the issue in the near future. In the meantime, and despite the fact that the DOJ issued notices of proposed rulemaking in 2010 and 2016, there is no indication that the DOJ will provide any additional guidance in the near future.
- b. Risk Reduction Tips
 - i. Assess your website's current accessibility, and create a plan to take steps to address and enhance any accessibility issues.
 - ii. Ask your website provider about how they are addressing your site's accessibility, and be sure to address ADA website accessibility and indemnification issues in your contract with the provider.
 - iii. Consult a website accessibility expert to create a plan for addressing website accessibility issues.
 - iv. Include an accessibility statement on your website, along with contact info where individuals with disabilities may report difficulty accessing the website and can seek additional assistance accessing information or services. Feel free review and copy: <https://www.nar.realtor/accessibility>.
- c. Resources:
 - i. REALTOR® Magazine: "ADA Demand Letters: A Vexing Reality for Real Estate Pros": <https://magazine.realtor/law-and-ethics/feature/article/2021/04/ada-demand-letters-a-vexing-reality-for-real-estate-pros>
 - ii. REALTOR® Magazine: "Is Your Website ADA Compliant?": <https://magazine.realtor/technology/feature/article/2016/04/is-your-website-ada-compliant>
 - iii. Window to the Law: ADA and Website Accessibility Update: <https://www.nar.realtor/window-to-the-law/ada-and-website-accessibility-update>
 - iv. Window to the Law: Accessible Websites and the ADA: <https://www.nar.realtor/window-to-the-law/window-to-the-law-accessible-websites-and-the-ada>

TCPA & DNC: TEXTING AND CALLING

(<https://www.nar.realtor/window-to-the-law/fair-housing-update>)

- a. Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate professionals have violated the Telephone Consumer Protection Act (TCPA) and Do Not Call (DNC) laws by sending text messages and placing phone calls without the recipient's consent. Specifically, the TCPA requires prior express written consent before using an automatic telephone dialing system (ATDS) to place telemarketing calls or texts to wireless numbers.

On April 1, 2021, the United States Supreme Court issued its long-awaited opinion in *Facebook v. Duguid*, unanimously overturning the Ninth Circuit Court of Appeals and narrowly defining the TCPA's ATDS definition. In order to trigger the TCPA's ATDS consent requirements, the call technology must not only store or dial numbers, it must actually use a random or sequential number generator to place the calls. Thus, calls using random or sequential number generators still require prior express written consent, which involves a signed agreement clearly and conspicuously disclosing the text recipient's permission to receive call and text messages from the sender. Now, it is clear that calls generated individually - not using a random or sequential number generator - need not obtain prior consent at all. Even if the device has the ability to store and dial call lists. DNC laws should always be followed, which prohibits individuals from contacting phone numbers contained in the DNC registry.

b. Follow these tips to reduce risk of violating TCPA

- i. Consent is the gold standard to avoid TCPA liability and should must obtained when using technology that employs a random or sequential number generator. 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 calls and text messages from or on behalf of the sender.
- iii. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE").
- iv. Promptly remove individuals from your messaging lists who have opted out, and be sure to record the date the person opted-out, and the date the person was removed.
- v. Talk to your vendors about TCPA and DNC compliance and indemnification.

c. Follow these tips to reduce risk of violating DNC

- i. Create an office policy for compliance with DNC 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 customer relationship management platform: <https://www.nar.realtor/legal/complying-with-federal-regulations/do-not-call-registry/accessing-the-registry>

d. Resources:

- i. NAR Telemarketing & Cold-Calling Topic Page: <https://www.nar.realtor/telemarketing-cold-calling>
- ii. TCPA Quick Reference Guide. <https://www.nar.realtor/references-150>
- iii. REALTOR® Magazine: "Do You Know Who You Are Calling?": <https://magazine.realtor/law-and-ethics/feature/article/2019/07/do-you-know-who-you-are-calling>
- iv. National Do Not Call Registry: <https://www.donotcall.gov/>
- v. Window to the Law: Comply with The Do Not Call Registry: <https://www.nar.realtor/window-to-the-law/comply-with-the-do-not-call-registry>
- vi. Window to the Law: TCPA and Texting: <https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-tcpa-and-texting>
- vii. Window to the Law: TCPA Update on Cell Phone Marketing: <https://www.nar.realtor/window-to-the-law/tcpa-update-on-cell-phone-marketing>

COVID-19

(<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. Coronavirus: A Guide for REALTORS®: <https://www.nar.realtor/coronavirus/guide-for-realtors>
 - ii. Coronavirus Guidance: Commercial Real Estate: <https://www.nar.realtor/coronavirus-guidance-commercial-real-estate>
 - iii. COVID-19: Guidance for Workplace Vaccination Policies: <https://www.nar.realtor/coronavirus/covid-19-guidance-for-workplace-vaccination-policies>
 - iv. COVID-19: Workplace Re-entry Checklist: <https://www.nar.realtor/covid-19-workplace-re-entry-checklist>
 - v. Sample Preparedness Plan for Circumstances Relating to COVID-19: <https://www.nar.realtor/sample-preparedness-plan-for-circumstances-relating-to-covid-19>
 - vi. Window to the Law: Showing Guidance During a Pandemic: <https://www.nar.realtor/window-to-the-law/showing-guidance-during-a-pandemic>
 - vii. Window to the Law: Making Your Workplace COVID-Safe: <https://www.nar.realtor/window-to-the-law/making-your-workplace-covid-safe>

WIRE FRAUD

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

- a. Email compromise continues to be the number one reported internet crime, according to the Federal Bureau of Investigation's (FBI) 2020 Internet Crime Report. In the real estate space, criminals hack into email accounts and use information gained in those accounts to dupe homebuyers into sending fraudulent wire transfers. Hackers send homebuyers a spoofed email that appears to come from the real estate agent, title representative, or attorney involved in the transaction. The email is sent right before closing and claims a last-minute change to the wiring instructions. Following these new fraudulent instructions, the homebuyer wires 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 real estate industry and consumers are educated about these scams, remain vigilant, protect their data, and follow best practices in sharing personal and financial information.

b. Risk Reduction Tips

- i. Alert and educate homebuyers of wire fraud scams at the outset of the transaction, and consider using a consumer disclosure: <http://www.realtor.org/videos/wire-fraud-alert-for-buyers>
- ii. Instruct homebuyers to always first call wire recipient using an independently-verified phone number to verify wire instructions.
- iii. Avoid sending wire instructions (and any sensitive financial information) via email.
- iv. Use a secure transaction management platform to share documents and sensitive personal 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. Immediately report fraud incidents to local FBI office, local law enforcement, and file a complaint at www.ic3.gov.

c. Resources

- i. NAR's Wirefraud Topic Page: <https://www.nar.realtor/wire-fraud>
- ii. NAR Video Alert for Buyers: <https://www.nar.realtor/videos/wire-fraud-alert-for-buyers>
- iii. NAR Consumer Wire Fraud Alert handout: <https://narfocus.com/billdatabase/clientfiles/172/13/3450.pdf>
- iv. Window to the Law: How to Avoid Wire Fraud in Transactions: <https://www.nar.realtor/window-to-the-law/how-to-avoid-wire-fraud-in-transactions>
- v. Window to the Law: Preventing Cyber Crime During COVID-19: <https://www.nar.realtor/window-to-the-law/preventing-cybercrime-during-covid-19>
- vi. Coalition Stop Real Estate Wire Fraud – “Protect Your Money”: <https://stopwirefraud.org/protect-your-money/>
- vii. Cyber and Fidelity Insurance Report for Real Estate Brokers: <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>
- viii. Data Privacy & Security: <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
- ix. Directory of Local FBI Field Offices: <https://www.fbi.gov/contact-us/field-offices>

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 reinforces transparency and competition between real estate listings and between brokers as pro-consumer benefits of the MLS. 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. When a property is submitted into the MLS, the seller and the broker have concluded cooperation with other MLS participants is in the seller's best interests and enables the listing to be shared with the widest group of potential buyers, which increases the chance for the best offer. 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 that buyers' brokers play a very real and critical role in the home buying and selling process.

- a. *Leeder v. The National Association of REALTORS®*, Realogy Holdings Corp., HomeServices of America, Inc., BHH Affiliates, LLC, The Long & Foster Companies, Inc., RE/MAX LLC, and Keller Williams Realty, Inc. (U.S. Dist. Ct. N.D. Ill., Case No. 1:21-cv-00430), filed January 25, 2021.
- b. *Conti v. The National Association of REALTORS®*, San Francisco Association of REALTORS®, Greater San Diego Association of REALTORS®, Realogy Holdings Corp., HomeServices of America, Inc., RE/MAX Holdings, Inc., Keller Williams Realty, Inc., Compass SF I, Inc., Sotheby's International Realty, and Rodeo Realty, Inc. (U.S. Dist. Ct. N.D. Ca., Case No. 3:21-cv-01934), filed March 19, 2021.

Plaintiffs filed a putative class action lawsuit against NAR, two REALTOR® associations, and several corporate defendants. The purported class consists of home buyers who mischaracterize NAR's rules by alleging that defendants promulgated and enforced anticompetitive rules that caused home buyers to pay inflated commissions for broker services they misrepresent are free, to pay inflated prices for the homes they purchase, and to receive reduced quality broker services.

Discussions regarding these lawsuits will be grounded in the bigger picture of the value of REALTORS® and the MLS system brings to both buyers and sellers, including that:

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.

Resources

- i. Antitrust Lawsuits: Frequently Asked Questions: <https://www.nar.realtor/antitrust-lawsuits-frequently-asked-questions>
- ii. General Member Message Points on Antitrust Lawsuits: <https://www.nar.realtor/general-member-message-points-on-antitrust-lawsuits>
- iii. REALTOR® Magazine: "Lawsuit Against NAR is Baseless": <https://magazine.realtor/news-and-commentary/commentary/article/2019/09/lawsuit-against-nar-is-baseless>

DOJ ACTION AND SETTLEMENT

<https://www.nar.realtor/2020-nar-doj-agreement-regarding-mls-rules>

United States of America v. National Association of REALTORS®, (U.S. Dist. Ct. D.C., No. 1:20-cv-3356), filed November 19, 2020.

In November 2020, NAR reached a settlement with the Department of Justice that resolves the DOJ's questions about the MLS system and commissions, and requires NAR to make certain changes to MLS rules and the REALTOR® Code of Ethics as a result. The rule changes that will result from the settlement seek to more explicitly

state what is already the spirit and intent of NAR's Code of Ethics and MLS policies, and will serve to further NAR's long-standing objective of creating a competitive and efficient market for the benefit of home buyers and sellers.

The settlement includes four required rule changes:

- 1) The offer of compensation must be disclosed;
- 2) Real estate transaction services must not be advertised as free;
- 3) MLS listings may not be filtered based on commission amount or name of the listing broker or agent;
- 4) Lockbox access must be available to all licensed real estate professionals.

There are no immediate changes or actions to take. In order for the rule changes to go into effect, the court must enter its final order, and both the DOJ and the NAR Board of Directors must review and approve the proposed rule changes.

Resources

- i. 2020 NAR-DOJ Agreement Regarding MLS Rules: <https://www.nar.realtor/2020-nar-doj-agreement-regarding-mls-rules>
- ii. Code Comprehension: Article 3 – Ethical Duty to Cooperate: <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/code-comprehension-article-3-ethical-duty-to-cooperate>