

Hot Topics in Broker Risk Reduction

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Katie Johnson, General Counsel and Chief Member Experience Officer

kjohnson@nar.realtor

COMPETITION IN REAL ESTATE

- a. REALTORS® help foster competition through their participation in local broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants. REALTORS® work together in for the benefit of consumers, and to help ensure buyers and sellers have the greatest access, transparency and choice in their homeownership journeys. As a result, brokerages of all sizes are able to compete and provide their services to consumers, who in turn have the freedom to choose between different service models and pricing that best meet their needs.
- b. Resource
 - i. [Competition.realtor](#): Learn the key points for you as members of the National Association of REALTORS® to know and share about how competitive and consumer-friendly local broker marketplaces – another name for MLSs – are, and the critical role NAR members play in advancing consumers' interest. This is followed by key questions you may have or get asked about on related topics.

RANSOMWARE

- a. Cybercrime continues to rise. The FBI Internet Crime Complaint Center reported that in 2020 it received over 790,000 complaints with an estimated total loss of \$4.2 billion dollars. Ransomware is the fastest growing cybersecurity threat where cybercriminals exploit vulnerable systems and install malicious software that either completely lock users out of their system or encrypts data making it inaccessible. Businesses will be able to regain access to their systems and data with a decryption key, which cybercriminals will turn over only in return for a ransom payment. Without payment, not only will the system and the data remain inaccessible, cybercriminals will often threaten to sell or leak sensitive information found on the business' system. These ransomware attacks can impact not only a business' bottom line, but also its reputation. As real estate transactions become increasingly digital, it is important that the real estate industry be educated about cybercrime and take proactive steps to protect itself from attack.
- b. Risk Reduction Tips
 - i. Train staff to be suspicious before clicking on unknown links or attachments.
 - ii. Routinely patch and update business software and equipment.
 - iii. Use multifactor authentication and require passwords to be updated regularly.
 - iv. Backup data and files regularly, following the 3-2-1 backup strategy; 3 copies of the data in 2 different formats with 1 copy stored off-site.
 - v. Require vendors to adhere to good cybersecurity practices, and obtain assurances in contracts.
 - vi. Immediately report ransomware incidents to local FBI office, local law enforcement, and file a report at www.ic3.gov.

- c. Resources
 - i. [Window to the Law: Protecting Your Business from a Ransomware Attack](#)
 - ii. [Window to the Law: Cybersecurity: What You Need to Know](#)
 - iii. [Cybersecurity Checklist: Best Practices for Real Estate Professionals](#)
 - iv. [NAR Emerging Technology Series: Episode 3 – Ransomware](#)
 - v. [AEI Year-Round Virtual Sessions: Cybersecurity Best Practices in the Era of COVID-19](#)
 - vi. [Cyber and Fidelity Insurance Report for Real Estate Brokers](#)
 - vii. [NAR Data Security & Privacy Toolkit](#)
 - viii. [FBI Internet Crime Center: Internet Crime Report 2020](#)
 - ix. [Directory of Local FBI Field Offices](#)

- MULTIPLE OFFERS**

 - a. Presenting and negotiating multiple offers brings the potential for misunderstanding and missed opportunities. 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 how to handle 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 that 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](#)
 - ii. [Window to the Law video: How to Handle Multiple Offers](#)
 - iii. [NAR Professional Standards Manual, Part 4, Appendix IX – Presenting and Negotiating Multiple Offers](#)
 - iv. [A Buyer's and Seller's Guide to Multiple Offer Negotiations](#)

COPYRIGHT INFRINGEMENT

- a. To avoid copyright infringement, real estate professionals must obtain the rights in the photographs before sharing the photos on their website, in the MLS, public portals, and other venues. Real estate professionals should also ensure proper rights to any music used at live events and incorporated into video recordings, including listings. In addition, real estate professionals should avail themselves of the Digital Millennium Copyright Act safe harbor, which should greatly reduce brokers' and agents' risk of liability regarding third party photos and music in IDX displays.

- b. Risk Reduction Tips
 - i. Obtain ownership or a broad exclusive license for photographs.
 - ii. Secure necessary licenses in order to play music at a live event or incorporate music into a listing video.
 - iii. Be sure to understand the rights granted in license agreements, and consider any future use of copyrighted material when securing the license.
 - iv. Comply with the Digital Millennium Copyright Act safe harbor.
 - v. Keep records of license agreements to easily confirm rights, if challenged.
- c. Resources
 - i. [Listing Photo Sample Agreements](#)
 - ii. [NAR Risk Management Webinar Series: Copyright: Best Practices to Avoid Costly Claims](#)
 - iii. [Window to the Law: Copyright Best Practices for Listing Photos](#)
 - iv. [Window to the Law: Copyright Infringement Safe Harbor](#)
 - v. [Window to the Law: How to Avoid Copyright Infringement](#)
 - vi. [NAR Article: "Who Owns Your Property Photos?"](#)

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 by 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 or delivering 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](#)
 - ii. [Real Estate Brokerage Essentials: Chapter on Fair Housing with training materials](#)
 - iii. [NAR Video: Implicit Bias Override](#)
 - iv. [At Home with Diversity Certification](#)
 - v. [A Snapshot of Race and Homebuying in America](#)
 - vi. [REALTOR® Fair Housing Declaration](#)
 - vii. [The Color of Law: A Forgotten History of How Our Government Segregated America, by Richard Rothstein \(2017\)](#)
 - viii. [Fair Housing social media assets available via Photofy](#)

- ix. [Fairhaven: A Fair Housing Simulation](#)
- x. [Window to the Law: Criminal Background Checks and Fair Housing](#)
- xi. [Window to the Law Video: Creating a Diversity, Equity & Inclusion Policy](#)
- xii. [Window to the Law Video: NAR's Fair Housing Action Plan](#)
- xiii. [Window to the Law: Fair Housing Update](#)

ADA WEBSITE ACCESSIBILITY

- a. Americans with Disabilities Act (ADA) website accessibility claims continue to be filed in large numbers. 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 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 to copy NAR's [accessibility statement](#) on its website.
- c. Resources:
 - i. [REALTOR® Magazine: "ADA Demand Letters: A Vexing Reality for Real Estate Pros"](#)
 - ii. [REALTOR® Magazine: "Is Your Website ADA Compliant?"](#)
 - iii. [Window to the Law: ADA and Website Accessibility Update](#)
 - iv. [Window to the Law: Accessible Websites and the ADA](#)

TCPA & DNC: TEXTING AND CALLING

- 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. Keep in mind that DNC laws should always be followed, which prohibits individuals from contacting phone numbers contained in the DNC registry.

a. Follow these tips to reduce risk of violating TCPA

- i. Consent is the gold standard to avoid TCPA liability and must be 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 messaging lists who have opted out, and be sure to record the date the person opted-out, along with the date the person was removed.
- v. Talk to your vendors about TCPA and DNC compliance and indemnification.

b. Follow these tips to reduce risk of violating DNC

- i. [Create an office policy](#) for compliance with DNC rules.
- ii. [Obtain an updated DNC list monthly](#) and cross reference with your company customer relationship management platform.

c. Resources:

- i. [NAR Telemarketing & Cold-Calling Topic Page](#)
- ii. [TCPA Quick Reference Guide](#)
- iii. [REALTOR® Magazine: "Do You Know Who You Are Calling?"](#)
- iv. [National Do Not Call Registry](#)
- v. [Window to the Law: Comply with The Do Not Call Registry](#)
- vi. [Window to the Law: TCPA and Texting](#)
- vii. [Window to the Law: TCPA Update on Cell Phone Marketing](#)

COVID-19

- a. The COVID-19 pandemic has impacted 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 showings when possible.
 - iii. Implement a preparedness plan and discuss COVID-19 protocols 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®](#)
- ii. [Coronavirus Guidance: Commercial Real Estate](#)
- iii. [COVID-19: Guidance for Workplace Vaccination Policies](#)
- iv. [COVID-19: Workplace Re-entry Checklist:](#)
- v. [Sample Preparedness Plan for Circumstances Relating to COVID-19](#)
- vi. [Window to the Law: Showing Guidance During a Pandemic](#)
- vii. [Window to the Law: Making Your Workplace COVID-Safe](#)

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](#)
- ii. [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.

- c. 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.

Plaintiff filed a putative class action lawsuit against NAR, 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.

Resources

- i. [Competition.realtor](#)
- ii. [REALTOR® Magazine: "Lawsuit Against NAR is Baseless"](#)

DOJ ACTION

National Association of REALTORS® v. United States of America et al. (U.S. Dist. Ct. D.C., No. 1:21-cv-2406), filed September 13, 2021.

In September 2021, NAR filed a petition to quash a request by the Department of Justice to reopen its investigation into the MLS system, which was resolved by the fully negotiated and approved November 2020 settlement announced by the DOJ and NAR. The DOJ's attempt to withdraw from the settlement is unprecedented, and a breach of both the agreement and the law. NAR filed this action to simply require the DOJ to live up to the terms of the agreement, which NAR had already begun implementing. That agreement included a requirement that NAR adopt the following four rule changes to more explicitly state what is already in the spirit and intent of NAR's Code of Ethics and MLS policies:

- 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.

While the settlement is currently on hold, NAR is always committed to acting in the best interest of buyers and sellers across the country and updates its polices to protect consumers and promote transparency and efficiency in the real estate marketplace. Therefore, [NAR's MLS Committee will consider adoption of certain of these rule changes](#) at its November 2021 meeting.

Resources

- i. [Competition.realtor](#)
- ii. [National Association of REALTORS® Files Petition to Oppose Department of Justice Breach of Settlement Agreement](#)
- iii. [Code Comprehension: Article 3 – Ethical Duty to Cooperate](#)

Check out the REALTOR® Store to get a copy of [Real Estate Brokerage Essentials®](#), a comprehensive tool to help brokerages navigate important issues while minimizing legal risk.