

Hot Topics in Broker Risk Reduction

May 2023 | NAR Legal Affairs

**COMPETITION IN REAL ESTATE | ANTITRUST | CYBERCRIME & WIRE FRAUD
COPYRIGHT INFRINGEMENT | DISCLOSURES & MISREPRESENTATION
INDEPENDENT CONTRACTOR STATUS | TCPA & DNC: TEXTING AND CALLING**

COMPETITION IN REAL ESTATE

REALTORS® help foster competition through their participation in local MLS broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants. REALTORS® work together for the benefit of consumers and 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.

Call to Action

1. Educate consumers, policymakers, media and other interested third parties about [how the local MLS broker marketplaces work](#), and how they promote equity, transparency and market-driven pricing options for consumers.
2. Promote consumer understanding about the [value REALTORS® bring to the transaction](#), how REALTORS® serve as champions in their communities and as advocates for private property rights.
3. Use buyer representation agreements and continue to have transparent conversations with consumers about the [services buyer agents provide](#) and [how they are paid](#).
4. Use the fact sheets, FAQs, articles, infographics and other resources on [competition.realtor](#) to promote the value of local MLS broker marketplaces and how they work in the best interest of consumers.

Resources

- [Competition.realtor](#): A resource for REALTORS®, consumers, media, academics, experts on competition, and anyone that wants to know more about how competitive and consumer-friendly local broker marketplaces — another name for MLSs—are, and the critical role NAR members play in advancing consumers' interests. Consider this a go-to source to access a host of resources to facilitate conversations with consumers and other interested third parties about the local broker marketplaces, competition, the REALTOR® value. In addition, find the latest developments on legal and other challenges facing the industry.

- [Realestatecommissionfacts.com](https://www.realestatecommissionfacts.com): Use and share this website to access information and facts about how real estate compensation works, and why the listing broker compensating the buyer broker underpins the local broker marketplaces, and enables efficiency, effectiveness and accessibility for all homebuyers, and especially first-time, low- and middle-income buyers.

ANTITRUST

Understanding the principles of antitrust law is critical for both brokers and agents, not only to protect the brokerage from costly antitrust claims, but to best serve consumers in their homeownership journey. Keep in mind that brokers may be held liable for the anticompetitive behavior of their salespeople and staff, so having an antitrust compliance program in place to educate and train staff is important. Business decisions should always be made unilaterally and independently, and never as a result of an agreement, understanding or conspiracy among competitors. Any agreement to fix prices is prohibited, and real estate professionals should never agree, expressly or implicitly, with their competitors about matters such as the commission rate charged to consumers or the cooperative compensation they will offer to MLS participants. Similarly, brokers should never agree with other competitors to refuse to deal—or to only deal on certain terms—with another competitor or business. Avoid discussions with competitors about how to do business with other competitors altogether.

Risk Reduction Tips

1. Always make pricing decisions unilaterally and independently; avoid discussing pricing or compensation with other brokers.
2. Never discuss or agree with competitors to boycott or refuse to deal with another broker or business.
3. Do not agree with competitors to divide up markets, customers or practice areas. Such market allocation agreements are generally illegal.
4. Implement a written antitrust compliance program and regularly educate salespeople and staff about antitrust laws.
5. Never contribute to anticompetitive discussions - whether in-person or online. If you find yourself in a meeting or conversation where anticompetitive behavior occurs, make your objection clear by leaving the meeting and ask that your objection be recorded in the minutes or document it in a follow-up email.

Resources

- [Window to the Law: Antitrust for Real Estate Professionals](#)
- [“Antitrust 101 for Real Estate Professionals” video](#)
- [Antitrust Pocket Guide](#)
- [MLS Antitrust Compliance Policy](#)

CYBERCRIME and WIRE FRAUD

Cybercrime continues to be a top concern in the real estate industry. In 2022, the FBI Internet Crime Complaint Center (IC3) reported a significant increase in total victim losses of \$10.3 million, a 49% increase from 2021. The top scams facing consumers and business in the real estate industry are:

1. **phishing/vishing/smishing/pharming** whereby fraudsters use unsolicited emails, text messages and phone calls from a purportedly legitimate company to obtain personal, financial and login credentials;
2. **wire fraud** is carried out by fraudsters compromising email accounts to effectuate fraudulent fund transfers; and
3. **ransomware** whereby cybercriminals install malicious software that locks users out of their systems or encrypts data making it inaccessible unless a ransom payment is paid.

FinCEN recently released a Financial Trend Analysis report on business email compromise in real estate, which underscores that real estate continues to be an attractive target for cybercriminals to exploit the high monetary values generally associated with real estate transactions. According to the report, FinCEN found that 37 percent of fraudulent wire instruction emails impersonate the title/closing entity, and 23 percent of such emails impersonate a real estate professional in the transaction. Real estate professionals should be aware of the risks facing not only their businesses, but also consumers, and educate staff and clients about preventative steps they can take to prevent falling victim to cybercrime.

Risk Reduction Tips

1. Train staff educate to be suspicious before clicking on unknown links or attachments.
2. Routinely patch and update business software and equipment.
3. Distribute [consumer information](#) and remind consumers throughout the transaction about the threat of wire fraud and to always verify any wire or payment instructions with a known contact before sending any money.
4. Use multifactor authentication and require passwords to be updated regularly.
5. 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.
6. Require vendors to adhere to good cybersecurity practices, and obtain assurances in contracts.
7. Immediately report any suspected cyber crime incident by filing a report at www.ic3.gov, to the local FBI office, and local law enforcement.

Resources

- [Mortgage Closing Scam Client Advisory Brochure](#)
- [Window to the Law: Avoiding Wire Fraud in Transactions](#)
- [Window to the Law: Protecting Your Business from a Ransomware Attack](#)
- [Window to the Law: Cybersecurity: What You Need to Know](#)
- [Cybersecurity Checklist: Best Practices for Real Estate Professionals](#)
- [NAR Data Security & Privacy Toolkit](#)
- [NAR Emerging Technology Series: Episode 3 – Ransomware](#)
- [Drive with NAR: What to Do If Your Business Faces a Ransom Threat](#)
- [AEI Year-Round Virtual Sessions: Cybersecurity Best Practices](#)

- [in the Era of COVID-19](#)
- [Cyber and Fidelity Insurance Report for Real Estate Brokers](#)
- [FinCEN Financial Trend Analysis on Business Email Compromise in the Real Estate Sector](#)
- [FBI Internet Crime Center Internet Crime Report 2022](#)
- [Directory of Local FBI Field Offices](#)

COPYRIGHT INFRINGEMENT

It is easier than ever for unauthorized uses of third-party works to be discovered. To avoid costly copyright infringement demands, real estate professionals should be sure to obtain permission to use any third-party work and comply with the terms of the license to avoid copyright infringement and keep records to easily confirm rights as needed. Be sure to confirm that any rights received align with the current and planned use of photographs or other third-party work before using it, including on a website, in the MLS, and marketing materials. Real estate professionals should also ensure proper rights to any music used at live events, such as an open house and before incorporating into recordings. Keep in mind that specific types of licenses must be obtained before incorporating music into a video recording. In addition, real estate professionals should comply with the Digital Millennium Copyright Act safe harbor to reduce the risk of when third-parties post on their websites, including photos and music that appear through an IDX displays.

Risk Reduction Tips

1. Obtain ownership or a broad exclusive license for photographs.
2. Secure a performing rights license to play music at a live event and a synchronization and mater recording license before incorporating music into a video, such as a listing video. Be sure to understand the rights granted in license agreements and consider any future use of copyrighted material when securing the license.
3. Comply with the Digital Millennium Copyright Act safe harbor.
4. Keep records of license agreements to easily confirm rights, if challenged.

Resources

- [Window to the Law: Protect Your Website from Copyright Liability](#)
- [Window to the Law: Copyright Best Practices for Listing Photos](#)
- [Window to the Law: How to Avoid Copyright Infringement](#)
- [Listing Photo Sample Agreements](#)
- [NAR Risk Management Webinar Series: Copyright: Best Practices to Avoid Costly Claims](#)
- [NAR Article: "Who Owns Your Property Photos?"](#)
- [Make NAR's Marks Remarkable & Quick Copyright Best Practices](#)

DISCLOSURES AND MISREPRESENTATION

Misrepresentation of a property's condition is consistently among the top claims against real estate professionals. To reduce the risk of a costly misrepresentation claim, it's critical that real estate professionals are familiar with applicable disclosure laws. Real estate professionals generally owe a duty to disclose any known material fact under state law and, pursuant to Article 2 of the REALTOR® Code of Ethics, REALTORS® must disclose material facts, which are facts that a reasonable buyer would consider important in deciding whether and on what terms to purchase a property. Failure to properly disclose can lead to misrepresentation claims, ranging from fraud to negligence and in some states, innocent misrepresentation.

Risk Reduction Tips

1. Always ensure that material, known facts and defects are disclosed to the buyer. Review the seller's disclosure to ensure all questions are answered, and if the seller refuses to disclose a material fact or defect that you know about, you should make the disclosure.
2. Do not complete a disclosure form on behalf of a seller client. If a disabled client needs assistance, advise the client to have a friend or family member help them.
3. Immediately correct any misstatements you or the seller may have made, upon learning of the error.
4. Document and keep information received from the seller and provided to the buyer, including answers to questions about the condition of the property. Document any research done on the condition of the property, including the sources of information.
5. Stay informed about any "red flags" or defects that may be common to properties in the area such as zoning changes or plumbing issues. Discuss any red flags with the seller and have them investigated. If the investigation is inconclusive, alert the buyer to the potential red flag and its consequences.

Resources

- [Window to the Law: Reduce the Risk of Misrepresentation Claims](#)
- [Window to the Law: Flood Insurance and Disclosures](#)
- [Window to the Law: What to Know About E&O](#)
- [Disclosure Suit Against Brokers Rejected by Court](#)
- [Fraud, Negligence and Liability](#)
- [Dealing with Stigmatized Properties](#)

INDEPENDENT CONTRACTOR STATUS

The ability to work as an independent contractor is recognized and protected under [many state](#) and some federal laws. The risk of misclassification poses a challenge for brokerages, particularly with the proliferation of teams, where team leads may want to dictate how team members manage their tasks and time. While there is often an inherent conflict between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors, some state statutes expressly address the unique status of real estate agents, permitting classification as independent contractors despite the required control and supervision the broker has over the licensees. For example, in 2022, New Jersey amended its real estate brokerage law to retroactively exclude real estate salespersons from the state wage law, which uses the “ABC test” to classify workers. In addition, a [recent California appellate decision](#) affirmed a salesperson’s ability to choose to be an independent contractor, citing a 3-part test found in the state business licensing code.

However, litigation and new federal and state legislation continue to threaten workers’ ability to be classified as independent contractors, including many real estate professionals. In October 2022, the U.S. Department of Labor (DOL) issued a [proposed rule](#) to update the test for determining whether a worker is an employee or independent contractor under the Fair Labor Standards Act. The proposed rule does not impact real estate professionals’ explicit protection in the [Internal Revenue Code](#) (IRC), but NAR has [advocated](#) that the DOL incorporate the IRC provision, and made other suggested changes for the DOL’s consideration that would better recognize the real estate broker-agent relationship and state laws to ward off litigation or similar state measures.

Risk Reduction Tips

1. Know your state law regarding independent contractor classification of real estate licensees. Statutes protecting this classification are the strongest defense to a legal challenge.
2. Always have a written independent contractor agreement and consider including a mandatory arbitration and class action waiver provision in such agreements.
3. Don’t mandate meetings, administrative office duties, or use of certain tools.
4. Allow salespeople to work where, when, and how they deem best.

Resources

- [Window to the Law: Legal Issues for Teams](#)
- [NAR’s Comments on Proposed Independent Contractor Rule](#)
- [NAR Issue Brief: Real Estate Professionals’ Classification as Independent Contractors](#)
- [Independent Contractor State Law Survey](#)
- [Independent Contractor Status Frequently Asked Questions](#)
- [Key Provisions for Independent Contractor Agreements](#)

TCPA & DNC: TEXTING AND CALLING

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.

The [United States Supreme Court](#) recently overturned the Ninth Circuit Court of Appeals and narrowly defined the TCPA's ATDS definition to require that the call technology not only store or dial numbers, but 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.

In response to the U.S. Supreme Court's decision, several states have enacted so-called "mini-TCPA" laws which change the ATDS definition and provide additional restrictions on telemarketing calls and texts. In some states, the requirement for express written consent has been expanded to include any calls made using an automated dialing device or artificial voice message, not just random or sequential numbers. States have also adopted additional restrictions on the times in which such calls can be made as well as specifying the content and timing of required disclosures during a telemarketing call. These mini-TCPA laws apply to calls made within and to consumers located within the applicable states, and could provide the setting for the next wave of litigation on this issue as state courts tend to be more consumer-friendly.

Risk Reduction Tips: TCPA

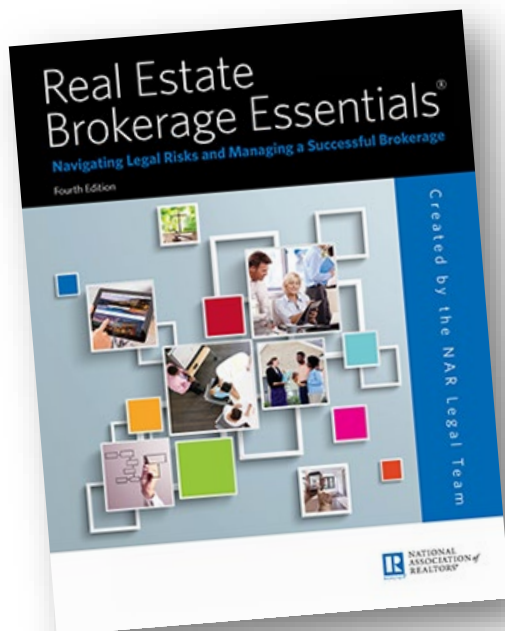
1. Consent is the gold standard to avoid TCPA liability and must be obtained when using technology that employs a random or sequential number generator. Consent should be clearly stated, well documented and preserved.
2. Include language on consent forms stating that recipients who submit wireless numbers agree to receive calls and text messages from or on behalf of the sender.
3. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE"). Promptly remove individuals from messaging lists who have opted out. Maintain an opt-out record, including the date the person opted-out and the date the person was removed.
4. Talk to your vendors about TCPA and DNC compliance and indemnification.
5. Consult counsel regarding the applicability and requirements of any applicable "mini-TCPA" laws.

Risk Reduction Tips: DNC

1. [Create an office policy](#) for compliance with DNC rules, and implement a method to monitor compliance.
2. [Obtain an updated DNC list monthly](#) and cross reference with your company customer relationship management platform.

Resources

- [Window to the Law: Comply with The Do Not Call Registry](#)
- [Window to the Law: TCPA and Texting](#)
- [Window to the Law: TCPA Update on Cell Phone Marketing](#)
- [TCPA Quick Reference Guide](#)
- [DNC Safe Harbor Provision](#)
- [REALTOR® Magazine: "Do You Know Who You Are Calling?"](#)
- [National Do Not Call Registry](#)



Go to 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.