

Hot Topics in Broker Risk Reduction

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May 2019

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

a. Follow these tips to reduce risk of wire fraud:

- 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, use strong passwords and two-factor authentication, purge regularly, and avoid using unsecured wifi.
- vi. Create an e-mail rule to flag email communications where the “reply” email address is different from the “from” email address shown.
- vii. Immediately report suspected fraud to the bank from which the funds were transferred.
- viii. Get to know your local FBI field office and contact them immediately if fraud is suspected.
- ix. Report fraud incidents to www.ic3.gov.

b. Resources:

- i. *How to Avoid Wire Fraud video:* <https://www.nar.realtor/window-to-the-law/how-to-avoid-wire-fraud-in-transactions>
- ii. *Wire Fraud Email Notice:* <https://www.nar.realtor/law-and-ethics/wire-fraud-email-notice-template>
- iii. *FBI, BEC: The 12 Billion Dollar Scam:* <https://www.ic3.gov/media/2018/180712.aspx>
- iv. *Directory of Local FBI Field Offices:* <https://www.fbi.gov/contact-us/field-offices>
- v. *Data Security:* <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
- vi. *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. *FCC Stop Unwanted Robocalls and Texts*: <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts>
 - iii. *National Do Not Call Registry*: <https://www.donotcall.gov/>

INDEPENDENT CONTRACTOR STATUS (<https://www.nar.realtor/independent-contractor-status>)

- a. There has been an increase in litigation filed against real estate companies in California recently alleging their misclassification of licensees as independent contractors instead of employees. Most claims are brought pursuant to the Private Attorneys General Act (PAGA) which authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations. 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.
- b. Risk Reduction Tips:**
- i. Know your state law regarding independent contractor classification of real estate licensees. Statutes protecting this classification are the strongest defense to a legal challenge.
 - ii. Always have a written independent contractor agreement and consider including a mandatory arbitration and class action waiver provision in such agreements.
 - iii. Don't mandate meetings, administrative office duties, or use of certain tools.
 - iv. Allow salespeople to work where, when, and how they deem best.
- c. Resources:**
- i. White Paper Report: *Independent Contractor Classification in Real Estate*:
<http://www.realtor.org/sites/default/files/reports/2016/independent-contractor-white-paper-2016.07.14.pdf>
 - ii. State Statutory Approaches to Worker Classification: <http://www.realtor.org/law-and-ethics/state-statutory-approaches-to-worker-classification>
 - iii. *Key Provisions for Independent Contractor Agreements*: <http://www.realtor.org/law-and-ethics/key-provisions-for-independent-contractor-agreements>
 - iv. *Ten Ways to Manage the IC Relationship*: <http://www.realtor.org/articles/ten-ways-to-successfully-manage-your-independent-contractor-relationships>

- v. FAQs: <http://www.realtor.org/law-and-ethics/independent-contractor-status-frequently-asked-questions>
- vi. California's Private Attorneys General Act: <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>

COPYRIGHT INFRINGEMENT (<http://www.realtor.org/topics/copyright>)

- a. To avoid risk of copyright infringement, brokers should ensure that they've obtained the rights in the photographs that they assert to have when sharing the photos in the MLS, public portals, and other venues. Brokers should also be able to document that chain of title. In addition, compliance with the Digital Millennium Copyright Act (DMCA) Safe Harbor Provision for IDX displays should greatly reduce brokers' and agents' risk of liability regarding third party photos.
- b. **Obtain Ownership or Broad Exclusive License for Photographs:**
 - i. *Sample Work For Hire, Exclusive License, and Assignment Agreements available for you to use at:* <http://www.realtor.org/law-and-ethics/who-owns-your-property-photos>
 - ii. Understand the *Best Practices for Listing Photos*: <https://www.nar.realtor/videos/window-to-the-law/copyright-best-practices-for-listing-photos>
- c. **Understand Representations, Warranties, and Indemnification:**
 - i. "The crux of this lawsuit is whether VHT's clients -- not Zillow -- committed wrongdoing by providing downstream rights they didn't have. Because VHT's claim requires the Court to pass judgment on the actions of VHT's clients, those clients must be joined." *VHT, Inc. v. Zillow Group, Inc.*, No. 2-14-cv-1096 (W.D. Wash. 2015)(Zillow's Motion for Judgement on the Pleadings for Failure to Join Indispensable Parties)
- d. **Comply with the Digital Millennium Copyright Act:**
 - i. *DMCA Compliance video:* <http://www.realtor.org/videos/window-to-the-law-copyright-infringement-safe-harbor>
 - ii. *How to Avoid Copyright Infringement video:* <https://www.nar.realtor/window-to-the-law/window-to-the-law-how-to-avoid-copyright-infringement>

FTC/DOJ WORKSHOP: BROKERAGE COMPETITION (<https://www.ftc.gov/news-events/events-calendar/2018/04/whats-new-residential-real-estate-brokerage-competition-ftc-doj>)

- a. On June 5, 2018, the FTC and DOJ hosted a workshop to discuss competition in the real estate industry. Panelists included perspectives from brokers, MLSs, portals, an economist, a consumer advocate, and NAR. The discussions explored, distribution of listing data, diverse brokerage models, policies and regulations, and competition with respect to fees, services, reputation for quality.
- b. **Resources:**
 - i. NAR GC's opening remarks at workshop: <https://www.nar.realtor/nar-general-counsel-addresses-real-estate-competition-in-doj-ftc-workshop>
 - ii. NAR Comment Letter to FTC/DOJ: <https://www.nar.realtor/nar-comment-letter-on-ftc-doj-competition-in-residential-real-estate-brokerage-workshop>
 - iii. Consumer Federation of America's Agency Report: <https://consumerfed.org/reports/the-agency-mess/the-agency-mess-home-buyer-and-seller-confusion-report/>

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.
- b. **Sawbill Strategic, Inc. v. NAR et al.** (U.S. Dist. Ct. N.D. Ill., Case No. 1:19-cv-02544), filed April 15, 2019.
- c. **Sitzer and Winger v. NAR et al.** (U.S. Dist. Ct. W.D. Mo., Case No. 4:19-cv-00332), filed April 29, 2019.

Following the *Moehrl v. NAR* litigation filed in March, two additional lawsuits with similar allegations have been filed against the same defendants. Plaintiffs in all three cases allege home sellers unfairly pay the commissions of buyers' brokers. The complaints ignore how commissions are subject to negotiation. And they question the value buyers' brokers deliver in the home buying and selling process.

Often referred to as copycat lawsuits because the allegations are substantially similar to lawsuits already filed, such litigation is commonly brought by additional law firms whose ultimate goal is to combine their suits with others, in hopes they receive a portion of attorneys' fees. NAR remains confident these lawsuits are without merit. They are wrong on the facts, wrong on the law, and wrong on the economics. The MLS system is designed first and foremost with the buyer and seller in mind. It is pro-competitive and pro-consumer. And buyers' brokers play a very real and critical role in the home buying and selling process.

In the best interests of consumers, NAR will aggressively defend all three lawsuits – and any others that may be filed in the future. 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.