

Hot Topics in Broker Risk Reduction

Katie Johnson, General Counsel & Chief Member Experience Officer

kjohnson@realtors.org

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

a. Risk Reduction for 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. Avoid sending wire instructions (and any sensitive financial information) via email.
- iii. Instruct homebuyers to call wire recipient using an independently-verified phone number.
- iv. Security-conscious email and password practices – never open unsolicited links or attachments, use strong passwords, purge regularly, and avoid using unsecured wifi.
- v. Contact law enforcement immediately if fraud is suspected.

b. Risk Reduction for Ransomware:

- i. 3-2-1 backup. 3 copies; 2 types of backup; 1 backup offsite.
- ii. Segment and restrict network access on a need-to-have basis.
- iii. Keep operating systems and software patched/updated.
- iv. Disconnect from network and power off. Consult IT professional.
- v. Decide whether to pay ransom despite possibility that the files are permanently gone.

c. Implement a Written Data Security Plan:

- i. Video: <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
- ii. Data Security and Privacy Toolkit: <http://www.nar.realtor/law-and-ethics/nars-data-security-and-privacy-toolkit>
- iii. FCC Cyberplanner: <https://www.fcc.gov/cyberplanner>
- iv. Cyber Insurance: <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>

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

a. 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>

b. 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)

c. NAR Videos:

- i. Best Practices for Listing Photos: <https://www.nar.realtor/videos/window-to-the-law/copyright-best-practices-for-listing-photos>
- ii. DMCA Compliance: <http://www.realtor.org/videos/window-to-the-law/copyright-infringement-safe-harbor>

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. **NAR 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>

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

- a. There is an inherent conflict between common law independent contractor status and the traditional classification of real estate salespeople as independent contractors. However, some state real estate 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. In recent years, attempted class action lawsuits by salespeople against brokers have challenged this inherent conflict.
- 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.
 - 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. **NAR 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>

TEXTING AND THE TCPA

- a. Plaintiff lawyers have created a lucrative business model filing class action lawsuits alleging real estate companies have violated the Telephone Consumer Protection Act by sending text messages 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. Non-telemarketing messages are subject to a lower consent threshold, requiring just prior express consent, made one of three ways: 1) verbally; 2) in writing; or 3) by providing a wireless number.
- b. **Risk Reduction Tips:**
 - i. All forms of consent should be clearly stated, well documented and preserved.
 - ii. Even where verbal consent is sufficient, follow up with written confirmation.
 - iii. Include language on forms stating that recipients who submit wireless numbers agree to receive text messages from or on behalf of sender.
 - iv. Allow recipients to easily cancel or opt-out (e.g., by responding "STOP" or "UNSUBSCRIBE")
 - v. Set email alerts to document when subscribers opt-out.
 - vi. Upon receiving an opt-out request, promptly remove the person from your messaging lists.
 - vii. Record the opt-out date and date when person was removed.
 - viii. Engage an individual or messaging vendor experienced in sending text messages.
- c. **NAR Resources:**
 - i. Window to the Law: TCPA and Texting: <https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-tcpa-and-texting>

RESPA (<https://www.nar.realtor/real-estate-settlement-procedures-act-respa>)

- a. Section 8(a) of RESPA prohibits payment in exchange for referral of business for settlement service. Real estate licensees are exempted from that prohibition under Section 8(c)(3), meaning that real estate licensees can pay each other for referrals. And, pursuant to Section 8(c)(2), all other settlement service providers may pay each other for services performed by other providers as long as the payments equate to fair market value of the service received. CFPB enforcement actions over the past several years and CFPB's failure to provide clear guidance on marketing service agreements has caused settlement service providers to terminate and avoid entering into MSAs.
- b. **Risk Reduction Tips:**
 - i. Payments related to advertising service arrangements must be for goods or services actually provided and for the fair market value of the services provided. Document analysis used to determine fair market value.
 - ii. Do not endorse settlement service provider or enter into exclusive arrangements.
 - iii. Service provider should be monitored to ensure that it is performing the services set forth in the MSA and should be able to demonstrate such performance.

RESPA (<https://www.nar.realtor/real-estate-settlement-procedures-act-respa>)

c. NAR Resources:

- i. Window to the Law: PHH v. CFPB - Important RESPA Decision:
<https://www.nar.realtor/videos/window-to-the-law/window-to-the-law-phh-v-cfpb-important-respa-decision>
- ii. FAQs: <https://www.nar.realtor/topics/real-estate-settlement-procedures-act-respa/respa-faq>
- iii. MSA “Dos and Don’ts” at the REALTOR® Store on nar.realtor:
<https://store.realtor.org/product/brochure/respa-do-s-and-don-ts-msas?sku=126-123>
- iv. “Complying with RESPA” at the REALTOR® Store on nar.realtor:
<https://store.realtor.org/product/brochure/respa-guide-complying-real-estate-settlement-procedures-act-download?sku=E126-110>

20% TAX DEDUCTION FOR PASS THROUGH BUSINESSES

a. The Tax Cut and Jobs Act of 2017 (TCJA) touched the real estate industry in a variety of ways. One of the biggest changes for REALTORS® is the new 20% tax deduction for qualified business income, also known as Section 199A. The deduction grants self-employed persons as well as owners of pass-through businesses (S corporations, partnerships, and limited liability companies) with eligible income (including commissions from real estate sales) a deduction of up to 20% on their net business income. Rental income from real estate may also qualify for the deduction, depending on the circumstances. For owners with incomes above certain limits, the deduction is more complex and certain business activities do not qualify for the deduction.

b. Tax Tips:

- i. For those with taxable income below \$157,500 for single filers (below \$315,000 for joint filers), the deduction is quite straightforward and most business income is eligible for the deduction.
- ii. The deduction is phased out ratably for those with incomes above the thresholds but below \$207,500 (singles) and below \$415,000 (joint).
- iii. Business owners with taxable income above the phase-out limits face certain prohibitions on the type of income eligible for the deduction. For example, income earned in the performance of service in the fields of health, law, accounting, performing arts, consulting, athletics, financial services, investing or trading is not qualified. Also, the deduction for these higher-income business owners is more complex and based on the amount of wages paid and/or depreciable property in the business.

c. NAR Resources:

- i. Article, How the 20% Business Income Deduction Applies to You: <https://magazine.realtor/law-and-ethics/feature/article/2018/09/how-the-20-business-income-deduction-applies-to-you>
- ii. Video, The Voice for Real Estate 90: How to Take the New 20% Deduction:
<https://www.nar.realtor/the-voice-for-real-estate/how-to-take-the-new-20-deduction>
- iii. Article, Big Win for REALTORS® on IRS Guidance for 20% Income Deduction:
<http://speakingofrealestate.blogs.realtor.org/2018/08/09/big-win-for-realtors-on-irs-guidance-for-20-income-deduction/>
- iv. NAR’s comment letter to the Treasury and the IRS:
<https://narfocus.com/billdatabase/clientfiles/172/3/3247.pdf>
- v. NAR Washington Report: NAR Urges Deduction for Rental Income:
<https://www.nar.realtor/washington-report/nar-urges-deduction-for-rental-income>