

Hot Topics in Broker Risk Reduction

November 2017

Katie Johnson
General Counsel & Senior Vice President
kjohnson@realtors.org

1. Cybercrime (<https://www.nar.realtor/data-privacy-security>)

- a. **Background:** Cybercrime is on the rise and real estate transactions are a prime target because they involve many parties and the electronic transfer of large sums of money. A variety of sophisticated scams are being directed at the real estate industry; most notably, wire fraud scams. Cybercrime is often devastating and can mean the loss of a client's life savings, as well as significant expenses for a broker having to take remedial measures following an attack and defending from legal liability.
- b. **Risk Reduction Tips:**
 - i. Avoid sending any sensitive financial information via email. Instead, use a secure transaction management platform or document-sharing program.
 - ii. Alert homebuyers to potential wire fraud and instruct them to call wire recipient using an independently-verified number. <http://www.realtor.org/videos/wire-fraud-alert-for-buyers>
 - iii. Use strong passwords, purge email regularly, never open unsolicited links or attachments, and avoid using unsecured wifi.
 - iv. Develop and implement a Data Security Policy and a Document Retention Policy.
 - v. Review your insurance coverage for cyber, social engineering, and electronic crime riders.
- c. **NAR Resources:**
 - i. Cybercrime and Cyber Security Webinar: <https://www.nar.realtor/videos/cyber-crime-cyber-security-and-the-real-estate-professional>
 - ii. Data Security and Privacy Toolkit and Video: <http://www.nar.realtor/law-and-ethics/nars-data-security-and-privacy-toolkit> and <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
 - iii. Cyber Insurance: <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>

2. Teams (<https://www.nar.realtor/being-a-realtor/partnerships-teams/legal-issues-for-teams>)

- a. **Background:** As real estate teams have become a popular method for real estate professionals to service their clients and a profitable model for brokers, teams may expose brokers to potential areas of risk. Brokers should be familiar with team-related legal concerns, including proper worker classification, agency, supervision, licensed v. unlicensed activity, and compliance with state advertising and team-specific regulations.
- b. **Risk Reduction Tips:**
 - i. Brokers should supervise teams to ensure compliance with state laws and regulations.
 - ii. Where a broker classifies its agents as independent contractors, brokers should work ensure that team members are being properly treated as independent contractors.
- c. **NAR Resources:**
 - i. Videos: <https://www.nar.realtor/videos/window-to-the-law-legal-issues-for-teams> and <https://www.nar.realtor/videos/window-to-the-law-video-real-estate-team-legal-considerations>
 - ii. Article at: <https://www.nar.realtor/law-and-ethics/legal-issues-for-teams>
 - iii. *Broker Checklist for Possible Team Legal Issues*, at: <https://www.nar.realtor/law-and-ethics/broker-checklist-for-possible-team-legal-issues>

3. Copyright Infringement (<http://www.realtor.org/topics/copyright>)

- a. **Background:** With recent litigation against real estate brokers, agents, and portals, being brought by photographers and musicians, the need for brokers to ensure proper rights have been obtained in photographs and music used in listing content and the need to properly manage the dissemination of listing content in the MLS, public portals, and other venues remains paramount. In addition, the DMCA safe harbor is a great tool to reduce both broker and agent liability related to third party photos appearing on IDX sites, and it requires compliance by December 31, 2017, in order to maintain the safe harbor's protection.
- b. **Risk Reduction Tips:**
 - i. Use written agreements to obtain ownership or requisite exclusive licensing rights in listing photographs. (<https://www.nar.realtor/law-and-ethics/listing-photo-sample-agreements>)
 - ii. Comply with the safe harbor provisions of the Digital Millennium Copyright Act, including the recent changes requiring compliance by December 31, 2017.
- c. **NAR Videos:**
 - i. Listing Photo Copyright Issues, at: <https://www.nar.realtor/videos/window-to-the-law-listing-video-copyright-issues>
 - ii. Changes to the DMCA Safe Harbor, at: <https://www.nar.realtor/videos/window-to-the-law-video-changes-to-dmca-safe-harbor>
 - iii. Copyright Infringement Safe Harbor, at: <https://www.nar.realtor/videos/window-to-the-law-copyright-infringement-safe-harbor>

4. ADA Website Accessibility (<https://www.nar.realtor/accessibility>)

- a. **Background:** Plaintiffs' law firms are sending demand letters and initiating litigation against businesses in a variety of industries, including real estate, alleging that their websites are not compliant with the American with Disabilities Act (ADA). The law is not clear on whether the ADA applies to websites generally and the Department of Justice has failed to issue any rulemaking to-date so compliance obligations for private businesses remain unknown. A recent suit against Domino's Pizza was dismissed when the court found that there can be no liability until the DOJ issues guidance and the toll free hotline provided on the website could have been an acceptable alternative accommodation. (<https://www.nar.realtor/legal-case-summaries/website-accessibility-lawsuit-dismissed>)
- b. **Risk Reduction Tips:**
 - i. Ask your website provider about your site's accessibility and about indemnification in the event of a challenge.
 - ii. Include contact info on your site for individuals with disabilities to report difficulty accessing the website. For example, see (and feel free to copy): <https://www.nar.realtor/accessibility>.
- c. **NAR Resources:**
 - i. *Window to the Law: Accessible Websites and the ADA*, at: <https://www.nar.realtor/videos/window-to-the-law-accessible-websites-and-the-ada>
 - ii. NAR Comment in Response to DOJ's Supplemental Advanced Notice of Proposed Rulemaking, at: <http://www.narfocus.com/billdatabase/clientfiles/172/3/2752.pdf>