



MASSACHUSETTS ASSOCIATION OF REALTORS®

NEW REAL ESTATE FORMS

Notes from the MAR Legal Hotline
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The MAR Forms Content Committee has recently approved three new forms that you can now access on your electronic forms platform. Here is a summary of each form.

1. Wire Fraud Advisory Form

Working in conjunction with the Boston Federal Bureau of Investigation, MAR created this form to help your clients stay protected from the growing threat of email scams.

Here is an example of a typical scam that we hear about. A buyer in a transaction will receive an email from a real estate agent, title company, or attorney with wiring instructions to transfer money for the upcoming transaction. The email appears genuine and contains the company's email information and logo, and sometimes will include manipulative language to encourage you to act quickly. The email, however, is actually not from the so-called sender; rather, it is from a hacker who had monitored the email account of one of the parties, then altered information in the email to have the funds sent to the hacker's own account. Once the buyer transfers the funds pursuant to the wiring instructions included in the email, the funds are placed into the hacker's account, most likely never to be recovered. In this example, the buyer was targeted but keep in mind that altered emails could conceivably be sent to any party in the transaction to cause misdirection of funds.

What you can do to protect yourself:

- Encourage your clients to secure their computer systems and email accounts
- All parties in the transaction should confirm all emailing wiring instructions directly with the escrow officer via telephone prior to making any transfers
- If any party in the transaction has received suspicious or questionable wiring instructions, all parties should be notified immediately
- Carefully review your E&O Policy to see if your policy covers cybercrime
- Use the new MAR Wire Fraud Advisory Form with clients and explain that these crimes to continue in our market

2. Escalation Addendum to the Contract to Purchase

In this high-demand/low-inventory market, the use of escalation clauses in transactions has grown significantly. This new form attempts to standardize the use of escalation clauses and

reduces the risk to Realtors®. The form is accompanied by a two page explanation sheet to give buyers and sellers more information to consider when using these clauses.

An escalation clause is a term that is included in a buyer's offer that allows the buyer to automatically increase his or her offer to a certain amount. Because every transaction is different, we recommend that your buyer clients carefully consider the advantages and disadvantages of using an escalation clause, and to always consult with an attorney before including one in an offer.

Key considerations

While the terms in escalation clauses can vary, most escalation clauses contain the same basic features. These features include the original offer, the amount by which the buyer is willing to escalate his or her offer, the total amount that the buyer is willing to offer (the "cap") and details about how the buyer will fund the escalated offer. In order for the escalation clause to kick-in, the seller must have received a higher **bona fide** offer from a competing buyer. A **bona fide** offer is an offer that is made in good faith and is legitimate and enforceable. At the buyer's request, the seller must provide documentation to the buyer that the other offer was **bona fide**.

An escalation clause may not be right for all parties

Buyers should consider a few things before using an escalation clause in their offer. For example, buyers should be aware that not all sellers accept offers that contain escalation clauses. Some sellers prefer to know the exact amount that a buyer is willing and able to pay for a home. In addition, escalation clauses can lead to increased paperwork and can complicate the final decision about which offer the seller accepts. The buyer should also be aware that escalation clauses reveal to the seller more information than is contained in a traditional offer. This is because the seller will know exactly how much the buyer is willing to pay. The seller could then decline the buyer's offer and propose a counteroffer above the buyer's cap.

3. Addendum Regarding Prohibiting Smoking and Prohibiting Marijuana

With the recent legalization of recreational marijuana, MAR has created an Addendum to the MAR Standard Form Lease that prohibits the use or smoking of marijuana on or inside a rental unit.

In November 2016, Massachusetts voters approved a ballot initiative, which allows for the recreational use of marijuana. It was passed by a fairly wide margin of 54% to 46%. Under the new law, the use of marijuana for recreational purposes became legal on December 15, 2016. However, the sale of the drug from regulated retail stores will not be permitted until July 2018.

Homeowners, landlords, and tenants should keep in mind that although legal under state law, marijuana remains a Schedule 1 illegal substance under federal law. Up until this point, the federal government has taken the position that it will not enforce federal law in those states that permit recreational marijuana usage. However, there is no guarantee that they will keep this

position in the future as more and more states change their laws to allow for the use of marijuana.

When it comes to rentals, a landlord and tenant should address whether or not the tenant will be permitted to use or smoke marijuana on or in the property. MAR's new lease addendum should be used in those cases where a landlord wishes to prohibit this activity.
