Hot Topics in Broker Risk Reduction

Broker Power Hour
June 7, 2022
Hot Topics in Broker Risk Reduction

Katie Johnson, General Counsel & Chief Member Experience Officer, May, 2022

Download Hot Topics in Broker Risk Reduction for May, 2022  pdf 278.73 kb

Competition in Real Estate

a. REALTORS® help foster competition through their participation in local broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants.
Local Broker Marketplaces Foster Competition

Independent, local broker marketplaces create highly competitive markets that are friendly to small businesses and new market entrants.

Multiple Listing Services (MLSs) are independent broker marketplaces that focus exclusively on residential real estate in local real estate markets. Access to inventory and free advertising as well as the practice of the listing broker paying the buyer brokers’ commission incentivizes participation in these local real estate marketplaces and creates the largest, most accessible and most accurate source of housing information available to consumers. That levels the playing field among brokerages, allowing small brokerages to compete with large ones, and provides for unprecedented competition among brokers, including different service and pricing models.
CONSUMER ACCESS & OPPORTUNITY

The U.S. model of local broker cooperation has long been – and is still – viewed as the best value for consumers around the world. Local broker marketplaces provide sellers equal access to the largest possible pool of potential buyers and create the greatest number of housing options for buyers in one place without hidden or extra costs. Sellers making offers of compensation to buyer brokers also gives first-time, low/middle-income and all homebuyers a better shot at affording a home and professional representation. The free market organically establishes commission costs within local real estate markets based on service, consumer preference and what the market can bear, among other things.
REALTORS® are everyday working Americans who champion homeownership and property rights for the communities they serve.

REALTORS® are entrepreneurs—most often small business owners—who exemplify the spirit of this country. As expert, local brokers, REALTORS® help consumers navigate what is for many the most complex and important transaction they'll ever do. Every REALTOR® is bound by a strict code of ethics based on professionalism, consumer protection and the golden rule. REALTORS® also are engaged neighbors committed to building and enhancing the communities they serve and fighting for fair housing.
Following are stories that bring to life how REALTORS® advocate for consumers, how local broker marketplaces advance equity and access, and how small businesses are beneficiaries of these local real estate marketplaces.

- Growth of technology makes it even more important to use a REALTOR®
- Closing the Racial Homeownership Gap Must Be Part of Our Long-Term COVID Response
- Expertise when Buying, Selling Home Matters Even More in Internet Age
- NAR Board approved major MLS rule changes to take effect in January
How Real Estate Commissions Work

It’s important for consumers looking to experience the American dream of homeownership to understand how real estate agents are paid for the services they provide. At the outset, the seller and that person’s listing broker agree on the amount the listing broker will receive for the services it provides to the seller. The listing broker and seller also discuss and agree upon an amount that the listing broker will pay a broker who successfully closes the transaction with a ready, willing and able buyer. Here are seven additional things you need to know.

1. **Commissions are always negotiable.**

Commissions can be negotiated at any point throughout the transaction, including at the outset, after the results of a home inspection and after an offer has been made. Sellers negotiate with their broker what fee they are willing to pay for their broker’s services and the amount the listing broker offers to pay a cooperating buyer broker who brings a buyer for their home.

2. **There are different commission models to choose from.**

Buyers have many different choices about which broker they want to work with in terms of everything from the commission model to a real estate agent’s particular expertise to the agents’ customer service approach. In the full-service approach, commissions are negotiable at any point during the
## Key Questions Answered

Here are answers to some of the most common questions about competition and real estate.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is there a “set commission” real estate agents charge consumers?</td>
<td>+</td>
</tr>
<tr>
<td>Why not require buyers to pay commissions directly to their broker instead of the historic practice of listing brokers paying the buyer broker?</td>
<td>+</td>
</tr>
<tr>
<td>How does the U.S. model compare to other, international broker marketplaces?</td>
<td>+</td>
</tr>
<tr>
<td>Why are MLSs needed when you can find listings for homes in so many places online?</td>
<td>+</td>
</tr>
<tr>
<td>What is NAR’s role relative to independent, local MLS broker marketplaces?</td>
<td>+</td>
</tr>
<tr>
<td>Why should real estate professionals make the money they do in commissions when so much information is available online?</td>
<td>+</td>
</tr>
<tr>
<td>How does NAR promote access to homeownership?</td>
<td>+</td>
</tr>
<tr>
<td>How is NAR promoting equity in homeownership?</td>
<td>+</td>
</tr>
<tr>
<td>How do real estate professionals advance the economy?</td>
<td>+</td>
</tr>
<tr>
<td>What is happening with NAR and the Department of Justice?</td>
<td>+</td>
</tr>
<tr>
<td>How has NAR moved forward on what it agreed to with the DOJ?</td>
<td>+</td>
</tr>
<tr>
<td>What’s happening with class action lawsuits challenging how local broker marketplaces work?</td>
<td>+</td>
</tr>
<tr>
<td>What’s going on with lawsuits NAR is facing that challenge the Clear Cooperation Policy?</td>
<td>+</td>
</tr>
<tr>
<td>What is NAR’s thoughts on a certain industry participant who is regularly attacking NAR?</td>
<td>+</td>
</tr>
</tbody>
</table>
Ransomware/Cybersecurity

1. Train staff to be suspicious before clicking on anything unknown.
2. Routinely patch and update business software and equipment.
3. Educate consumers about the threat of wire fraud and need to verify.
4. Use multifactor authentication and require passwords to be updated regularly.
5. Backup data and files regularly, following the 3-2-1 backup strategy.
6. Ensure vendors to adhere to good cybersecurity practices.
7. Immediately report ransomware incidents to local FBI office, local law enforcement, and file a report at www.ic3.gov (link is external).
NAR Data Security & Privacy Toolkit (updated)

• Created in 2010 and previously updated in 2017

• New updates in 2022

• Provides education, tools and information for data security and privacy, and legal requirements

Multiple Offers

1. Discuss the potential for multiple offers at the listing interview and get the seller’s instruction for handling multiple offers in advance.

2. Know your state laws regarding duties owed to clients, presenting offers, and what may be disclosed to the other party in a multiple offer situation.

3. Remember that Article 1 requires REALTORS® to promote the interest of their client while treating all parties honestly.

4. Keep in mind that poorly drafted Buyer Love Letters can trigger fair housing violations for both the real estate professional and the seller.

5. Discuss the pros and cons of escalation clauses or addendums with buyers.
Copyright Infringement

1. Obtain ownership or a broad exclusive license for photographs.

2. Secure necessary licenses in order to play music at a live event or incorporate music into a listing video.

3. Be sure to understand the rights granted in license agreements, and consider any future use of copyrighted material when securing the license.

4. Comply with the Digital Millennium Copyright Act safe harbor.

5. Keep records of license agreements to easily confirm rights, if challenged.
Floorplan Copyright Litigation

**Designworks Homes, Inc. and Charles Lawrence James v. Columbia House of Brokers Realty Inc, 9 F.4th 803 (US Ct of Appeals, 8th Cir., 2021)**

- **Allegation:** Designworks brought action that its copyright of its architectural work were infringed by real estate brokers when they published a floor plan when trying to sell homes.

- **Summary Judgment Reversed:** On August 16, 2021, the appellate court reversed the trial court’s grant of summary judgment. Held that a floor plan is a technical drawing and not a pictorial representation.

- **Status:**
  - Case has been remanded to the trial court so it can consider the defendants’ other raised defenses such as fair use.
  - On April 7, a Petition for Writ of Certiorari to US Supreme Court was filed by a broad coalition of 18 groups led by NAR.
Fair Housing

1. Implement an Equal Services Report and Checklist for all customer interactions.

2. Ensure any prerequisites are consistent and objective.

3. Focus on objective characteristics of the property and avoid giving personal opinions about a neighborhood or community.

4. Warn of fair housing concerns related to poorly drafted letters Buyer Love Letters and avoid reviewing them should clients insist on using them.

5. Incorporate regular implicit bias and fair housing compliance into your ongoing training plans.
ADA Website Accessibility

1. Assess your website’s current accessibility, and create a plan to take steps to address and enhance any accessibility issues.

2. Ask your website provider about how they are addressing your site’s accessibility, and be sure to address ADA website accessibility and indemnification issues in your contract with the provider.

3. Consult a website accessibility expert to create a plan for addressing website accessibility issues.

4. Include an accessibility statement on your website, along with contact info where individuals with disabilities may report difficulty accessing the website and can seek additional assistance accessing information or services. Feel free to copy NAR’s accessibility statement on its website.
TCPA

1. Obtain clear, written consent of the recipient prior to sending texts, especially when using technology that employs a random or sequential number generator.

2. Include language on consent forms stating that submitting wireless numbers means consent to receive calls and text messages.

3. Allow recipients to easily cancel or opt-out (e.g., by responding “STOP” or “UNSUBSCRIBE”). Promptly remove individuals from your messaging lists who have opted out.

4. Preserve written records of consent and opt-out activity.

5. Talk to your vendors about TCPA and DNC compliance and indemnification.
LITIGATION UPDATE

• Rule of Compensation Litigation
• DOJ Update
• Clear Cooperation Policy Litigation
Rule of Compensation Litigation

**Moehrl v. National Association of REALTORS et al.,**
Case Nos.: 1:19-cv-01610 and 1:19-cv-2544 (N.D. Ill. 2019)

- **Filed:** March 6, 2019
- **Allegation:** Home sellers unfairly pay the commissions of buyers’ brokers.
- **Status:** Discovery proceedings and class certification

**Sitzer v. National Association of REALTORS et al.,**
Case No. 4:19-cv-00332-SRB (W.D. Mo. 2019)

- **Filed:** April 20, 2019
- **Allegation:** Home sellers unfairly pay the commissions of buyers’ brokers.
- **Status:** Appeal certification of class of plaintiffs
Rule of Compensation Litigation

Leeder v. National Association of REALTORS® et al., Civil Action No.:1:21-cv-00430 (N.D. Ill. Filed Jan. 25, 2021)

- **Filed:** January 25, 2021
- Plaintiff are a class of home buyers who purchased a home on REALTOR® association-owned MLS from December 1996 to present
- **Allegation:** That NAR and corporate defendants promulgated and enforced anticompetitive rules that caused inflated commissions and inflated home prices
- **Status:** Dismissed (without prejudice). Amended complaint due on July 6.
DOJ Update

In an unprecedented move, the Department of Justice withdrew its consent to the settlement agreement reached in 2020. Lesley Muchow, Deputy General Counsel and Vice President, Legal Affairs, and AMR Trust, provided an update.

- The Department of Justice has withdrawn its consent to a settlement agreement reached in 2020, which had received issues raised by the DOJ about brokerage commissions and the MLS system. The DOJ also voluntarily dismissed its action in federal court.
- The proposed changes to the Code of Ethics and MLS rules, which were the result of the settlement agreement, are on hold.
- NAR is committed to act in the best interest of buyers and sellers across the country, and will continue to update our policies and rules to protect consumers and promote transparency and efficiency in the real estate marketplace.

As a small business owner and president of the National Association of REALTORS® (NAR), I want to set the record straight on misconceptions by some about the real estate industry.
Clear Cooperation Policy Litigation


- **Filed:** May 11, 2020
- **Allegation:** That the Clear Cooperation Policy is anticompetitive
- **Trial Court Dismissal:** On August 16, the case was dismissed with prejudice
- **Status:** On September 10, TAN filed a Notice of Appeal. Pending appeal in the 9th Circuit.
Clear Cooperation Policy Litigation

The PLS.com, LLC v. National Association of REALTORS® et al., Case No. 2:20-cv-04790 (C.D. Cal., 2020)

- **Filed:** May 28, 2020
- **Allegation:** That the Clear Cooperation Policy is anticompetitive
- **Trial Court Dismissal:** On February 3, 2021, the case was dismissed with prejudice
- **Status:** On February 23, 2021, PLS filed a Notice of Appeal. Pending appeal in the 9th Circuit.
Hot Topics in Broker Risk Reduction

Katie Johnson, General Counsel & Chief Member Experience Officer, May, 2022

Download Hot Topics in Broker Risk Reduction for May, 2022  pdf 278.73 kb

Competition in Real Estate

a. REALTORS® help foster competition through their participation in local broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants.
Real Estate Brokerage Essentials®: Navigating Legal Risks and Managing a Successful Brokerage, Fourth Edition is the most comprehensive business tool for brokers to run their offices efficiently and minimize their risk for legal liability. This is a must have for all Brokers!

Available in the REALTOR® Store!