

Legal Update

Regional Association Executives Conference 2023

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NARdotRealtor



nar.realtor



Litigation Landscape

- Rule of Compensation Litigation
- Clear Cooperation Policy Litigation
- DOJ Litigation
- REX Litigation

How you can help with litigation

**We need your
help in the court
of public opinion.**

NAR APPROACH



**Proactive
story-telling**



Powerful Content



**Thoughtful
Response**



**Member
Engagement**



Articulate the value proposition:

- How do you serve in consumers' best interests?
- What do they get by working with a REALTOR®?
- How do your services provide great value to this significant transaction?
- How will you get paid, and why does that structure serve their interests?
- What is the MLS and what are the benefits it provides consumers?

COMPETITION.REALTOR



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Competition in Real Estate

REALTORS® are mostly small business owners who work to ensure buyers and sellers have the greatest access, transparency and choice through independent, local broker marketplaces that level the playing field for all types and sizes of brokerages.

[Learn More](#)

[Fostering Competition](#) [Consumer Access & Opportunity](#) [REALTORS® as Champions](#) [In the News](#) [FAQ](#)

Fostering Competition

Multiple Listing Services (MLSs) are independent, local marketplaces that promote innovation and make it possible for residential real estate businesses of all types and sizes to compete.

Consumer Access & Opportunity

Local broker marketplaces ensure equity, transparency and market-driven pricing options for the benefit of home buyers and sellers.

REALTORS® as Champions

REALTORS® are everyday working Americans who champion wealth building through homeownership and property rights while advocating for their communities.

FREQUENTLY ASKED QUESTIONS

Real Estate Topics > Competition & Opportunity in Real Estate

FAQs

Answers to some of the most common questions about competition & opportunity in real estate.

Why can't commissions be included as part of a mortgage?

Is there a "set commission" real estate agents charge consumers?

Why not require buyers to pay commissions directly to their broker instead of the historic practice of listing brokers paying the buyer broker?

How does the U.S. model compare to other, international broker marketplaces?

Why are MLSs needed when you can find listings for homes in so many places online?

What is NAR's role relative to independent, local MLS broker marketplaces?

Why should real estate professionals make the money they do in commissions when so much information is available online?

How does NAR promote access to homeownership?

How is NAR promoting equity in homeownership?

How do real estate professionals advance the economy?

IN THE NEWS

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Real Estate Topics > Competition & Opportunity in Real Estate

In the News

Following are stories about competition in real estate, how local broker marketplaces advance equity and access, and REALTORS® as consumer advocates.

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Local Broker Marketplaces Foster Competition

- Opinion: Court DOJ decision one of many pro-consumer moments +
- NAR Board approved major MLS rule changes to take effect in January +
- Real-Estate fees and competitive cooperation +
- National Association of REALTORS® files petition to oppose Department of Justice breach of settlement agreement +
- The problem with antitrust litigation as a real estate business strategy +
- MLSs advance small business, equity in homeownership +
- Charlie Oppler: DOJ needs to honor agreement with NAR +

INFOGRAPHICS

SELLING A HOME IS EASY!*

*If You Work with a Real Estate Agent Who is a REALTOR®

SOME PEOPLE THINK SELLING A HOME IS AS SIMPLE AS:

- Put a sign in your yard
- Let other real estate agents know
- Patiently wait

BUT THERE'S SO MUCH MORE TO IT.

Some of the things a real estate agent who is a REALTOR® helps you with include:

PRE-LISTING

- Research sales activity for past 18 months from local broker marketplaces and public records databases.
- Guide on best market pricing position based on current market.
- Perform exterior curb appeal assessment.
- Address important topics such as odors, clutter, cleanliness, décor neutralization and more.

LISTING

- Create detailed list of property amenities.
- Develop and execute marketing plan.
- Coordinate showings with seller and other agents.
- Pull data to compare offers.
- Create plan for pricing strategies accounting for local market conditions.
- Promptly enter price changes on local broker marketplace listing database.
- Prepare contract for buyer.
- Communicate weekly with activity, showings of homes that compete and market movement.
- Follow up with each buyer and agent with timeliness and kindness.
- Have a strong market reputation where agents want to show your home.
- Continue to audit the home to make sure it's market ready.
- Negotiate all offers.

CLOSING

- Help coordinate and review appraisal.
- Audit itemized list of all cost components seller and buyer are to pay.
- Protect trust/earnest money through process.
- Ensure transaction is flowing to avoid unexpected complications.
- Ensure smooth transition with utilities, final walk-throughs, inspection repairs and other tasks.
- Coordinate closing process with buyer's agent, lender and closing company.
- Explain technicalities in the final contract.

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BUYING A HOME IS EASY!*

*If You Work with a Real Estate Agent Who is a REALTOR®

SOME PEOPLE THINK BUYING A HOME IS AS SIMPLE AS:

- Look at houses online
- Find something you can afford
- Sign some papers

BUT THERE'S SO MUCH MORE TO IT.

Some of the things a real estate agent who is a REALTOR® helps you with include:

GETTING STARTED

- Educate client on home buying process and coordinate a plan.
- Review buyer rep agreement, agree upon representation and negotiate compensation.
- Understand budget and explain what will be needed financially.
- Search local broker marketplaces to find best matches.
- Serve as local housing market expert (e.g., price trends, negotiation trends, community).
- Arrange tours of homes and neighborhoods.
- Decipher public property and tax information.

FINDING YOUR HOME

- Research home information that aligns with buyers' interests.
- Prepare buyer to have the most attractive offer in the current marketplace.
- Coordinate professional home inspections, consultations with lenders and necessary property assessments.
- Develop competitive offers and negotiate the best price and terms.
- Represent clients' best interests, advise throughout the negotiation process and close the deal.
- Seward multiple parties and schedules to save buyer time.
- Look beyond décor, flooring and paint colors to other significant aspects of home.

ACHIEVING HOME OWNERSHIP

- Navigate state and federal forms.
- Research mortgage rates, terms and reputable lenders.
- Coordinate with lenders.
- Seward important contract deadlines.
- Provide guidance for walk-throughs prior to closing to ensure property condition.
- Work with necessary parties to ensure all contractual terms are completed by closing.
- Advocate for buyer throughout entire process and closing.
- Review buyer's closing statement to ensure accuracy.
- Provide information for everything needed to live in new home.
- Ensure all required actions are complete in advance, so closing day is a celebration, rather than a stressor.
- Remain a lifelong, trusted advisor

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LOCAL BROKER MARKETPLACES IN ACTION

Multiple Listing Services (MLSs) are independent broker marketplaces that connect buyers and sellers of real estate in the U.S. through their respective agents. Local broker marketplaces give first-time, low-income and other buyers better access to the American dream of homeownership while also exposing a seller's property to the greatest number of potential buyers.

WHAT LOCAL BROKER MARKETPLACES DO FOR YOU:

- Largest databases of available homes
- Most up-to-date home status information
- Maximized visibility of homes for sale
- Verified, trusted, detailed and accurate property information
- Facilitate cooperation between buyer and seller brokers
- Equal opportunity for all home buyers and sellers
- Easy to find the agent selling the home
- Level playing field between large and small brokerages

A WORLD WITHOUT LOCAL BROKER MARKETPLACES:

- No centralized source of available homes
- Outdated home status information
- Fewer homes for buyers to choose from on real estate websites
- Unverified, inaccurate and unreliable property information
- Buyers/sellers would likely have to pay to list on websites
- Residents without access to brokerages would have fewer options
- Inconsistent broker information in listings across marketplace
- Markets become broker-controlled

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WHY HIRE AN AGENT WHO IS A REALTOR®?

As experts of all things related to home buying and selling, real estate agents who are REALTORS® help consumers navigate the most complex and consequential transaction many of us will ever make.

BUYERS: Roughly 9 in 10 buyers work with a real estate agent who helps negotiate the best price & terms.

SELLERS: Without a REALTOR®, For Sale Owner homes sell for about less than agented properties.

WHEN YOU USE A REAL ESTATE AGENT:

They help you with things like...

- Navigate legal details including managing attorney reviews, filing required state and federal forms, and knowing contracts inside and out.
- Understand financial complexities such as mortgage rates and terms, appraisals and inspections, and coordination with lenders.
- Uncover community elements like property taxes, public property information, price trends and neighborhood details.

WHEN YOU DON'T USE A REAL ESTATE AGENT:

You have to do things like...

- Make sense of all the legal aspects of buying or selling a home.
- Become a financial expert and local tax codes & policies.
- Coordinate inspections and appraisals without training or know the best people.
- Learn local negotiating trends and
- Write your offer to outshine all other seller, evaluate all details of each beyond just price.
- Negotiate with seller, buyer and
- Accept your home likely will sell

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Toolkits

CONSUMER ACCESS & OPPORTUNITY REALTOR® TOOLKIT

Introduction

There are some – including class action attorneys motivated by self-interests – who are raising questions about the benefit of local MLS broker marketplaces[®] and REALTORS®. Each of us recognizes local real estate – buoyed by REALTORS® – is pro-consumer and pro-competitive. It's important that we continue to find ways to communicate and amplify these realities to clients, consumers, media and other interested parties.

To that end, there are three communications toolkits to help explain the benefits of local broker marketplaces and REALTORS®:

- Fostering Competition: Primarily business and economics storytelling
- **Consumer Access & Opportunity (this toolkit): Primarily business and consumer storytelling**
- REALTORS® as Champions: Primarily consumer storytelling

These toolkits contain a variety of communications materials that can be used as is or customized for local markets. You also can cut and paste relevant portions to share with members, as appropriate.

If you have any questions about this or other toolkits, please contact Mantill Williams (MWilliams@nar.realtor) in NAR communications or Lesley Muchow (L.Muchow@nar.realtor) in NAR legal.

Additional references and sites you can share, when pertinent, include [competition.realtor](#) (or the landing page [Prohomebuyersandsellers.com](#) to send someone directly to the "Consumer Access & Opportunity" section) or [RealEstateCommissionFacts.com](#), if there's a need to refer someone to content solely focused on how compensation works.

* Rather than refer only to Multiple Listing Services, we recommend a more explanatory term that better captures what MLSs are and how they operate: Independent, local broker marketplaces. It's important that people understand there's not a single broker marketplace; that each one is local or regional; and that each one has its own oversight organization. It can be appropriate to use different combinations of these terms depending on the context and on first or second reference, but "local broker marketplaces" is generally the term that best and most succinctly describes what they are. Note: More dated materials (e.g., older op eds) might not use the current, preferred terminology, but they may otherwise be a good resource for reference about pro-consumer, pro-competitive local broker marketplaces.

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FOSTERING COMPETITION REALTOR® TOOLKIT

Key Facts

Economic Impact

- Real estate accounts for nearly 17% of the nation's GDP. [\[Source\]](#)
- Every home sale generates roughly \$113,200 in local economic activity, and every **two home** sales support one American job. [\[Source\]](#)
- 89% of sellers list their homes in a local MLS broker marketplace, which is the number one source for sellers to list their home. [\[Source\]](#)

About Local Broker Marketplaces

- Each local broker marketplace provides quick, complete exposure to the largest and most centralized database of residential real estate listings in that local market.
- Businesses who participate in local real estate marketplaces compete on compensation, offering many different service and fee options ranging from varied compensation models to flat fees.
- Online home listing and brokerage websites get much of their listing data from local MLS broker marketplaces.
- Participants in local MLS broker marketplaces are guided by the Clear Cooperation Policy, which requires a listing broker to submit their listing to the marketplace within one business day of marketing a property to the public. This ensures equitable access to listings for all potential home buyers.

About Commissions

- The U.S. is seeing unprecedented competition among real estate brokers, especially when it comes to service and commissions.
- According to Real Trends, the average commission in the U.S. has fallen to a new low of 4.94%, down from 5.4% in 2012. [\[Source\]](#)

About REALTORS®

- In the real estate industry, there are 406,569 establishments, 83.3% of which employ fewer than 500 workers of a total of 2.1 million employees. [\[Source\]](#)
- Of the 1.5 million REALTOR® entrepreneurs across the country, more than 1.3 million (87%) are small businesses. [\[Source\]](#) 65% of REALTORS® are women. [\[Source\]](#)
- REALTORS® account for more than 4% of all U.S. small businesses. There are 31.7 million small businesses in America, including those with no employees, [\[source\]](#) of which 1.3 million are REALTORS®. [\[Source\]](#)
- REALTORS®, 88% of whom are single offices, typically have two full-time real estate licensees. [\[Source\]](#)

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REALTORS® AS CHAMPIONS REALTOR® TOOLKIT

Sample 30-Second Radio Ad Script

The following sample scripts can be used for local radio ads. Customize as you see fit, and be sure to read aloud to ensure they align with applicable timing requirements.

Sample 1: Real estate agents the experts for biggest lifetime purchase

For most of us, buying a home is the most significant purchase we'll ever make. Real estate agents who are REALTORS® are the experts there to help.

Need someone who knows about local property taxes and neighborhoods? Check.

Need someone who can coordinate with lenders and research mortgage rates? Check.

Need someone who can manage required state and federal forms and closing documents? Check.

When the time comes for your home purchase, save time, save money and save yourself a lot of stress. Work with an expert. Work with a real estate agent who is a REALTOR®. There's too much at stake not to.

Sample 2: Online only takes you so far when buying a home

Sure, you can go to WebMD and find symptoms of pain in your arm. But you need a doctor to diagnose and treat the condition.

In the same vein, you can go online and find a massive list of houses for sale. But you need a real estate agent who is a REALTOR® to navigate that information and data. Not to mention all the things you can't find online.

People get it. While most buyers begin their home search online, 9 in 10 still choose a trusted real estate agent to guide them through this infrequent, complex transaction.

A real estate agent who is a REALTOR® is a professional dealing EVERY. SINGLE. DAY, with community and financial and legal aspects of home buying. So while you can start your home search online, it's a real estate agent who will get you to the finish line.

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Real Estate Commissions Facts



We have received questions about why brokers representing home sellers often pay the commission of brokers representing home buyers. Here are answers to those questions and basic information every buyer and seller needs to know.

This practice has worked so well for so long because it provides the greatest economic benefits for both buyers and sellers, creates greater access and equity for first-time, low- and middle-income and all buyers and enables small business brokers to compete with larger brokers.

In fact, listing brokers paying the commission of buyer brokers underpins local broker marketplaces, which are the primary source of information for home search sites, and serve as the driving force behind America's efficient and accessible real estate market.

How Real Estate Commissions Work

In order to understand how real estate commissions are paid, it's necessary to first understand the tool used in the vast majority of all home purchases: a Multiple Listing Service.

Multiple Listing Services, or local broker marketplaces, are essentially databases of all the homes for sale in a given market, maintained in most cases by local REALTOR® associations. Local REALTOR® associations also make most of this information publicly available for free, and each database often feeds



Encourage the Use of Buyer Representation Agreements:

- Promotes transparency.
- Avoids misunderstandings.
- Establishes a contractual and agency relationship between the agent and the buyer.
- Ensures the real estate professional gets paid.
- Helpful in the event of a dispute.
- Very common with professional services, like a lawyer's services.

It's time to act

Through storytelling.

Conversations.

Social platforms.

Media relations.

People need to and want to hear YOUR MEMBERS' experiences.

Litigation & Risks to Watch



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:**
 - On June 27, the US Supreme Court denied the Petition for Writ of Certiorari filed by a broad coalition of 18 groups led by NAR.
 - Remanded to the trial court so it can consider the defendants' fair use defense and its motion for summary judgment.

Floorplan Copyright Litigation

Kipp Flores Architects, LLC v. AMH Creekside Dev., LLC SA-21-CV 01158 (W.D. Tex. Sept 16, 2022)

- **Allegation:** Plaintiff brought action for copyright infringement against defendants' alleging the dissemination of floorplans and 3D renderings created from plaintiff's copyrighted technical drawings of previously constructed home designs violated a license agreement between the parties; defendant asserted Section 120(a) of the Copyright Act as an affirmative defense.
- **Motion to Dismiss:** On Sept. 16, 2022, the District Court dismissed the infringement claims with prejudice, expressly rejecting the Eighth Circuit's decision in *Designworks* and held floorplans and renderings are pictorial representation under Section 120(a). ***"It's unreasonable to assume that Congress intended to subject real estate agents to copyright infringement liability for a floorplan posted online."***
- **Status:** The case is proceeding in District Court on other issues.

ADA WEBSITE ACCESSIBILITY

Atcheson Hotels, LLC v. Laufer, S. Ct. No. 22-429, 2023 WL 2634524 (Mar. 27, 2023), granting cert. in 50 F.4th 259 (1st Cir. 2022):

- **Allegation:** Plaintiff, a self-described tester, claims that the hotel’s website did not contain enough information about its accommodations for people with disabilities and therefore, was injured by the lack of information on the hotel’s website. Plaintiff had no intention of visiting the hotel.
- **Motion to Dismiss:** The district court dismissed plaintiff’s claim for lack of standing; First Circuit; reversed; Plaintiff appealed and the Supreme Court granted cert.
- **Status:** The Supreme Court will hear arguments in the fall 2023.

Fraudulent Seller Scams

Basics:

- A “seller” seeks to list their property posing as the true owner;
- Seller cannot meet in person; refuses to use zoom or facetime;
- Demands quick close; wants closing documents mailed;
- Upon closing, buyer wires to scammer’s account.

Fraudulent Seller Scams

Recommendations:

- Request government ID for address and schedule in-person or zoom conference;
- Conduct a social media search of property and seller; contact acquaintances or family of seller;
- Research tax records for addresses or addresses of properties affiliated with the seller.
- Encourage clients to create a Google alert of their property address. A listing would trigger a notification.

THANK YOU.

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