

Legal Update

BROKER POWER HOUR

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NARdotRealtor



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LITIGATION LANDSCAPE

- Rule of Compensation Litigation
- Clear Cooperation Policy Litigation
- DOJ 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:** Class certification granted on March 29.

Burnett 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:** Trial to begin on October 16, 2023.

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.
- **Allegation:** That NAR and the corporate defendants promulgated and enforced anticompetitive rules that caused inflated commissions, resulting in home buyers paying inflated home prices as a result.
- **Status:** Motion to Dismiss Pending.

Clear Cooperation Policy Litigation

Top Agent Network v. National Association of REALTORS® et al., Case No. 3:20-cv-03198 (N.D. Cal., 2020)

- **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:** 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:**
 - April 26, 2021, 9th Circuit Court of Appeals reversed and remanded.
 - On January 9, our petition of writ of certiorari to US Supreme Court was denied.
 - Discovery proceedings.

DOJ UPDATE

- November 2020: NAR-DOJ Settlement
- July 2021: DOJ Withdrew from Settlement
- September 2021: NAR Filed Petition to Quash
- ***January 2023: NAR Petition Granted***

DOJ Consent Decree

National Association of REALTORS® v. US (DOJ) No.: 1:21-cv-2406 (District of Columbia (Washington, DC)., Filed September 13, 2021)

- **Filed:** Sep. 13, 2021
- **Argument:** That NAR and the Department of Justice have a binding settlement agreement which closed the DOJ's investigation into the Participation Rule and the Clear Cooperation Policy.
- **Status:**
 - On January 25, 2023, the District Court agreed with NAR and granted its petition
 - The DOJ filed a notice of appeal on March 27.
 - DOJ's brief due on June 2; briefing should be complete by August 18.



The government, like any party, must be held to the terms of its settlement agreements, whether or not a new administration likes those agreements. For this reason, the CID at issue must be set aside.

Judge Timothy J. Kelly
United States District Judge

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



NATIONAL ASSOCIATION OF REALTORS®

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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?

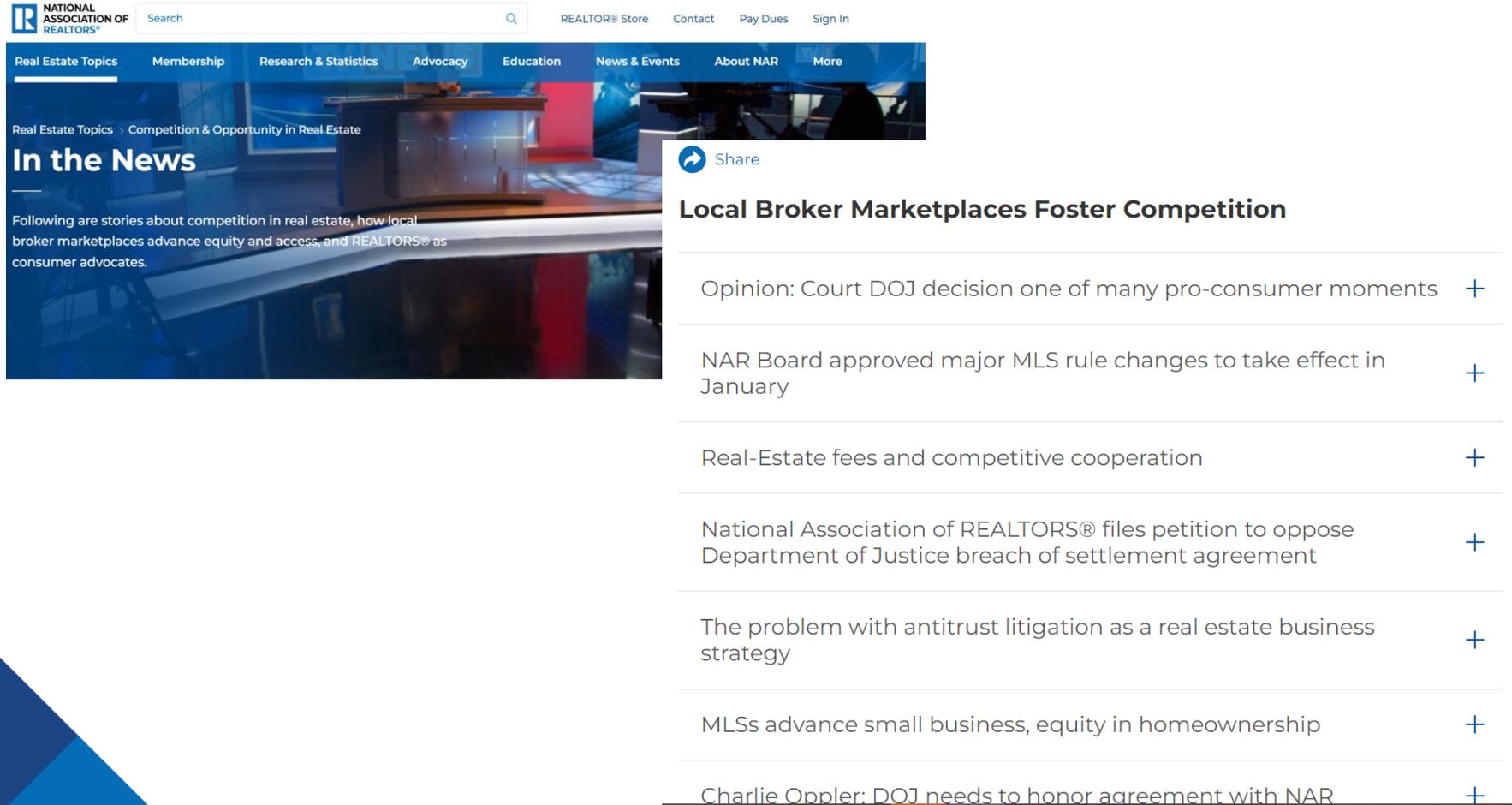
Why should real estate professionals make the money they do in commissions when so much information is available online?

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



The screenshot shows the National Association of REALTORS® website. At the top left is the logo and a search bar. The navigation menu includes: Real Estate Topics, Membership, Research & Statistics, Advocacy, Education, News & Events, About NAR, and More. The main content area is titled 'In the News' and features a sub-header 'Real Estate Topics > Competition & Opportunity in Real Estate'. Below this, a paragraph reads: 'Following are stories about competition in real estate, how local broker marketplaces advance equity and access, and REALTORS® as consumer advocates.' A 'Share' button is visible. The main article list is as follows:

Article Title	Expand Icon
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.
- Perform exterior curb appeal assessment.
- Address important topics such as odors, clutter, cleanliness, décor, neutralization and more.
- Guide on best market pricing position based on current market.

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.
- Look beyond décor, flooring and paint colors to other significant aspects of home.
- Develop competitive offers and negotiate the best price and terms.
- Represent clients' best interests, advise throughout the negotiation process and close the deal.
- Steward multiple parties and schedules to save buyer time.

ACHIEVING HOME OWNERSHIP

- Navigate state and federal forms.
- Research mortgage rates, terms and reputable lenders.
- Coordinate with lenders.
- Steward 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 1% 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 learn 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 offers, evaluate all details of each offer beyond just price.

Negotiate with seller, buyer and accept your home likely will sell.

...and more!
NATIONAL ASSOCIATION OF REALTORS®

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.

LITIGATION 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.



Hot Topics in Broker Risk Reduction

May 2023 | NAR Legal Affairs

COMPETITION IN REAL ESTATE | ANTITRUST | CYBERCRIME & WIRE FRAUD
COPYRIGHT INFRINGEMENT | DISCLOSURES & MISREPRESENTATION
INDEPENDENT CONTRACTOR STATUS | TCPA & DNC: TEXTING AND CALLING

COMPETITION IN REAL ESTATE

REALTORS® help foster competition through their participation in local MLS broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants. REALTORS® work together for the benefit of consumers and help ensure buyers and sellers have the greatest access, transparency and choice in their homeownership journeys. As a result, brokerages of all sizes are able to compete and provide their services to consumers, who in turn have the freedom to choose between different service models and pricing that best meet their needs.

Call to Action

1. Educate consumers, policymakers, media and other interested third parties about [how the local MLS broker marketplaces work](#), and how they promote equity, transparency and market-driven pricing options for consumers.
2. Promote consumer understanding about the [value REALTORS® bring to the transaction](#), how REALTORS® serve as champions in their communities and as advocates for private property rights.
3. Use buyer representation agreements and continue to have transparent conversations with consumers about the [services buyer agents provide](#) and [how they are paid](#).
4. Use the fact sheets, FAQs, articles, infographics and other resources on [competition.realtor](#) to promote the value of local MLS broker marketplaces.

<https://www.nar.realtor/legal/hot-topics-for-brokers>



THANK YOU.

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