



weissman

Answers to Questions about the NAR Settlement and the GAR Forms

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This Agreement shall be for the benefit of, and binding upon, the Parties, their heirs, successors, legal representatives and assigns, which this Agreement constitutes the entire agreement between the Parties. Seller shall convey title to the property by Warranty Deed or equivalent. The Property may be subject to restrictions contained in the plat, deed, covenants, conditions, and restrictions, or other documents noted in the Title Search Report. In the event the Seller cannot produce the aforementioned letter or other acceptable verification by the time of the above Agreement by the Parties, the Seller will, at the shared expense of both Buyer and Seller, order a Title Search Report and have delivered to the Buyer. No modification or amendment to this Agreement shall be binding unless signed by both Buyer and Seller. This Agreement

NAR Settlement

According to Clever Real Estate, 70% of REALTORS[®] surveyed don't like the NAR settlement.

67% of consumers support it.

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NAR Settlement

As much as you may not like parts of it, you must remember that it could have been worse and may still become worse.

NAR Settlement

The biggest challenge with the settlement agreement is that it is written in very general terms. As a result, lawyers, REALTORS® and consumer advocates all have different opinions as to what it requires. This has left many REALTORS® confused.

NAR Settlement

It has also left the GAR Forms Committee scrambling to modify our forms as NAR evolves its own positions on the NAR settlement.

NAR Settlement

What Does the Settlement Agreement Actually Say About Broker Compensation?

Three things are required:

1. The Settlement Agreement requires that “All REALTORS® . . . working with a Buyer enter into a written agreement before the Buyer tours any home.”

NAR Settlement

What Does the Settlement Agreement Actually Say About Broker Compensation?

2. The amount of compensation reflected must be objectively ascertainable and may not be open-ended (e.g. ‘Buyer Broker’s compensation shall be whatever amount the Seller is offering to the Buyer’); and

NAR Settlement

What Does the Settlement Agreement Actually Say About Broker Compensation?

3. The REALTOR® . . . may not receive compensation for brokerage services from any source that exceeds the amount or rate agreed to in the agreement with the Buyer.

NAR Settlement

What Does the Settlement Agreement Actually Say About Broker Compensation?

So, based on that, I and the GAR Forms Committee assumed that a buyer broker could enter into a compensation agreement with a buyer in which the buyer paid little or no money to the buyer broker but gave the buyer broker permission to receive, for example, 15 lollipops from the seller.

NAR Settlement

What Does the Settlement Agreement Actually Say About Broker Compensation?

This is because:

1. The compensation agreement is in writing;
2. The buyer has approved it (and transparency is a key goal of the settlement agreement); and
3. 15 lollipops is not open-ended and is readily ascertainable.

NAR's Position

NAR's position is that to be compliant with the NAR settlement, the Buyer must be on the hook for the Buyer's Broker's entire compensation (including any bonus). It can be offset by a contribution from the Seller or a Seller's Broker, but they do not think it is compliant to have, for example, the Buyer pay \$0 or \$1, but then give permission to the Buyer's Broker to negotiate a higher commission from the Seller.

NAR's position is that since there is no guarantee that the seller or seller's broker will pay 15 lollipops, the compensation could be anything from \$0 or \$1 to 15 lollipops and that is open-ended and not readily ascertainable.

NAR's Position

NAR's position is also that to be compliant with the settlement agreement, any payment of compensation by the Seller or Seller's Broker towards the compensation of the buyer's broker must offset the compensation obligation to the Buyer.

NAR's Position

So, the GAR Forms Committee will be releasing a new Exclusive Buyer Brokerage Engagement Agreement (GAR Form F110) as of January 1, 2025.

New F110

EXCLUSIVE BUYER BROKERAGE ENGAGEMENT AGREEMENT



2024 Printing

4. **Compensation for Professional Services of Broker ("Compensation")**.
- a. **Generally**: Compensation to Broker(s) is negotiable and is not set by state law.
 - b. **Compensation to Broker**: Buyer agrees to pay Broker the Compensation set forth in the Value of Broker's Professional Services section below at the closing of any Contract to Purchase (as that term is hereinafter defined).
 - c. **Value of Broker's Professional Services**: The value of Broker's Professional Services is as follows:
 - (1) ☐ _____ percent (_____ %) of the sales price;
 - (2) ☐ \$ _____;
 - (3) ☐ (other) _____.
 - d. **Possible Payment of Compensation by Seller or Seller's Broker**: Buyer ☐ directs or ☐ does not direct Broker to seek to get Seller or Seller's Broker to pay all or a portion of Broker's Compensation above, provided it does not exceed the value of Broker's Compensation above. If Seller or Seller's Broker agrees to pay all or a portion of Broker's Compensation, it shall reduce the Compensation Buyer shall pay to Broker dollar for dollar.
 - e. **Disclosure Regarding Broker's Compensation**: Buyer shall be obligated to pay all of Broker's Compensation not paid by Seller or Seller's Broker. Before making an offer to buy or accepting a counteroffer in a Contract to Purchase, Buyer should confirm: 1) any contribution of Seller or Seller's Broker towards Broker's Compensation; and 2) Buyer's ability to fulfill its Compensation obligation. Buyer should not make any offer to buy or accept any counteroffer in a Contract to Purchase that will result in Buyer paying more of the Broker's Compensation than Buyer can afford.



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New F110

NAR also did not like the sentence we added after the statement that “Compensation is negotiable”, explaining that individual brokers did not have to negotiate their compensation.

- A. 4. **Compensation for Professional Services of Broker (“Compensation”).**
 - a. **Generally:** Compensation to Broker(s) is negotiable and is not set by state law.

- B. 4. **Compensation for Professional Services of Broker.**
 - a. **Generally:** Compensation to Broker(s) is negotiable and is not set by state law. Of course, Brokers are free to set their Compensation based on their value in the marketplace and may or may not be flexible in establishing their Compensation.

GAR Forms

The GAR Forms Committee is frankly trying to make sure our forms keep up with rapidly changing practices in the real estate brokerage business.

GAR Forms

When the NAR settlement was announced, we knew that buyer brokers would need to protect their compensation in new ways since they would no longer be protected by having that information in an MLS.

GAR Forms

The GAR Forms Committee did this by creating a Pre-Showing Compensation Agreement (GAR Form F258) that buyer agents could get signed in advance spelling out what portion of the buyer agent's commission would be paid by the seller or seller's broker.

GAR Forms

If the buyer couldn't get a Pre-Showing Compensation Agreement (GAR Form F258) signed by the seller or seller's broker, we created a Buyer Broker Compensation Agreement (GAR Form F259) that would be an exhibit to the Purchase and Sale Agreement (GAR Form F201) spelling out that compensation.

GAR Forms

What many of the larger, national brokerage firms are moving to is a complete decoupling of the buyer broker's compensation from the seller's broker's compensation.

GAR Forms

There is also a growing trend as part of the decoupling to offer no compensation up front to the buyer's broker.

GAR Forms

Now, what does that look like?

Buyers would ask for compensation in their offers.

GAR Forms

What are the implications of that?

1. More sellers will be paying the seller's broker directly and the buyer brokers directly.
2. From the perspective of broker liability, it is probably better in that the listing broker has nothing to do with the buyer broker's compensation.

GAR Forms

It is also better for the buyer's broker to ask the seller to pay their compensation, rather than the seller's broker.

O.C.G.A. § 43-40-25(b)(35). Inducing any person to alter, modify, or change another licensee's fee or commission for real estate brokerage services without that licensee's prior written consent.

GAR Forms

Of course, this means that if there is a dispute, it will be litigated rather than arbitrated in front of a REALTOR® panel.

GAR Forms

It also means that not many REALTORS® will be using a Pre-Showing Compensation Agreement (GAR Form F258) at all.

GAR Forms

The big question that everyone continues to ask is if commission information is not in the MLS, how do buyer brokers protect their commissions when they are being pay by the seller or seller's broker?

GAR Forms

The answer is to either use the Buyer Broker Compensation Exhibit (GAR Form F259) or a special stipulation to the contract.

GAR Forms

However, if you are using a special stipulation, make sure it protects you!

The special stipulation needs to do three things in addition to spelling out how much money the buyer broker will receive:

1. It needs to say it cannot be modified without the written consent of the buyer broker;
2. It needs to say that the buyer broker is an express third-party beneficiary of the purchase and sale agreement; and
3. It needs to say that the provision survives the closing (so that the buyer broker has legal rights to sue if the compensation is not paid at closing).

GAR Forms

Stipulation to Protect Buyer's Broker's Compensation When Paid by Seller

For and in consideration of Buyer's Broker having procured the Buyer to purchase the Property, Seller agrees to pay Buyer's Broker at the Closing the following Compensation:

This special stipulation can only be modified with the prior written consent of Seller and Buyer's Broker and any attempt to modify the same shall be null and void. Buyer's Broker shall be an express third-party beneficiary of this Agreement to enforce its rights to the Compensation above. This special stipulation shall survive the Closing if the Compensation is not paid in full at Closing.

GAR Forms

One question that is routinely asked is whether we should just make the broker's compensation part of the Purchase and Sale Agreement (GAR Form F201).

Every time you make a change, you solve one problem and create another.

1. The seller's broker's compensation is addressed in the listing agreement. There is really no need (unless it is being changed) to repeat it in the contract, and doing so may invite the seller or buyer to try to change it.
2. If all you include in the contract is the buyer broker's compensation being paid by the seller or seller's broker, it may look like you are creating a presumption that the seller should be paying the buyer broker's compensation.

Questions

So what questions are being asked by REALTORS® about the NAR settlement and our Forms?

Answers to Questions About the NAR Settlement and the GAR Forms

If I am sending pictures of a listing to a Buyer, do I need a compensation agreement?

If I have made a video of the property to show my buyer, do I need a compensation agreement?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I still get a bonus?

Answers to Questions About the NAR Settlement and the GAR Forms

Do I, as the listing agent, need to get a compensation agreement signed by unrepresented visitors to an open house?

Answers to Questions About the NAR Settlement and the GAR Forms

Must I, as a buyer's broker, use a GAR Form, to protect the commission I am being offered by the seller or seller's broker?

Answers to Questions About the NAR Settlement and the GAR Forms

Does the NAR settlement apply to commercial real estate, leasing or land?

Answers to Questions About the NAR Settlement and the GAR Forms

What do I do if the buyer refuses to sign a compensation agreement?

Answers to Questions About the NAR Settlement and the GAR Forms

Can the buyer direct me to only show them houses when the seller or seller's broker is paying the broker's compensation?

Answers to Questions About the NAR Settlement and the GAR Forms

Buyer directs Buyer's Broker to use best efforts only to show Buyer properties where the Seller and or Seller's Broker are offering to pay Compensation to Buyer's Broker that is equal to Buyer's Compensation obligation to Buyer's Broker.

OR

Buyer directs Buyer's Broker only to show Buyer properties where the Seller and/or Seller's Broker have signed a Pre-Showing Compensation Agreement or other similar agreement agreeing to pay Buyer's Broker Compensation that is equal to Buyer's Compensation obligation to Buyer's Broker.



Answers to Questions About the NAR Settlement and the GAR Forms

What are the risks of putting compensation information in a non-REALTOR® owned MLS?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I put information about Seller concessions to buyers into the private remarks section of the MLS?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I use the private remarks section of the MLS to include compensation information?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I upload an already filled out Pre-Showing Compensation Agreement (GAR Form F258) to the MLS?

Answers to Questions About the NAR Settlement and the GAR Forms

What do the references to two computer clicks mean as far as complying with the NAR settlement?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I avoid following the new settlement rules if I just stop being a REALTOR®?

Answers to Questions About the NAR Settlement and the GAR Forms

Who will enforce the NAR settlement?

Answers to Questions About the NAR Settlement and the GAR Forms

Must my compensation, as a buyer's agent, be included in a Purchase and Sale Agreement (GAR Form F201)?

Answers to Questions About the NAR Settlement and the GAR Forms

Should I continue to use the Instructions to Closing Attorney form (GAR Form F255)?

Answers to Questions About the NAR Settlement and the GAR Forms

If I have a signed Pre-Showing Compensation Agreement (GAR Form F258), do I also need a Buyer Broker Compensation Agreement (GAR Form F259)?

Answers to Questions About the NAR Settlement and the GAR Forms

When should the seller sign a Pre-Showing Compensation Agreement (GAR Form F258), a Buyer Broker Compensation Agreement (GAR Form F259) or the Instructions to Closing Attorney form (GAR Form F255)?

Answers to Questions About the NAR Settlement and the GAR Forms

Do I, as a buyer's agent, need a separate compensation agreement with the seller or seller's broker for every house I show my buyers?

Answers to Questions About the NAR Settlement and the GAR Forms

What do I do if I get to the closing and either the buyer or the seller says they do not have the compensation they agreed to pay me?

Answers to Questions About the NAR Settlement and the GAR Forms

Can I, as a seller's broker, post information about the compensation that I or my seller is offering on social media?

Answers to Questions About the NAR Settlement and the GAR Forms

What kind of compensation agreement do I need when I am acting as a dual agent?

Answers to Questions About the NAR Settlement and the GAR Forms

What happens when a friend within the same brokerage asks you to do an open house for them? Do you need a compensation agreement with visitors to the open house? What if you find a buyer there?

Answers to Questions About the NAR Settlement and the GAR Forms

Can my company have a standard policy about the commissions it charges?

Answers to Questions About the NAR Settlement and the GAR Forms

Is it the role of either the listing agent or closing attorney to confirm that the buyer's broker is not being paid more than what their compensation agreement permits them to be paid?

Answers to Questions About the NAR Settlement and the GAR Forms

Why are the Pre-Showing Compensation Agreement (GAR Form F258) and the Buyer Broker Compensation Agreement (GAR Form F259) complicated?

Answers to Questions About the NAR Settlement and the GAR Forms

1. Is the seller or seller's broker paying the buyer's broker?
2. If so, how much are they paying?

Pre-Showing Compensation Agreement (GAR Form F258)

1. **Compensation Being Offered to Buyer's Broker.**

A. The Compensation being offered to Buyer's Broker shall be paid to Buyer's Broker at the closing of the purchase and sale contract as follows: *[Select one. The boxes not checked shall not be a part of this Agreement.]*

- ☐ _____ % of the purchase price;
- ☐ \$ _____;
- ☐ _____ (other)

Pre-Showing Compensation Agreement (GAR Form F258)

1. B. The above-referenced Compensation shall be paid by: *[Select one. The boxes not checked shall not be a part of this Agreement.]*

- ☐ Seller (in addition to the Compensation Seller is paying to Seller's Broker)
- ☐ Seller's Broker (out of the Compensation Seller is paying to Seller's Broker)
- ☐ Seller and Seller's Broker as set forth in the "other" section above.

Buyer Broker Compensation Agreement (GAR Form F259)

1. (THIS AGREEMENT SHOULD NOT BE USED IF THE BROKER(S) COMPENSATION AND THE PARTY OR BROKER PAYING IT HAVE ALREADY BEEN AGREED TO IN A SEPARATE WRITTEN AGREEMENT AND IS NOT BEING MODIFIED)

1. **Compensation Being Offered to Buyer's Broker.** The compensation of the undersigned Broker(s) for professional brokerage services ("Compensation") provided in the above-referenced transaction is set forth below and shall be paid by the following party or the Broker working with or representing such party:

Compensation of Buyer's Broker:

_____ % of the purchase price;
\$ _____;
(other) _____

Compensation of Seller's Broker:

_____ % of the purchase price;
\$ _____;
(other) _____

The Compensation of Buyer's Broker Shall Be Paid By:

The Compensation of Seller's Broker Shall Be Paid By:



Questions?

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