



## THE NEW WORLD OF REAL ESTATE COMMISSIONS

By: Seth G. Weissman, GAR General Counsel

The press has unfortunately given consumers the incorrect impression that the NAR settlement of current antitrust litigation (“NAR Settlement”) included provisions requiring real estate brokerage firms to slash their commissions. Nothing in the NAR Settlement requires this. REALTOR compensation in Georgia has always been negotiable, and the NAR Settlement simply confirms that point. Sadly, some consumers are now asking for reductions in commissions based on the flawed media reporting. Nevertheless, there are some significant changes agreed to in the NAR Settlement (which, as of the date of this article, has not yet been approved by the court and is thus not in effect) that will affect how brokerage business is done in Georgia. This article will explain those changes. It will also discuss how to put your best foot forward in explaining your value to buyers and sellers if you find yourself being asked to negotiate your commissions more so than in the past.

### **A. Significant Changes in the NAR Settlement**

1. No More Working With Buyer or Seller Without a Written Agreement. Under the NAR Settlement, a written agreement will now be required for both customers and clients before

a house can be shown. The agreement must explain, and the buyer must approve how the buyer broker will be compensated. Once there is an agreement on compensation, it cannot be changed without a new agreement.

Let's look at the following examples to better understand how this will work:

**Example #1:** A buyer sees your sign and calls you to view your listing. Must you have a written agreement with the buyer before showing her the house?

**Answer:** No, you already have a client in the transaction (i.e., the Seller) and an agreement with the seller on how you will be compensated. (i.e., the Exclusive Seller's Brokerage Engagement Agreement). Since the buyer is your customer and they are not paying you a commission, no written agreement specifying how you will be paid will be required.

**Example #2:** A buyer calls you and wants your help in finding a new home. The buyer does not want to hire you in a client relationship but instead wants to be your customer. The buyer wants to see around a half dozen homes in a particular neighborhood. Do you need to have a written agreement with the customer before showing her houses?

**Answer:** While a written agreement is not required under the Brokerage Relationships in Real Estate Transactions Act ("BRRETA"), the answer to this question is yes under the NAR Settlement. If the REALTOR is going to be helping the buyer find a house with the expectation of earning a commission for doing that work, the REALTOR needs to have a written agreement approved by the buyer setting forth how the REALTOR will be paid for their services. Once approved, it cannot be changed without a written agreement between the Realtor and the party who gave the approval.

2. No Advertising of Buyer Broker Compensation on Any REALTOR MLS. No REALTOR MLS will be allowed to advertise the commissions being offered to buyer brokers. This essentially means that REALTORS looking through a MLS will be in the dark as to whether a commission will be offered to the buyer's broker on a property and in what amount. Buyer brokers should be able to get that information by calling the listing broker and asking, but this may make the process of showing houses more cumbersome. REALTORS should be able to put their listings on a personal website and include a statement there as to how buyer brokers will be compensated. A broker can still provide other information in the MLS about what closing costs the seller will pay. So, for example, a listing broker could state "Seller will pay \$10,000 toward Buyer's closing costs". But no mention of compensation to the buyer broker can be included in any REALTOR MLS under the NAR Settlement. This will likely result in most offers to purchase including a special stipulation asking the seller to pay the buyer broker's commission. It may also result in some buyer agents encouraging buyers to purchase new construction homes if builders continue their long-standing practice of paying the commissions of both the seller's broker and the buyer's broker. If the buyer cannot afford to pay a commission, but still wants the help of a buyer broker, agreeing to see only new construction homes where the builder is paying the commission may be a good solution.

3. Consumers Must Approve the Specific Commission Being Paid to REALTORS. Under the NAR Settlement, consumers must approve the specific compensation being paid to their broker in a written agreement entered into between the parties, even if the consumer is not

the party paying it. Once an agreement is reached, it cannot be changed without amending that agreement. Let's look at the example below to better understand how this will work.

**Example #1:** Buyer agrees in a written agreement with the Buyer's Broker to pay Buyer's Broker a 2% commission minus any amount paid by the Seller or Seller's Broker. Buyer puts a house under contract in which the Seller has agreed to pay the buyer's broker a 3% commission. What commission amount does the buyer's broker receive?

**Answer:** Since the written agreement between the buyer and buyer's broker limits the buyer broker's commission to 2%, this is the total amount that the buyer's broker can receive unless the buyer agrees otherwise. Of course, the buyer's broker can ask the buyer's to amend their agreement, and hopefully, the buyer will not object to that. The GAR Forms Committee is exploring ways to get the Buyer to pre-agree to a maximum amount paid by the buyer, but where the buyer's broker can get an additional pre-agreed amount from the seller or listing broker.

So, what happens if the buyer will not agree to let the buyer broker earn the extra 1% commission? The answer is that it will likely depend on how the listing agreement is written. If the listing agreement states that the seller's broker is paid the entire commission and then shares that commission with the buyer's broker, then the seller's broker would likely get the extra 1%. However, if the listing agreement states that the seller's broker's commission is one amount and the buyer broker's commission is another amount, then the seller likely gets the benefit of the buyer's broker only being able to receive a lower commission.

4. Commissions Cannot Be Conditioned on MLS Membership. Under the NAR Settlement, offers of seller concessions (such as the payment of the buyer's closing costs) cannot

be conditioned on the buyer using the services of a REALTOR, the buyer paying any amount of commission to the buyer's broker, or the buyer's broker being a member of an MLS. One issue related to this that will need to be addressed involves offering a variable commission based on whether the buyer's broker is the one who first shows the buyer the house. For example, let's say the listing broker puts on their own website that they are offering a 3% commission to buyer's brokers, but this is reduced to a 1% commission if the buyer's broker is not the one who first shows the house to the buyer. Now lets say the house is on a lockbox that is owned by a local MLS, and only members of that MLS can access the lockbox. The buyer's broker, who is not a member of the local MLS, brings a buyer. Because they cannot access the lockbox, the listing broker must show up and open the door. Can the listing broker tell the buyer's broker they are only paying 1%? The answer appears to be "no," since doing so would, in effect, be offering a 3% commission based on the buyer's broker being a member of the local MLS.

5. Certain New Disclosures Need to be Made. Certain consumer-oriented disclaimers and disclosures will now be needed in brokerage engagement agreements and agreements with customers. GAR is in the process of revising its Forms to include these new disclosures. So, for example, a statement will be added to our Forms that "Commissions are negotiable and are not set by state law."

6. Enforcement of the NAR Settlement Agreement. Enforcing the NAR Settlement Agreement is a bit of tricky issue because to my knowledge no individual REALTORS were actually defendants in the lawsuit, yet the Settlement tries to bind well over a million REALTORS.

This was accomplished by NAR agreeing to adopt new rules requiring compliance with the terms of the NAR Settlement.

7. When Will This All Go Into Effect? While the NAR Settlement has been signed by the parties, it still needs to be approved by the court. It is anticipated that this will occur sometime this spring and go into effect by summer of 2024. The NAR Settlement protects most smaller real estate brokerage firms from further liability. However, it still leaves the litigation in place against some of the larger brokerage firms who have not settled.

## **B. Negotiating for the Commission you Want**

In light of all of the press about commissions being slashed, there will likely be many more negotiations over commissions between REALTORS and their customers and clients. How can REALTORS put their best foot forward?

While everyone has their own negotiating style, consider explaining your value in terms of a cost-benefit analysis. Buying and selling a house is the most important financial decision most buyers and sellers make in their lives. Clients generally want to get the best financial deal they can get. They also want to avoid making a stupid mistake that may cost them a lot of money. The services of a REALTOR can help ensure that both of these goals are met. While there is obviously a cost to hire a REALTOR, what is at risk financially if mistakes are made or if there is poor negotiating on price and terms is usually far greater than the cost of a REALTOR.

In order to understand the mistakes that can be made, consider using a checklist to explain all of the things that you actually do for clients. Possibly the biggest challenge REALTORS have

in any commission negotiation is that clients often do not have a clue as to all of the things that a good REALTOR does. Using a checklist may be an excellent way to explain your value to clients. While there are a variety of lists of things REALTORS do to protect their clients, my list of what a great buyer's broker or seller's broker does for their clients is as follows:

### **Services I Provide My Sellers**

1. I can do a comparative market analysis for you to see what other properties in the area have sold for.
2. I can help advise you on what work should be done to the property before listing it for sale.
3. I can help advise you on how to stage the house to maximize its sales price.
4. I can prepare marketing materials and photographs for you to maximize the ability to sell the property.
5. I can have the property listed in a multiple listing service where it will receive maximum exposure.
6. I can answer questions from other real estate agents and buyers about the property and a potential transaction.
7. I can provide you with contract forms that will allow you to make counteroffers, send notices, terminate contracts, and take numerous other actions in real estate transactions.
8. I can answer basic questions regarding GAR Contract Forms in non-legalese.
9. I can recommend an attorney if you have questions of a legal nature.

10. I can help you negotiate the best price for your property.
11. I can make you aware in non-legalese of certain laws affecting you such as fair housing laws and lead-based paint laws.
12. I can make you aware of various professionals you may need to consult with or help you in a real estate transaction including lawyers, surveyors, engineers, contractors, termite companies, etc.
13. I can help explain what costs you will likely have in selling a house.
14. I can explain the different steps in the home selling business.
15. I can help make you aware of and manage various time limits and deadlines in a real estate transaction.
16. I can provide you with a laymen's explanation of your disclosure duties.
17. I can help make you aware of and draft special stipulations that the seller may want to add to a contract.
18. I can help you understand the various provisions in the GAR Form contract.
19. I can help you do an economic and risk analysis of different offers.
20. I can help advise you on how much earnest money is typical.
21. I can help advise you on the types of seller incentives and concessions that are usually made.
22. I can try to help you avoid a wire fraud.



### **Services I Provide My Buyers**

1. I can help you identify properties that meet your criteria.
2. I can help identify off-market properties.
3. I can be available to answer your questions about properties, market conditions and neighborhoods
4. I have lockbox access and can show you properties that you want to see.
5. I can help make you aware of and draft special stipulations that you may want to add to a contract.
6. I can provide you with contract forms that will allow you to make offers, send notices, terminate contracts, and take numerous other actions in real estate transactions.
7. I can answer basic questions regarding GAR Contract Forms in non-legalese.
8. I can recommend an attorney if you have questions of a legal nature.
9. I can help you negotiate the best price on any property you want to buy.
10. I can do a comparative market analysis of what other properties have sold in an area in which you are interested in buying.
11. I can make you aware in non-legalese of certain laws affecting real estate transaction such as our fair housing laws and lead-based paint laws.
12. I can make recommendations on various people you may need to consult with or help you in a real estate transaction including mortgage lenders, home inspectors,

lawyers, surveyors, termite inspectors, engineers, roofers, painters, plumbers, and other contractors.

13. I can help explain what costs you will likely have in buying a house other than the purchase price.
14. I can explain the different steps in the home buying process.
15. I can help you sell any house you need to sell in order to buy another house.
16. I can help you manage time limits for applying for a loan, inspecting a property, negotiating repairs, and closing on the purchase of a property.
17. I can help you draft any special stipulations that you may want to include in an offer.
18. I can advise you on how much earnest money or option money might be typical to offer in different transactions.
19. I can help you understand the settlement statement being used in the transaction.
20. I can help you communicate effectively with the seller and other real estate agents when issues arise.
21. I can help you communicate and coordinate with various experts you may have hired to assist you with the home buying process.
22. I can try to help you avoid identity theft and wire fraud.

## **Conclusion**

In every industry there are periodic paradigm shifts where new ways of doing business must be learned. We are likely going through such a paradigm shift at the moment. Of course, judging from past paradigm shifts, successful REALTORS quickly adapt to the new environment, modify their business practices, and continue on as before.

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