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Eternal confusion: Mixed messages on amending buyer agreements

Commission lawsuit changes took effect 6 months ago, compliance expert Summer Goralik writes, but uniformity in implementation and guidance remains elusive, fueling industry confusion

Image by: Canva

BY SUMMER GORALIK
Today, March 04, 2025

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In a recent article, Law Professor Tanya Monestier and I explored zero-fee touring agreements in the post-settlement landscape, highlighting the inconsistencies between plaintiff lawyers' identification of prohibited activity and the National Association of Realtors' (NAR) competing guidance.

If this piece feels like déjà vu, that's because we're once again confronting a troubling trend: mixed messaging that leaves Realtors uncertain. But let's be honest: mixed messages are one thing. When one of those messages could put you in violation of the settlement — or at the center of a new lawsuit—what Realtors are really juggling is risk.

At the core of the conflict? One moment, we were told that buyer brokers cannot amend written buyer agreements to increase compensation. Now, it seems there may be *leeway* for amendments, depending on the *business justification*.

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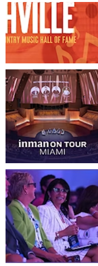

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What follows will shed light on new guidelines from NAR and, once again, showcase Professor Monestier's legal perspectives in a brief interview, breaking down key discrepancies and their implications for Realtors.

What we knew before

In the wake of the Sitzer-Burnett litigation, plaintiff lawyers clearly stated that written buyer agreements could not be amended to raise an agent's compensation beyond what was already agreed to by the parties. The intent was to prohibit any post-execution modifications that would financially benefit the agent at the seller or buyer's expense. This prohibition provided a straightforward compliance framework — Realtors could not use amendments to increase their commissions, thereby reinforcing consumer protection principles and ethical real estate practices.

More recently, though, a competing viewpoint from a high-level executive at NAR has challenged these guidelines, forcing us to recognize that our once well-defined understanding was short-lived.

NAR guidance and new uncertainty

During her interview on the *Real Estate Insiders Unfiltered* podcast, Lesley Muchow, NAR's general counsel, answered many practical questions to help Realtors navigate the new practice rules. While her insights clarified several topics, some key areas remain shrouded in uncertainty.

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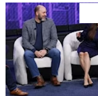

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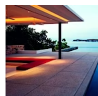

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Aside from contradictory opinions on touring agreements, which Professor Monestier and I examined previously, another significant unresolved area is the issue of amending written buyer agreements. Importantly, Muchow suggested that amendments could be permissible if justified by a legitimate business purpose. However, what constitutes a valid justification has left me stumped.

Notably, Muchow stated that amendments could not solely be made to increase compensation or circumvent the settlement; yet she also indicated that such amendments were not entirely off-limits.

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One particularly concerning example discussed in the interview relates to bonuses. Whereas we had learned from plaintiff lawyers last November that buyer brokers could not amend their written buyer agreements to collect a bonus offered by sellers or builders if that compensation exceeded what the parties had already agreed to, it seems that clarification was not as clear-cut as originally thought.

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When asked whether a Realtor could accept a bonus in excess of what was initially agreed upon with the buyer, Muchow initially states that a business justification would be required but then reinforces her earlier statement that the amendment could not exclusively be made to increase compensation. Unfortunately, this equivocal qualification leaves room for interpretation and potential disputes over what constitutes a valid justification.

Muchow's position on amendments due to changes in scope may seem reasonable, but as a compliance consultant, I'm concerned it could be misinterpreted. Drawing on my experience as a California

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Will Realtors just hear what they want to hear?

Before diving in, let me sidetrack for just a moment. One of my favorite movies of all time is *Eternal Sunshine of the Spotless Mind*, which explores how people selectively remember, or misremember, their experiences, focusing on certain truths and disregarding others.

At one point, Clementine, played by Kate Winslet, says, "You stop listening to what's really going on. You just, you just hear what you want to hear." This line is becoming our new reality in the aftermath of the NAR settlement, as conflicting narratives continue to evolve without ever fully converging.

At the heart of the Sitzer Burnett case, plaintiff lawyers made it clear that amending buyer-broker agreements to increase commission was prohibited. This firm stance left industry professionals with a straightforward understanding: such amendments were not permitted.

But when NAR's general counsel provided an alternative view — that amendments could be made with a business justification — the clarity of the initial opinion suddenly became "muddy." More importantly, it opened the door for brokers to reinterpret or "hear" that direction differently, creating ambiguity again, even if the core message hadn't fully changed.

Now, the question is: how will this 'new' reading of permissible amendments be received? Will some embrace it as a workaround, as others view it with skepticism?

Just like in the film, where people focus on the parts of relationships they want to remember or reinterpret, some industry players may simply adhere to the guidance that fits their situation — leaving problematic space for divergent practices and potential compliance risks.

Interview with Professor Monestier

To determine whether this eternal confusion (and risk) is just in my head or a real concern, I reached out to Professor Tanya Monestier to tap into her legal expertise on the subject.

You're a contracts professor. Can you tell us when you can amend a contract generally speaking?

Monestier: The most important thing to know and that has been lost in this conversation is that just because both parties agree to something and/or put it in writing does not make it a legally enforceable modification. Let me give you a parallel. You can buy a wedding dress and have someone officiate your wedding ceremony; that doesn't make you legally married.

As a general matter, a contractual modification requires that both parties agree to do something new or different going forward. This is referred to as "consideration." The key is that consideration is prospective, or future-looking: I agree to do X, and you agree to do Y.

There are also some circumstances where the law allows parties to modify contracts where only one party commits to doing something new — but this usually requires that there be unforeseen circumstances that justify a request to modify a contract. Ultimately, state law will govern on the exact circumstances that modification is permitted.

So how does all this apply to modifications of buyer broker compensation in written buyer agreements?

Monestier: Leaving aside the settlement for the moment, parties to a buyer representation agreement can modify their agreements, including the compensation provision, as a matter of contract law. But this would

buyer agreed to 2 percent commission. The parties could decide to modify, but both would have to do something new: The broker might agree to extend the geographical area to a 50-mile radius, and the buyer might agree to pay 3 percent. But it must be prospective, like I said. There is no such thing as modifying retrospectively (i.e., the broker unilaterally extending the radius to 50 miles and then going back to the buyer to ask for a modification).

Lesley Muchow says that you can modify an agreement if there is a legitimate business reason. That sounds like the unforeseen circumstances you're talking about. Is it?

Monestier: Yes and no — and I'm going to emphasize the "no."

Let's look at what Lesley Muchow said: "Did you contemplate that this was going to take a month, but it ended up taking a year and a half? Did you contemplate viewing one home but you ended up touring 100 homes? Those are some examples of potential ways that there might be a potential justification to go back to that buyer and ask them to amend. With all of this, you have to remember that this is not a unilateral amendment. The buyer would have to agree that amendment …"

She is talking past tense. She is saying that *after* the broker did more work, or expanded the scope of their services, he can "go back" and ask the buyer to sign a modification. And that is absolutely not permitted. The whole point of modification is to change your agreement going forward.

Take this outside the real estate context for a moment. You go to an auto repair shop, and they tell you the cost to fix your car is $1,000. When you go to pick up your car, they tell you it took longer than they thought, so they want to modify the contract to $2,000. Would that ever happen? Of course not. And that's exactly what NAR seems to be saying you can do: Perform the services and then, if there is a "legitimate business reason," try to upcharge the client.

Muchow said repeatedly that you can't modify the compensation just to match what the seller is offering. Does that alleviate any of these concerns?

Monestier: Not at all. Fundamentally, she seems to be endorsing unenforceable modifications, so I have a problem with that.

But there is another problem lurking below the surface here. As with everything, context matters.

What would this look like in the real world? Let's say a buyer has a signed a representation agreement at 2 percent. Then, the broker does more work than originally contemplated, and because he has a "business justification" for seeking a modification, he asks the buyer for 3 percent. In what universe is any buyer paying out of their own pocket going to agree to that? That would be like agreeing to pay $2,000 for your car repair instead of the $1,000 you contracted for.

But there is one circumstance where a buyer would likely agree to the modification — where it isn't coming out of the buyer's pocket. If the seller is offering 3 percent commission in advance, then the buyer isn't really paying 3 percent, the seller is. So, a buyer might happily agree to modify the contract in these circumstances. And that takes money right out of the pockets of sellers, who this whole settlement was designed to benefit.

So far, we've just been talking about contract law modification in general. How does the NAR settlement fit into this?

Monestier: One way that I've explained this is to picture a square. That square is the universe of contract law and provides the outermost boundaries of what is legally enforceable. Now, picture a smaller square within the bigger square. That is the universe that plaintiffs and defendants agreed to in the settlement.

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The settlement agreement states that the compensation for a buyer broker may not exceed that which is agreed to in "*the* agreement with the buyer." This refers to the agreement in Section H.58.(vi) that the Realtor has already "enter[ed] into … before the buyer tours any home." By its plain terms, "the agreement" that provides the cap on compensation is the one already entered into prior to the buyer touring the home, not a subsequently amended one.

Is amending a contract to collect a bonus any different?

Monestier: Yes, in that there is even less of a legal basis to allow this. At least in the traditional modification context, a buyer is arguably committing to paying more (even though, in practical terms, it comes out of the pocket of the seller). In the builder bonus context, the buyer is just authorizing the broker to collect more — without himself committing to paying more. There is absolutely no consideration here.

And as for "business justification" (or what I refer to as unforeseen circumstances), I can't see any scenario in which this exception would be engaged. Again, recall that the business justification must be forward-looking. So, if Lennar, for example, is offering a 5 percent bonus, what possible "business justification" not contemplated in the original scope of work could validate the amendment?

Do you have any additional thoughts on Muchow's statements?

Monestier: It is unfortunate that this messaging is coming from NAR. Despite saying that participants should act in good faith and not circumvent the settlement, NAR is providing a blueprint for violating the settlement, one that rests entirely on an undisclosed state of mind (i.e., did the broker have a business justification for the amendment?).

I am also concerned about Muchow's statements regarding the seller's inability to verify the commission agreed to in the buyer broker listing agreement. A seller has no way to know if he is overpaying a buyer broker, or more accurately, if a buyer broker is collecting more than specified in the buyer broker agreement.

I recently had a woman from California contact me. She agreed to pay 2 percent to a buyer broker (something like $60,000). At closing, she happened upon the buyer broker representation agreement, which was signed after the buyer had put an offer on her property. The buyer broker nonetheless collected the full $60,000, despite not complying with the NAR settlement. The settlement was supposed to protect sellers like her. And I think it's likely failing miserably.

Left in compliance limbo

Clarity — not confusion — is what the real estate industry desperately needs. The introduction of ambiguity, where there was seemingly once a clear prohibition, has made it more challenging for industry professionals to assess risk and ensure compliance. Rather than settling the issue, Muchow's comments raise new questions about how buyer agreements can be amended, creating opportunities for varying interpretations, inconsistent application of the practice changes and potential legal issues.

As Professor Monestier points out, contract modifications require new consideration or must meet an exception under state law, and the settlement itself imposes even stricter limitations. The idea that a broker can retroactively demand additional compensation for extra work contradicts fundamental contract principles and risks producing unenforceable agreements — or worse, inviting renewed legal scrutiny.

Meanwhile, six months after the changes took effect, uniformity in implementation and guidance remains elusive, making industry confusion the norm and compliance an ever-moving target.

brokerage and/or appropriate legal counsel in your jurisdiction for further clarification.

Summer Goralik is a real estate compliance consultant and former CA DRE Investigator in Huntington Beach, California. Connect with her on LinkedIn.

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Steve Hummel

Well, imagine that!
More evidence that the settlement terms -- especially the requirement for a buyer rep agreement PRIOR to showing -- is completely ludicrous!

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