

What the Bleep Do We Do Now?

Understanding the Settlement and What Happens Next.

#50000036 4-hour Elective course

We move forward

with Clarity

and Integrity

A Talia Freedman Confab

This Class is Sponsored by:



MESA
Real Estate Institute, LLC
New Mexico

INTRODUCTIONS



What we hope to learn today.

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When in doubt, talk to your QB.

I am not an attorney.

I am not your Qualifying Broker.

Nothing I say should be construed as
legal advice or supervision.

Who am I?

Residential
REALTOR.

Licensed in 2005.

Qualifying Broker
since 2015.

Someone who
"digs in" to figure
out the best and
most ethical
ways to practice
real estate.

City girl cat lover
who ended up in
the Sandia
Mountains with 4
cats and 2 dogs.

Live Classroom policies:

- Only one person speaking at a time.
- No side conversations.
- No use of percentages or dollar amounts.
- No sharing of business practices.
- Have your class materials ready.
- Be present, focused and participate.

Virtual Classroom policies:

- Have full face visible on screen at all times.
- Have a working microphone.
- No driving, moving around...while in class.
- No use of percentages or dollar amounts.
- No sharing of business practices.
- Have your class materials ready.
- Be present, focused and participate.
- Must have your first name, last name and license number showing.

Instructions to change your “name”:

- Hover your mouse over your picture.
- Click on the tiny blue button that will appear.
- Click on the option to rename your screen in the list.
- Change your name and add your license number as needed.

Recording Notice:

This class will be recorded for attendance purposes only and no portion of it will be used for marketing purposes. The video may be shared with the NM Real Estate Commission upon request.

What We’re Going to Review Today:

- Sherman Antitrust Act
- History of The NAR Settlement
- Do’s and Don’ts of The Settlement
- Our Relationship with Our Clients
- Creating Our Value Propositions
- The Settlement and Buyers
- The Settlement and Listings
- What Form to Use and When

How many of you have closed a buyer since last August?



And how many of you got paid at the end of those transactions?

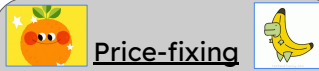
How many of you work mostly with buyers?

How many of you work mostly with sellers?

How many of your work 50/50 with buyers and sellers?

Sherman Antitrust Act - What is it?

A Federal act “to protect trade and commerce against unlawful restraints and monopolies.”



Price-fixing

Deciding what to charge in collusion with other companies.



Group Boycotting

Collectively deciding not to work with other companies.



Market Allocation
Not really a factor in real estate.

We cannot discuss fees or business practices outside of our companies. We CAN discuss options, examples, scenarios that do not use amounts.

But...We didn't do anything!

Individual Brokers might not have done anything on purpose. But (in my opinion) listing compensation in the MLS contributed to ongoing Antitrust violations by creating an environment where listings with certain compensation would be prioritized and those with less would be relegated.

But...We didn't do anything!

How it happened.	What did that do?	What kept it going?
MLS required compensation. You looked at listings.	Allowed other Brokers to tell you what your time was worth. You internalized it.	You got a listing. So you negotiated competition's compensation.

Really? Did Brokers use to...

- Filter listings based on compensation?
- Show houses with higher comp first?
- Offer compensation based on what other listings were offering?
- Refuse (or ignore) showings with “low” compensation?

But...Our Brokerages Didn't Do Anything!

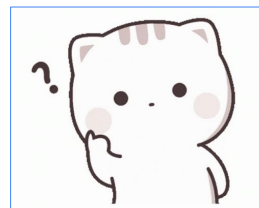
Brokerages may set fees. But (in my opinion) large brokerages throughout the country requiring virtually the same fee as each other led to systematic and on-going Antitrust violations even if not by express agreement. Putting offers of compensation made those fees known perpetuating those rates. This is what could be construed as an Antitrust violation.

But...It's Industry Standard!

“Industry standard” is a nice way of saying “price-fixing.”



Definition of Price-Fixing: “an agreement (written, verbal, or inferred from conduct) among competitors to raise, lower, maintain or stabilize prices or price levels.” (ftc.gov)



A Brief History of The Settlement

- Four cases and the “Settlement Class” are included. Burnette is the most famous of them.
- The Plaintiffs allege that “NAR participated in a conspiracy to raise, fix, maintain, or stabilize real estate commissions in violation of Section 1 of the Sherman Act...”
- NAR fought the lawsuit(s) for a long time.
- The Burnette case went to trial and NAR lost!

Why did NAR Settle?

- At a certain point the cost to continue fighting a battle we were likely to lose again was too high.
- NAR settled four total cases with The Settlement.
- NAR has not admitted any wrongdoing and maintains that offers of compensation benefit the consumer.

Requirements of The Settlement

- Must sign a compensation agreement **before** showing in person, virtually or sending video.
- Compensation must be clear and “objectively ascertainable.”
- Must inform buyers that compensation is not set by law and is negotiable.



What Does Negotiable Mean?

While legally compensation is “negotiable” Brokers and Brokerages are still allowed to set their own fee structures and stick to them.

Being “negotiable” does not mean the parties are obligated to negotiate. It simply means it’s not set by law or rule and consumers can make decisions about who they work with based on this and other variables.



Steering, The Settlement and The DOJ

Not the kind of “steering” we’re used to hearing about. This kind is not about Fair Housing Law, but it is THE LAW!!!

Examples include:

- Telling sellers Brokers won’t show their house if they don’t offer (a certain amount of or any) compensation.
- Refusing to show a property because of inadequate (or no) offers of compensation.
- Guiding (steering) buyers to places offering more comp than others. (Builder bonuses...)



Violations of The Settlement

- Sneaking comp into the MLS.
- Finding “work arounds” to the Settlement.
- Telling buyers your services are “free” if they are not.
- Steering buyers to or away from properties due to amount of compensation being offered.
- Accepting more comp than what’s in your agreement.
- Sharing compensation without seller permission.
- Showing houses (that are not your brokerage’s listings) without a signed agreement.



Violations are not worth the risk.

Risks to not abiding by the settlement?

- More class action or individual lawsuits
- Pursuit by plaintiffs for breaking the rules
- Release from the Settlement (for you or your brokerage)
- Fines and complaints to the MLS, Association & Commission
- Negative Public Opinion
- Loss of reputation and loss of business
- Expulsion from NAR
- Further DOJ action (i.e. Forcing a full decoupling of comp)

**Please
don't break
the
rules.**

Who Monitors Compliance?

**Please
don't break
the
rules.**

The MLS's are responsible for monitoring. If a complaint is made to the MLS they can ask you to send in your buyer broker agreement.

The DOJ's Views on Compensation

DOJ is concerned any offer of compensation will lead to steering.

Are they right?

The DOJ would Like...

To make it illegal to offer compensation.

What would this mean?

No offers of compensation, even off MLS, but buyers could still ask for it in their offers.

The DOJ's Views on Compensation

How much would that change things?

(In my opinion, not much)

What does all of this mean?

The the settlement boils down to three major changes:

- Buyer's brokers have to talk to Buyers about compensation,
- The Buyer Broker fee has become a buyer fee. And like all fees, it's negotiable, and
- Who pays the Buyer's Broker fee is now (more) subject to the ebb and flow of the market.

What would 2022 have been like?

Buyers would have spent some of their appraisal gap waivers or TOM fees on their broker's comp.

What would 2008 have looked like?

Sellers would have tripped all over themselves to pay any buyer closing cost needed to sell their house.

Customers vs. Clients. Know the Difference.

Customers:

Brokers owe customers basic broker duties and must behave according to the Code of Ethics. Per The Code, when not acting in an agency manner, the broker owes all parties in a transaction honestly. However, Reasonable Care is a very broad concept and is required by state law.

Clients:

Brokers owe clients all of the same duties as they do with customers in addition to having a contractual relationship where the duties and responsibilities owed to each party are outlined in the contract. Being a client is not the same as being an "agent."

BASIC BROKER DUTIES:

*Honesty and reasonable care, ethical and professional conduct...
Performance of any and all written agreements...*

THE CODE:

When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.

Centering Our Clients. It's The Code and The Law.

????

Who are our clients?

Who are our customers?

Will buyers ever be customers again?

Who should be at the center of the process?

Who should not be at the center of the process?

What Hat are We Wearing?

Competitor



Buyer Rep



Colleague



Seller Rep



Peer



Self



Building a Relationship of Trust

What do **WE** do for our **BUYERS**?

Building a Relationship of Trust

What do **WE** do for our **SELLERS**?

Developing your Personal Value Statement

What do **YOU** do for **CLIENTS**?

Expertise, specialities, unique
services...

What makes you stand out?

Developing your Personal Value Proposition

Your Personal Value Statement?

Presenting Your Value

Providing written materials to prospective clients can help you communicate your expertise and other attributes that might make someone choose to work with you. Some of those items might be:

- Resume
- Bio Page
- Reviews
- List of certifications

NAR on working with Buyers.

*"When assisting or enabling a client or customer in establishing a contractual relationship (e.g., listing and representation agreements... etc.) **electronically**, REALTORS® shall make reasonable efforts to explain the nature and disclose the specific terms of the contractual relationship being established prior to it being agreed to by a contracting party."*

Getting the Agreement Signed

What concerns have come up from buyers about signing an agreement?



What are some ways to overcome these concerns?

Getting the Agreement Signed

Common Objections and Concerns:

- No one else made me sign an agreement
- I don't believe you
- I don't know if I want to work with you yet
- What if I can't pay you
- Others

When do I need a Signed Agreement?

You must sign a compensation agreement with a buyer BEFORE showing them a house virtually or in person.

"Virtual includes" taking video and sending it to them later.

When Do I NOT Need an Agreement?

- Showing your own listing.
- Showing a listing in your office/company.
- You're hosting an Open House.
- To set up a search for a buyer.
- To have a buyer consultation.
- A broker in your office needs you to show their "signed buyer a house.

The Buyer Brokerage Agreement. Obligation or Opportunity?

Don't downplay it. Make a big deal out of it and explain it.

Make sure they understand:

- The agreement is exclusive-even if short term.
- How much you charge.
- That the amount is not required by law, MLS, GAAR or NAR.
- They'll NEVER owe you money "by accident."
- When they WOULD owe you money.
- How long the agreement will last.
- What happens when the term ends.

NAR on Compensation.

"...educate buyers...that buyers can ask sellers to pay for buyer broker compensation as part of the offer, even if there is no offer of compensation."

"You CAN inquire about the existence of such offers...and communicate the response to your buyer."

"Do not accept 'bonuses' or other compensation from a seller or any other source that is more than what is in your written buyer agreement."

NAR on Changes to Compensation.

"When you agree with a buyer to certain work for a particular amount of compensation, you must do so in good faith."

"...there needs to be a business justification."

Lesley Nuchow, NAR Attorney

"...you should not amend an agreement for the sole purpose of "matching" an offer of compensation that is greater than what you and your buyer agreed to."

Before Raising Compensation, Consider:

Who are you "centering?"

What benefits your client?

What benefits you? Short Term? Long Term?

Office policy?

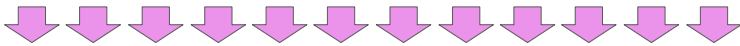
- Reputation
- Referrals
- Code of Ethics
- NAR Guidance
- DOJ
- Spirit vs. Letter

"My broker said we should use the extra funds being offered to them to get me a better deal!"

"My broker renegotiated their fee when I was writing an offer with them."

What Form to Use and When - Buyers 1

You showed a few houses to a buyer using the Short Form 1206 A for showing services ONLY. They now want to work with you going forward and want you to help them through the whole process.

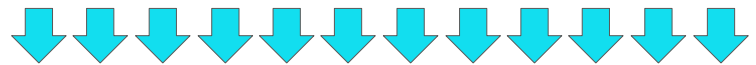


Terminate your Short Form and Sign a new Buyer Brokerage Agreement 1206
OR

Use Buyer Brokerage Agreement Addendum 5116 to edit the services and compensation of the already signed BBA.

What Form to Use and When - Buyers 2

Listing broker is **SHARING** compensation that matches your BBA. There are no offers.



Get Broker to Broker Compensation Agreement - 1108 from the listing broker.

Get it signed by the listing broker **BEFORE** you submit an offer. If you can't, then **PUT IT IN THE OFFER!**

What Form to Use and When - Buyers 3

Listing broker is sharing compensation that is **LESS** than your BBA. Your buyer needs the seller to pay your entire fee.



Get Broker to Broker Compensation Agreement 1108 signed by the listing broker **AND** put the remaining amount in your offer.
OR, put your whole fee in the offer.

What Form to Use and When - Buyers 4

Seller is offering compensation that matches your BBA but does not send you a 4660

→ Your buyer decides **NOT** to put compensation in the offer.



Initiate form 4660 and get it signed by the seller **before** submitting the offer.



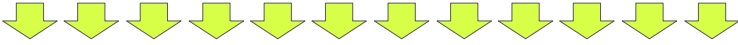
Can't wait to get the 4660 signed?



Put it in the offer!

What Form to Use and When - Buyers 5

Seller is absolutely clear they will **NOT** pay for buyer broker compensation but buyer needs it to purchase.



Request credit with a 2101 and...



“Attach” to the offer via Para. 49 of the PA.

What Form to Use and When - Buyers 6

Increasing compensation?

Changing your scope of Services?

No. I think I might be violating The Settlement or Code.

Yes. The scope of services has changed.

Talk to your QB or just don't do it!

Great! Use Form 5116 Buyer Brokerage Agreement Addendum

Buyer Scenario 1

Listing broker **strongly** suggests you initiate the Seller to Buyer's Broker Compensation Form 4660, submit it **WITH** the offer, and leave compensation out of the offer.

What should you do?

A listing broker cannot insist how you write your offer. This is between you and your buyer. Only use the 4660 if you are getting it signed by the seller **BEFORE** submitting your offer.

Buyer Scenario 2

You have an agreement signed with a buyer and then you take them to a builder to look at new construction. The builder is offering a bonus to the Buyer's Broker.

What do you do?

Remember, NAR strongly advises you not to change your compensation just to match a higher offer of compensation. There should be a “reasonable justification” for the change.

Buyer Scenario 3

You're getting ready to write an offer and the listing broker sends over Form 4660 already signed by the seller.

What do you do?

Sign the form and send Basic Broker Duties, initiated by you and signed by you, to the seller for them to sign. Once this is signed you do not need to include compensation in your offer, unless you are asking for compensation **IN ADDITION** to what's in the 4660.

Buyer Scenario 4

You had an agreement with your buyer for “x” compensation. You included it in your offer. The seller sends a counter offer lowering your fee.

What are you and your buyer's options?

- Buyer pays the difference
- Increase the price and ask seller to pay
- Lower your fee to match the compensation offered
- Counter back adding it back in (stand firm)

Buyer Scenario 5

You had an agreement with your buyer for “x” compensation. You included it in your offer. The seller sends a counter offer lowering your fee.

The buyer is willing to pay the difference and is willing to accept the other terms in the counter.

What form(s) do you send to the listing broker in response?

The only form you need is the buyer-signed counter offer. NEVER send your BBA to the listing broker.

Buyer Scenario 6

You had an agreement with your buyer for “x” compensation. You included it in your offer. The seller sends a counter offer lowering your fee. The buyer is only able to pay some, but not all, of the difference and is otherwise willing to accept the counter.

You’ve decided to lower your fee for THIS PROPERTY ONLY.

Do you need to do an addendum to your Buyer Brokerage Agreement?

NO! You do NOT need to amend your BBA to lower your fee. You can make less without written approval from your buyer. You just cannot make more.

Buyer Pop Quiz 1

Can we refuse to show a house because they’re not offering compensation?

Can we only send buyers listings where we have vetted what the compensation will be?

Can we withhold listings from a buyer because of no or insufficient compensation?

NO. All of these things are STEERING. If there is not adequate or no compensation being offered you should tell your buyers they can attempt to negotiate it into the offer just like you would with a lower purchase price or request for closing costs.

Buyer Pop Quiz 2

Can we set up searches, show our own listings, or show inter-office listings without a buyer brokerage agreement?

Can we show a house to a buyer who has a buyer brokerage agreement with someone else in the same office or company?

Can we show vacant land, rentals, or commercial property without a written compensation agreement?

Can we have two agreements – one for resale and one for new construction – with different compensation rates?

YES! All of these things are permissible per The Settlement.

Buyer Pop Quiz 3

Can we write an offer without a written agreement?

Can we take video and send it to a buyer w/out an agreement?

Can we write a new agreement for each house based on compensation being offered?

Can we meet our buyer at another company’s open house without a signed agreement?

Can we state we will get paid “Whatever the listing side is paying” in our agreement?

NO! All of these things would be violations of the settlement.

Marketing Listings Post Settlement

How do most buyers find houses?

ONLINE!

Marketing Listings Post Settlement

Where can we market buyer credits?

- MLS listings
- Social Media groups (including those with brokers)
- Sign Riders
- Flyers
- Open houses
- Our own websites
- Social media posts
- Anywhere and everywhere

Marketing Listings Post Settlement

Where can we market compensation?

- Social Media groups (excluding those with other brokerages)
- Sign Riders
- Flyers
- Open houses
- Our own websites (but not with comps for other brokerages)
- Social media posts
- Anyplace else (outside of the MLS or group w/ other brokerages).

Marketing Listings Post Settlement

What gets more exposure: Credit or Compensation?

CREDIT!

NAR on working with Sellers

Offers of comp =
OK.

"Make sure to emphasize that it is the seller's choice whether an offer of compensation is made..."

"...inform your sellers that offers of compensation may be marketed off MLSs."

"...the seller decides whether and when their agent can communicate the amount of compensation."

Seller Conversations

Be sure to tell sellers where they can and cannot market compensation vs. credits.
Give them options not orders!

**Steering
=
Bullying**

Seller Conversations

Do we trust our competitors to be ethical and follow the rules?

I hope so!

Seller Conversations

What does it say about our competitors if we tell sellers that brokers won't show their house without offering compensation?

That we DON'T think they are ethical!

Seller Conversations

Anyone have sellers counter compensation in an offer?

Did it result in a benefit to the seller?
(Higher purchase price, lower compensation...)

If not set by law or convention, how do you know what to pay a buyer's broker?

Seller Conversations

Anyone have a seller refuse to pay a buyer broker fee?

Did they end up paying it in the end?



Seller Conversations

What is the objective of a listing appointment?

Who decides the list price of a property?

Who decides whether to offer credit, comp, both or none?

Who are we "centering" when we push sellers to offer comp?

How should we explain the options to the seller?

What's most important to sellers?

A Sampling of Fee Structures

- Per the activity/a la carte
- By the hour
- Percentage of the sales price
- Flat fee
- Volume based business model
- Small and selective business model
- Varied based on experience (like law firms)
- Tiered options based on level of service
- Sliding scale (based on client financials)

Unrepresented Buyers

Anyone have an unrepresented buyer write an offer on a listing?



What Form to Use and When - Sellers 1

Seller is open to paying comp.

Seller is open to negotiating comp before seeing the offer.

Seller wants to specify the amount of the comp.

Note it in the Listing Agreement Form 1106

You may market compensation outside of the MLS only.

What Form to Use and When - Sellers 2

Unrepresented buyer wants to write an offer on your listing.

Send them Form 2112 Notification of Deadline Default and Opportunity to Cure

Use Notice to Unrepresented Buyer 1208 and Unrepresented Party Use of Forms 1208 A

They keep missing their deadlines in the contract.

What Form to Use and When - Sellers 3

Seller gives you permission to share Compensation at the time of the listing.

Fill out Compensation and Cooperation Brokerage to Brokerage Agreement - Form 1108 AND note it in the Listing Agreement.

Buyer's broker is going to submit an offer

Fill in the buyer name and TERM and send to buyer's broker.

What Form to Use and When - Sellers 3

Your seller has (now) agreed to let you share your compensation with a buyer's broker **AFTER** you signed a listing agreement. What form(s) do you use?

Addendum to your listing agreement and Brokerage to Brokerage Compensation Agreement Form 1108.

What Form to Use and When - Sellers 4

Seller did **NOT** offer compensation but has changed their minds.



Put it in a listing addendum and Seller to Buyer Brokerage Form 4660 or in the offer.

What Form to Use and When - Sellers 5

You have a listing and you receive an offer asking for more in compensation than your seller is willing to provide. How do you negotiate the change in offered compensation?

**Put it in the counter offer.
No other form is needed if it's in the contract.**

Listings Pop Quiz 1

Can we advise sellers to offer buyer's broker compensation?

Can a brokerage only take listings where the seller allows cooperative compensation?

Can a brokerage only take listings where the seller offers buyer broker compensation?

Can a brokerage have a policy to never offer cooperative compensation?

YES! BUT! Be sure to explain the pros & cons of each, & tell your seller not all Brokerages policies are the same.

Listings Pop Quiz 2

Can we ask a broker to send us their Compensation Agreement?

Can we create a forum or database where multiple brokerages can share compensation on their listings?

Can the seller dictate what a buyer spends a seller credit on?

Can we require the use of certain compensation forms when brokers submit offers?

Can we sneak compensation into the MLS?

Can we share compensation without seller's written consent?

NO! These are all violations of The Settlement.

Listings Pop Quiz 3

Can we call brokers to tell them about offers of comp?

Can we put offers of comp on sign riders, flyers, ads, websites, social media, text messages and other forms of advertising?

Can we send email blasts with offers of compensation in them?

Can we show buyers we meet at an open house one of our listing w/out a buyer brokerage agreement?

Can we put "buyer concessions/closing cost credit" in the MLS?

Can the seller refuse to offer compensation?

YES! These are all allowed under The Settlement.

Final Questions

- What do you do when brokers from outside of your company wants to talk about compensation?
- Any remaining questions

Reminders

- Keep your certificate for the class.
- Consider these other classes at _____.
- Leave a Google review
(and mention my name)

Resources for Staying on Track

Dos & Don'ts - BUYERS.



Put Client's Interest First



Dos & Don'ts - SELLERS.



RE Unfiltered Pod - NAR Part 1



RE Unfiltered Pod - NAR Part 2



NAR Settlement FAQ's

