

## *A Brave New World of Broker Commissions and Escrow Issues*



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Kate Berard is the Director of Professional Standards and Associate Counsel at the Massachusetts Association of REALTORS® (MAR). In that role, Kate manages MAR's Professional Standards Program, which consists of ethics and arbitration hearings and mediations. In addition, Kate also advises members on all aspects of real estate

transactions and brokerage management, including the updating and creation of new forms and contracts, educating on new and trending legal issues and general risk management.

Prior to joining MAR, Kate practiced real estate law and general civil litigation. While not currently active in real estate sales, Kate holds her real estate broker's license and REALTOR® membership. Kate also serves as Vice President of the Town Council in Barrington, Rhode Island, where she resides with her husband and three children.

Kate received her J.D. from New England School of Law, her M.Ed. from Rutgers Graduate School of Education, and her B.A. from Rutgers University.



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Richard Sullivan is General Counsel for Gibson Sotheby's International Realty, ("Gibson SIR"), a real estate brokerage company specializing in premier luxury residential real estate in eastern Massachusetts. Based in Boston, and with twenty offices and five hundred agents, Richard oversees legal risk management,

acquisitions, litigation, arbitration, and training and education.

Prior to joining Gibson SIR, Richard was staff counsel at the Greater Boston Real Estate Board and was in private practice for 17 years. His practice focused on real estate, including buyers, sellers, lenders, and commercial landlords and tenants, as well as real estate brokers and developers in civil litigation, arbitration and before administrative agencies. Richard also represented a number of real estate companies, including Gibson SIR, as outside counsel, before becoming in-house General Counsel in 2017.

Richard received his J.D. from New England School of Law, and his B.A. from the American University in Washington D.C. He is licensed as a Real Estate Instructor by the Board of Real Estate Brokers and Salespersons.

## Brave New World of Broker Commissions

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### INTRODUCTION

The issue of broker compensation has been the subject of national and local class action lawsuits, including *Sitzer v. Nat'l Ass'n of Realtors et al*, No. 4:19-cv-00332-SRB (W.D. Mo. 2019) (commonly known as *Sitzer/Burnett*), *Moehrl v. National Association of Realtors*, No. 1:2019cv01610 - Document 184 (N.D. Ill. 2020), *Gibson v. Nat'l Ass'n of Realtors, et al*, No. 4:23-cv-00788 (W.D. Mo. 2023), and locally, *Nosalek v. MLS Property Information Network Inc., et al*, file in the United States District Court in Massachusetts in 2021 as Case No. 20-cv12244-PBS.

These cases allege that defendants, the National Association of REALTORS® (NAR), various MLS networks and corporate realty defendants conspired to inflate real estate commissions by enforcing a cooperative compensation rule that required listing brokers to offer compensation to buyer brokers in order to list properties on Multiple Listing Service databases (MLS). The plaintiffs in the seller compensation cases argue that the conspiracy resulted in inflated and fixed commission rates and that some sellers may have not been aware they were paying the buyer's broker's commission compensation (a harder argument in Massachusetts as the listing agreements have been clear on this topic). The plaintiffs in the buyer compensation cases argue that the conspiracy resulted in inflated home prices.

The jury in the *Sitzer/Burnett* case agreed with the seller's allegation of a horizontal price fixing scheme, finding the defendants liable for violating Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 and awarded approximately \$1.785 billion dollars to the Plaintiffs. Following the *Sitzer/Burnett* verdict, over thirty copy-cat cases have been filed against over 250 defendants, and it is anticipated additional cases concerning broker compensation and policies of the various MLS companies will surface.

As a result, efforts have been made to settle several of the seller compensation lawsuits, and the National Association of REALTORS® (NAR) and many of the larger corporate defendants have entered into nationwide settlement agreements, many receiving final approval at the end of 2024. As of the time of this printing, the *Nosalek* parties were denied preliminary approval in the MLSPIN case, but approval seems imminent with adjustments to class size.

Even as settlements in the seller compensation cases continue to pile up, several prominent real estate companies are fighting back in the *Gibson* case and others. At the same time, the buyer compensation cases continue to roll forward under state antitrust laws that allow for indirect purchaser claims.

### THE ANTI-TRUST STANDARDS

The Sherman Act, codified in 15 U.S.C. §§ 1 to 7, is the federal antitrust law that prohibits unreasonable restraint of trade and is enforced by the Department of Justice (DOJ). Section 1 of the Act, at issue in the compensation cases, states: *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*

Agreements with competitors, are viewed as per se violations – meaning, their mere existence is illegal. Some problematic agreements are price fixing, joint boycotts, bid rigging and dividing customers or markets between competitors.

## The Per Se Rule v. the Rule of Reason:

Violations under the Sherman Act take one of two forms -- either as a per se violation or as a violation of the rule of reason. Per se violations of the Sherman Act include price fixing, bid-rigging, horizontal customer allocation, and territorial allocation agreements.

A per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.

All other violations are analyzed under the Rule of Reason. Established in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the Rule of Reason establishes that a business practice is illegal if it *unreasonably* restricts trade. Courts often find intent and motive relevant in predicting future consequences under this analysis. If certain business practices have both pro-competitive and anti-competitive elements, the court applies a "totality of the circumstances test" and asks whether the challenged practice promotes or suppresses market competition – does the benefit outweigh the harm.

Applying the per se standard, the jury instructions in the *Sitzer | Burnett* case told the jurors, “If you find that any Defendant engaged in a price-fixing conspiracy, it is not a defense that such Defendant acted with good motives, thought its conduct was legal, or that the conduct may have had some good results.”

*\*Antitrust law is very complex and fact specific, this is a brief summary.*

## COMPENSATION LITIGATION

### THE SELLER CASES:

#### ***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

**Status:** Class certification granted on March 29, 2023

Class consists of home sellers who paid a broker commission in last 4 years – sale of property listed in one of 20 MLSs

**Final Settlement:** November 26, 2024, court granted final approval of settlement

#### ***Burnett (Sitzer) v. National Association of REALTORS, et al***

Case No. 4:19-cv-00332-SRB (W.D. Mo. 2019)

**Filed:** April 20, 2019

**Status:** Jury verdict for Plaintiffs reached on October 31, 2023 - Damages \$1.78 billion (trebled \$5.4 billion)

### **Jury Instructions in *Burnett*:**

1. **Did a conspiracy exist?**
2. If so, did that conspiracy *raise, inflate, or stabilize broker commission* rates paid by home sellers?
3. If yes, did each of the defendants *knowingly and voluntarily* join the conspiracy with the purpose of furthering its goals?
4. If yes, did the conspiracy *cause the plaintiffs to pay more* for real estate brokerage services than they would have without the conspiracy?
5. If yes, state the amount of *damages* proved.

**A jury in Kansas City, Missouri ruled in favor of the home seller-plaintiffs on 10/31/23 finding NAR et al liable after deliberating for only 2 hours 28 minutes (!)**

- NAR stands by the assertion that there was no evidence of a conspiracy and that they presented a very strong case and witnesses.
- There was concerning testimony about training videos and materials; Plaintiffs were happy with representation provided by their agent but *did not know* they were paying buyer's broker.
- There were errors: Motions in limine granted but not adhered to. Important evidence not allowed in.

However, while motions were filed post-verdict, settlement by corporate defendants and NAR followed shortly thereafter.

**Final Settlement Approval for NAR:** November 26, 2024, court granted final approval of settlement that included a nationwide class and release, \$418 million dollars and injunctive relief. Appealed to the 8<sup>th</sup> Circuit.

**THE BIG SELLER COPYCAT: 30+ cases filed, over 250 defendants.**

***Gibson v. National Association of REALTORS, et al***

Case No. 4:23-cv-00788 (W.D. Mo. 2023)

**Filed:** October 31, 2023

**Status:** Still in early stages as to some Defendants

Proposed class action against NAR and 7 different corporate defendants.

Covering Sellers across the US who paid commissions over last four years. Seeking more than \$100 Billion in damages

**Final Settlement:** NAR and some corporate defendants granted November 26, 2024

The remaining corporate defendants are still litigating asserting that plaintiffs' claims are barred due to the nationwide NAR settlement; that they are "a released party" and that the NAR settlement "resolved those claims for the alleged conspiracy as a whole."

**THE BUYER CASES:**

***Batton v. National Association of REALTORS, et al (aka Leeder case; Batton 1)*** Case No.

1:21-cv-00430 (N.D. Ill. 2021)

**Amended Filing:** July 6, 2022

**Status:** Headed toward class certification

Plaintiffs are homebuyers that allege Defendants have inflated costs for home buyers by participating in the cooperative compensation rule.

***Batton v. Compass, et al (aka Batton 2) (No NAR)***

Case No. 1:23-cv-15618 (N.D. Ill. 2023)

**Filed:** November 2, 2023

**Status:** Quest for additional defendants, in early stages.

Largest scope - seeks class certification for a "Nationwide Class" and "Damage Class" each of which represents all person who purchased residential real estate in the U.S. on a NAR MLS anytime between December 1, 1996, through the present day.

## **THE DOJ LITIGATION:**

### ***Department of Justice v. National Association of Realtors***

**Status:** Ongoing. DOJ opened investigation into NAR concerning policies: Participation Rule and Clear Cooperation. Parties reached a settlement that included the closure of the Antitrust Division's investigation into the policies. DOJ attempted to re-open the investigation. The Court upheld the terms of the Settlement in June; DOJ appealed and won the appeal.

NAR agreed:

- Brokerages to make offers of compensation public on their websites;
- Code of Ethics Standard of Practice 12-1 was amended in January 2022 to state:  
“REALTORS® must not represent that their brokerage services to a client or customer are free or available at no cost to their clients, unless the REALTOR® will receive no financial compensation from any source for those services.” DOJ agreed to stop investigating those policies.

DOJ sent out CIDs - free to continue to investigate.

## **THE MASSACHUSETTS CONNECTION:**

### ***Nosalek v. MLS Property Information Network, et al***

Case No. 20-cv-12244 (D. Mass. 2021) **Filed:** December 17, 2020 **Status:** Stayed, pending MDL

Filed: 12/17/2020

**NAR/MAR not included**

Motion to Dismiss (denied): 12/10/2021

MLS PIN filed Settlement: 6/30/2023

**DOJ Statement of Interest:** 2/15/2024

Final Settlement Deadline: 4/10/2024 then case was stayed pending NAR settlement outcome.

**Preliminary Settlement Approval Hearing:** Denied on April 1, 2025 because of the expanded class; Judge Saris noted she was under the impression that the lawsuit involved residential real estate and none of the named plaintiffs were involved in commercial sales or mobile home sales.

When asked by the Judge why they “care so much” about retaining the ability to have compensation to buyer brokers reflected on the MLS, MLS PIN maintains the position that it would be a commercial speech issue and infringe on seller's first amendment rights. MLSPIN stated that since MLS PIN changed its rules surrounding offers of cooperative compensation in July 2024, only 25% of properties listed in the MLS include offers to buyer broker compensation greater than \$0.

MLS PIN and plaintiffs have until April 22, 2025 to file changes to their current settlement agreement.

## **THE SETTLEMENT PRACTICE CHANGES**

### **NAR: (Received Final Approval – Appealed to 8<sup>th</sup> Circuit)**

What are the key terms of the agreement?

**Release of liability:** The agreement releases NAR, over one million NAR members, all state/territorial and local REALTOR® associations, all REALTOR® MLSs, and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was \$2 billion or below from liability for the types of claims brought in these cases on behalf of home sellers related to broker commissions.

The agreement provided a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded \$2 billion, and MLSs not wholly owned by REALTOR® associations to obtain releases efficiently if they chose to use it.

Individual members and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was \$2 billion or below are released by the agreement and not required to opt in.

**Compensation offers moved off-MLS:** NAR agreed to put in place a new rule prohibiting offers of compensation on an MLS. Offers of compensation continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. Sellers can offer buyer concessions on an MLS (for example – concessions for buyer closing costs). This change went into effect August 17, 2024.

**Written agreements for MLS Participants acting for buyers:** While NAR has been advocating for the use of written agreements for years, in this settlement NAR agreed to require MLS Participants working with buyers to enter into written agreements with their buyers before touring a home. This change went into effect August 17, 2024.

**Settlement payment:** NAR to pay \$418 million over approximately four years.

### **MLS PIN: (Denied Preliminary Approval – Likely approval with some adjustments to class)**

1. MLS PIN will remove the requirement that an offer of compensation must be made to the Buyer's Broker.
2. MLS PIN will require the Seller's Broker to ***provide notice***: (a) the seller is not required to offer compensation to the buyer-broker and (b) if the buyer-broker requests compensation, the seller can decline.

#### **BECOMES SELLER TO BUYER BROKER OFFER**

3. If the seller makes an offer to a buyer broker and the buyer makes a counteroffer (effectively rejecting the seller's offer), then any commission to be paid is negotiated among the seller, the buyer, the seller broker, and the buyer broker.

In this third version,

1. Pay \$3.95 million into settlement fund;
2. Covers all real estate listings (not just residential); \*Judge says no.
3. Releases Participants and Subscribers.

### **What is the interplay of both settlements?**

**The NAR settlement prohibits offers of compensation of any kind to be reflected on an MLS that opts in.** Even if an MLS allows for seller concessions, those concessions cannot be marked specifically for compensation to the buyer representative.

**Conversely, The MLSPIN settlement proposes that there can be an offer of compensation reflected in the MLS but that offer comes directly from the seller.**

Negotiated throughout the transaction between the seller and the buyer representative (in essence a seller concession marked specifically for buyer broker compensation)

## **THE DOJ's STATEMENT OF INTEREST**

### **IN THE NOSALEK /MLSPIN SETTLEMENT:**

The original proposed settlement included some rule changes on behalf of MLSPIN, offered \$3 million in settlement funds and an agreement to cooperate in the litigation against the remaining defendants.

The proposed rule changes adjusted the compensation field to allow for \$0; aka no requirement to offer cooperative compensation; required the subscribers attest to informing the Seller they were not required to offer cooperative compensation and can decline if requested to do so; has the Seller offer directly to the buyer broker; would have clarified that if the Seller makes the offer to the buyer broker and buyer makes counteroffer, commission would be negotiated between all parties: Brokers and Buyers/Sellers.

The DOJ expressed concerns with the original settlement terms and the Judge requested the concerns be outlined; DOJ had until 2/15/2024 to file a Statement of Interest (Amicus Brief).

The DOJ's brief argued that the proposed settlement offers "cosmetic changes" that are inadequate because similar reforms have not driven down commissions. The DOJ instead calls for an outcome that completely separates the seller broker from offering anything to the buyer broker – essentially a request to "decouple" the MLS and the offering of compensation.

They do not want to see sellers and listing brokers having a role in setting compensation for buyers and buyer brokers they instead would propose a rule change that eliminates the offer of compensation to a buyer broker so that sellers would be responsible for determining only the compensation of their own broker in the listing contract and buyers would be responsible for determining compensation for their buyer broker in their own representation contract.

DOJ relayed largest concern is "steering"

Practically, this filing tells the judge what the DOJ would like to see happen; however, the judge can still approve the Settlement over DOJ's objection.

At the preliminary hearing on April 1, 2025, Judge Saris let the parties know she was inclined to see it as the DOJ outlined until reviewing the Parties replies which included the assertion that participants who included compensation on MLSPIN was down to just 25%.

The DOJ continued to assert its same concerns in its second brief, and will be able to supplement it with additional data to support its assertion of an anti-competitive effect as the Parties were sent back to amend their attempt at an extended class size.

### **COMMENTS ON NAR SETTLEMENT:**

The DOJ provided a concern to Judge Bough at the final approval hearing for the NAR Settlement about the mandatory buyer agreement but did not expand on this position.

## **CODE OF ETHICS CONSIDERATIONS FOR REALTOR® MEMBERS**

**Article 1:** When representing a buyer, seller, landlord, tenant or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly.

- **Standard of Practice 1-12:** When entering into listing contracts, REALTORS® must advise sellers/landlords of:
  - the REALTOR® company policies regarding cooperating and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;
  - the fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords may represent the interests of buyers/tenants; and
  - any potential for listing brokers to act as disclosed dual agents, e.g., buyer/tenant agents.
- **Standard of Practice 1-13:** When entering into buyer/tenant agreements, REALTORS® must advise potential clients of:
  - the REALTOR® company policies regarding cooperation;
  - the amount of compensation to be paid by the client;
  - the potential for additional or offsetting compensation from other brokers, from the seller or landlord, or from other parties;
  - any potential for the buyer/tenant representative to act as a disclosed dual agent, e.g., listing broker, subagent, landlord's agent, etc.; and
  - the possibilities that sellers or sellers' representatives may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by any confidentiality agreement between the parties.

**Article 3:** REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker.

- **Standard of Practice 3-1:** REALTORS®, acting as exclusive agents or brokers of sellers/landlords, establish the terms and conditions of offers to cooperate. Unless expressly indicated in offers to cooperate, cooperating brokers may not assume that the offer of cooperation includes an offer of compensation. Terms of compensation, if any, shall be ascertained by cooperating brokers before beginning efforts to accept the offer of cooperation.
- **Standard of Practice 3-2:** Any change in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time that REALTOR® submits an offer to purchase/lease the property. After a REALTOR® has submitted an offer to purchase or lease property, the listing broker may not attempt to unilaterally modify the offered compensation with respect to that cooperative transaction.
- **Standard of Practice 3-3:** Standard of Practice 3-2 does not preclude the listing broker and cooperating broker from entering into an agreement to change cooperative compensation.

**Article 9:** REALTORS®, for the protection of all parties, shall assure whenever possible that all agreements related to real estate transactions including, but not limited to, listing and representation agreements, purchase contracts, and leases are in writing in clear and understandable language expressing the specific terms, conditions, obligations and commitments of the parties. A copy of each agreement shall be furnished to each party to such agreements upon their signing or initialing.

- **Standard of Practice 9-2:** When assisting or enabling a client or a customer in establishing a contractual relationship (e.g., listing and representation agreements, purchase agreements, leases, 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.



## **AGENCY, SERVICE & FEE AGREEMENTS**

### **AGENCY = Full Fiduciary Duties                      “OLD CAR”**

- **Obedience** Agent must carry out all lawful instructions of client.
- **Loyalty** Agent must act in best interest of client.
- **Disclosure** Agent must disclose all information relevant to client.
- **Confidentiality** Duty to keep confidential client's information or discussion. Duty survives termination of agency relationship. Duty does not apply to legally required disclosures such as known physical hazardous conditions of property.
- **Accountability** Agent must protect and account for all money, documents, or other personal property given to her by the client.
- **Reasonable Care & Due Diligence** Agent must act competently, capable of performing duties within scope of license requirements.

**Dual Agency** - a real estate agent who represents both the seller and buyer in the transaction is a disclosed dual agent with written informed consent of both the buyer and the seller. A Dual Agent has a duty of confidentiality and accounting to both parties.

**Duties = CAR. Undisclosed dual agency is illegal.**

**Designated Agency** - a real estate licensee who has been specifically appointed or designated by the broker with whom they are affiliated to individually represent a specific client (either a buyer or seller) when selling or buying real estate. The designated agent has full duties of agency to the client.

**Duties = OLDCAR.**

### **Facilitator -**

- Non-Agent or “Transactional”
- The Facilitator works to complete the transaction and **does not represent either party in the transaction.**
- Bound by license law and MGL Ch. 93A (must disclose all known material defects that exist).
- Do not have a fiduciary relationship with the seller or the buyer and no duty of confidentiality unless expressly agreed.

**Duties = AR**

**Switching type of representation (Upgrading):** Should the seller and/or buyer expressly agree, a facilitator relationship can be changed to a seller or buyer client relationship with the written agreement of the person so represented.

## **BUYER AGREEMENTS:**

### **NAR Settlement Requirements:**

- Specify and conspicuously disclose the amount or rate of any compensation the MLS Participant will receive from any source;
- The amount of compensation must be objectively ascertainable and may not be open-ended (e.g. “buyer broker compensation shall be whatever amount the seller is offering to the buyer”);
- Include a statement that MLS Participants may not receive compensation from any source that exceeds the amount or rate agreed to with the buyer;
- Disclose in conspicuous language that broker commissions are not set by law and are fully negotiable; and,
- Include any provisions required by law.

**Does not set type of relationship, scope, term, service, fee, etc.**

**Required when:** 1. Working with a buyer (triggered by) 2. Touring a property

**Not Required when:** Showing to consumer on behalf of your seller client; i.e.: direct calls to you as the listing agent / open houses.

### **ESCROW (DIS)CONNECT**

#### **Who can hold escrow?**

The seller's real estate brokerage or attorney typically holds Massachusetts escrow funds; title company or third-party escrow company could be used (but not usual in MA).

#### **254 CMR 3:10**

(a) **Escrow Accounts.** Unless otherwise agreed to in writing by the parties in transactions involving the sale, purchase, renting or exchange of real property, all money of whatever kind and nature paid over to a real estate broker to be held during the pendency of a transaction shall be immediately deposited in a bank escrow account and such broker shall be responsible for such money until the transaction is either consummated or terminated, at which time a proper account and distribution of such money shall be made. An escrow account is an account where the broker deposits and maintains the money of other parties in a real estate transaction and such broker has no claim to such money. An escrow account may be interest or non-interest bearing but where it is interest bearing the broker must make a proper account of such interest at either the consummation or termination of the transaction.

(b) **Record Keeping.** Every broker shall keep a record of funds deposited in his/her escrow accounts, which records shall clearly indicate the date and from whom the broker received the money, date deposited along with the source of the money and check number, **date of withdrawal with the name of the person receiving such withdrawal, and other pertinent information concerning the transaction and shall clearly show for whose account the money is deposited and to whom the money belongs.** Every broker shall also keep a copy of each check deposited into and withdrawn from the escrow account **for a period of three years from the date of issuance. All such funds and records shall be subject to inspection by the Board or its agents.**

(c) **Salespersons Prohibited from Holding Funds.** A real estate salesperson or broker engaged by another broker shall immediately turn over all deposit money or other money received to such employing broker. No salesperson shall at any time hold client funds.

*Zang v. NRT New England Inc.*, 77 Mass.App.Ct. 665 (2010): The Seller may direct in the Purchase and Sale Agreement that its broker (or other Escrow Agent) **shall disburse the Seller's agreed payment (if any) to the Buyer's broker from Seller's funds held as escrow agent (i.e., the purchase deposit) after the closing concludes and the deed is recorded.**

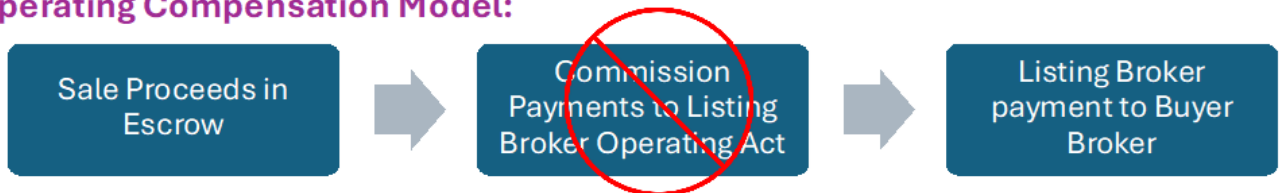
The case provides that if a party holds the deposit in escrow pursuant to a purchase and sales agreement (which is typically the Seller's broker) they are automatically authorized and bound to comply with the purchase and sale agreement disbursement instructions for the funds it holds in escrow without the need for the escrow agent to otherwise be a party or a counter-signatory to the purchase and sales.

### Managing the Escrow Disconnect:

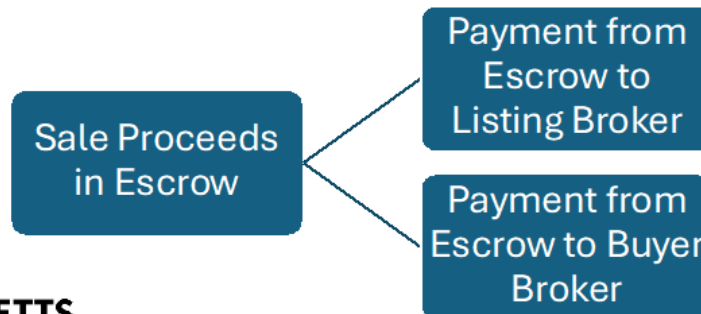
1. **Clarifying the difference** – disbursement of seller funds from escrow vs. making cooperative payment from operating.
2. **Focusing on the law** – protection of escrow agents when following mutual written instructions.
  - *Zang v. NRT New England Inc.*, 77 Mass. App. Ct. 665, 933 N.E.2d 694 (Mass. App. Ct. 2010)
3. **Talking about audits** – disbursements should match the PSA and settlement statement.
4. **Providing options up front** – the listing broker does not have to be the escrow agent; can discuss options with closing attorney re: disbursements.

## Escrow Funds vs. Brokerage Funds

### Cooperating Compensation Model:



### Seller Compensating Buyer Broker Directly:



**MASSACHUSETTS**  
ASSOCIATION OF REALTORS®

## **REBA's Standards & Forms Committee Offers Provisional Revisions to Residential Purchase and Sale Agreements Relating to Real Estate Commissions**

*In response to inquiries and concerns from members, the Standards and Forms Committee is pleased to offer draft revisions to Paragraph 5.7 of [REBA Form No. 66](#), which relates to payment of real estate broker commissions. This Form, originally approved in 2021, includes various rider provisions for use with residential purchase and sale agreements for single-family, 1-4 family and condominium units.*

*The Committee recommends use of this draft provisional paragraph, pending release of a final iteration of Paragraph 5.7, a copy of which is available by [clicking here](#).*

*The issue of broker compensation has been the subject of national and local class action lawsuits, including Sitzer v. Nat'l Ass'n of Realtors et al, Case No. 4:19-cv-00332-SRB (W.D. Mo. 2019) (commonly known as Sitzer/Burnett), Moehrl v. National Association of Realtors, No. 1:2019cv01610 - Document 184 (N.D. Ill. 2020) and locally, Nosalek v. MLS Property Information Network Inc. et al, filed in the United District Court in Massachusetts in 2021 as Case No. 20-cv-12244-PBS.*

*These broker compensation cases alleged the defendants conspired to inflate real estate commissions by enforcing a cooperative compensation rule that required listing brokers to offer compensation to buyer brokers on Multiple Listing Service databases (MLS) resulting in fixed commission rates, and that some Sellers may have not been aware this resulted in Sellers paying the Buyer's broker's commission compensation. The jury in the Sitzer/Burnett case agreed, finding the defendants liable for violating Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 and awarded approximately \$1.785 billion dollars to the Plaintiffs. Following the Sitzer/Burnett verdict, over thirty copy-cat cases have been filed against over 250 defendants, and it is anticipated additional cases concerning broker compensation and policies of the various MLS companies will surface.<sup>1</sup>*

*As a result, efforts have been made to settle several of the lawsuits, and the National Association of REALTORS® (NAR) and many of the larger corporate defendants have entered into nationwide settlement agreements pending final Court approval. A stay has been issued in the Nosalek case until the NAR settlement is finalized.*

*The below alternatives for paying the Buyer's broker are based upon the information and settlement terms of the cases available at the time this Advisory Report was drafted. This Form shall be reviewed and revised, if so required, once the cases conclude.*

<sup>1</sup> Multi Service Listing, or MLS, is a common term for a centralized listing of properties for sale. MLS Property Information Network, Inc. (MLS PIN), is one company that operates in Massachusetts and there are several other companies in Massachusetts and nationally that include MLS in their trade names. To minimize confusion among the companies, specific names are used in this Advisory Report if applicable, and otherwise MLS is used to mean a centralized property listing database.

## 5.7 BROKERS / BROKER'S COMMISSION

**SELLER's BROKER:**

Name: \_\_\_\_\_

MA Lic. No. \_\_\_\_\_

Mobile # \_\_\_\_\_

Email: \_\_\_\_\_

Brokerage: \_\_\_\_\_

MA Lic. No. \_\_\_\_\_

**BUYER's BROKER:**

Name: \_\_\_\_\_

MA Lic. No. \_\_\_\_\_

Mobile # \_\_\_\_\_

Email: \_\_\_\_\_

Brokerage: \_\_\_\_\_

MA Lic. No. \_\_\_\_\_

The Listing Broker (Company)/Agent and the Buyer's Broker (Company)/Agent shall each provide to the closing attorney within a reasonable amount of time prior to the Closing a commission statement together with the name, address, phone number, email, Agent State License ID number and Brokerage State License ID number.

**Listing Broker (Company)/Agent's Commission:**

A commission in the amount of \$\_\_\_\_\_ is due from SELLER to \_\_\_\_\_, being the Listing Broker (Company)/Agent, payable only upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise.

**Buyer's Broker (Company)/Agent's Commission:**

A commission in the amount of \$\_\_\_\_\_ is due to \_\_\_\_\_, being the BUYER's Broker (Company)/Agent, payable upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, but not otherwise, and is due from the following:

A. The amount of \$\_\_\_\_\_ is due from BUYER to \_\_\_\_\_, being the BUYER's Broker (Company)/Agent.

B. The amount of \$\_\_\_\_\_ is due from SELLER to \_\_\_\_\_, being the BUYER's Broker (Company)/Agent, which SELLER agrees and directs shall be paid by the Listing Broker (Company)/Agent from funds held in escrow.

**Direction to Escrow Agent:** The Escrow Agent holding the Deposit as set forth in this Agreement is responsible for disbursing funds in compliance with the terms of this Agreement. Upon the recording of the deed to the BUYER with the Registry of Deeds and payment of all monies due the SELLER, the Escrow Agent shall disburse funds as set forth above and the Escrow Agent shall disburse the balance of the deposit, if any, to the SELLER as excess deposit. SELLER, BUYER and Escrow Agent acknowledge that all disbursements from funds held in escrow are undertaken in the Escrow's Agent's capacity as Escrow Agent and not otherwise. These written instructions to the Escrow Agent constitute mutual, written instructions from the SELLER and BUYER to the Escrow Agent and supersedes any office policy of the Escrow Agent to the contrary.

*Notes: Delete and customize the above for the agreed contract terms and delete the introductory text and the below notes from the final Purchase and Sale Agreement or Rider.*

1. *The amount of the brokers' commissions may be filled in as the commission percentage or the calculated dollar amount. However, if written as a dollar amount then the amount may need to be correspondingly edited in the event of a sale price change.*

2. *Both Sellers and Buyers could be using the services of a broker (corporate or individual) or a designated agent. This form uses the word "broker" to mean the Seller's and Buyer's representative, and the form should be edited as applicable. However, all commission payments are made to the broker (corporate or individual) and not to the agent who works for that broker.*

3. *The Buyer's broker is paid the amount contracted between the Buyer and its broker. Many brokers require a written fee agreement (sometimes referred to as a Buyer's Commission Agreement or an Exclusive Buyer's Agreement). In Massachusetts, Buyer's broker written fee agreements are not a requirement for MLS PIN as of the time this Advisory Report was drafted, however practice changes provided in some of the case settlement terms require their use. None of the settlement terms prevent a Buyer or Seller from representing themselves and make it clear that a Buyer contacting a Seller's broker can do so without an agreement provided that the Seller's broker is working on behalf of and showing the property for the benefit of their Seller client.*

4. *The Buyer's broker commission may be paid in whole or in part by the Buyer and/or the Seller. Both the Nosalek and NAR preliminary settlements allow the Buyer's Offer to include a Seller concession marked for Buyer's broker compensation that can be accepted or denied like all other Offer terms. The breakdown of who is paying the Buyer's broker's commission should be clearly set forth in the P&S and the above should be edited, as applicable.*

5. *At the time of this Advisory Report, cooperative commissions are a permissible option for Listing Brokers (Company)/Agent to employ, and therefore a third option to pay the Buyer's broker's commission may be as follows:*

C. The amount of \$\_\_\_\_\_ is due from the Listing Broker (Company)/Agent to \_\_\_\_\_, being the BUYER's Broker (Company)/Agent.

*This option, given the current landscape, will likely become less common. Listing brokers should take caution that it is only permissible if done correctly with supporting underlying written fee agreements, proper disclosures, not reflected in an MLS, among other requirements.*

6. *Notwithstanding co-operative commission splits remains permissible at this time, it is noted MLS PIN has changed its practices stemming from the Nosalek case and any compensation listed on MLS PIN may not include a payment between brokers, although Sellers may choose to accept an offer term to pay all or a portion of the Buyer's broker's commission as an agreed term of the purchase and sale agreement.*

7. *The NAR preliminary settlement practice changes provide that a Buyer's agent cannot accept a larger commission than as set forth in their written fee agreement nor can they accept additional payment from any other party than the Buyer, Seller or Seller's Listing Broker (Company)/Agent, as and if applicable*

8. *Other parties could be acting as the Escrow Agent for the deposit, including either Seller's or Buyer's counsel, a title insurance company, or others. Revise the above as applicable to identify the Escrow Agent holding the deposit.*

9. *The Seller may direct in the purchase and sale agreement that its broker (or other Escrow Agent) shall disburse the Seller's agreed payment (if any) to the Buyer's broker from Seller's funds held as escrow agent (i.e., the purchase deposit) after the closing concludes and the deed is recorded. The case Zang v. Nrt New England Inc., 77 Mass.App.Ct 665 (2010) provides that if a party holds the deposit in escrow pursuant to a purchase and sales agreement (which is typically the Seller's broker) they are automatically authorized and bound to comply with the purchase and sale agreement disbursement instructions for the funds it holds in escrow without the need for the escrow agent to otherwise be a party or a counter-signatory to the purchase and sales agreement.*

10. *REBA's [Ethical Standard No. 4](#) provides "An attorney shall not act as both attorney for a party in a real estate transaction and as a real estate broker to a party in the same transaction."*