

*Sitzer et al v National Association of REALTORS® et al*

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# WHAT DOES IT MEAN FOR EDUCATORS?

*1.9 million students attending 116 colleges, with a mission is to provide students with the knowledge and background necessary to compete in today's economy.*



# Mark Johnson, MBA






- A practitioner, not a legal authority
- 24 Years California Real Estate Broker / 5 In Texas
- 4 Years Adjunct
- CEO and successful exit of the 35th largest brokerage firm in the US
  - *Inc 5000 list 5 years in a year*
  - *Built mostly on an education platform – driving industry leading per person productivity*
- 20,000 hours of 1 on 1 coaching sessions, 5,000 hours of adult education delivery
- Managing Partner – [Recruiting Insight](#)
- You can find me on [LinkedIn](#) and [Winningtheday.blog](#)



Mark and Beverly reside in Orange County, CA  
3 Children and 2 Grandchildren  
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## REAL-TIME MARKET PROFILE

Never miss important changes in the California market.

Median List Price		\$799,000
Median Price of New Listings		\$769,990
Per Square Foot		\$420
Average Days on Market		90
Median Days on Market		35
Price Decreased		24%
Price Increased		3%
Relisted		8%
Inventory		29,724
Median Rent		\$3,995
Market Action		50

**Strong Seller's Market**

# The Work Remains

**Jan 2024: 16,180 new and resale homes in California**  
(+8% YOY)

**Feb 2024: 18,450 new and resale homes in California**  
(+8% YOY | 13% PM)

## 3/15/24 – [NAR Settles](#) - \$418M The Reality – Agent Messaging

- **More Questions Than Answers – Get Comfortable!**
- The work just became “different.”
- **More work - less percentage**
- In the next few months, a lot will happen
- **Today through July, steady**
- July Forward – More Communication & Negotiation
- 1.5M NAR Members and 2.0M+ Agents
- **4.4 Million Sales USA = 8 Millions Sides**
  - Old math / new math = ~ 4 sales per agent



# Commission Lawsuits

Started as **1** - 2019:  
Grew to: **23 to 26**

The original action, together with new cases (as of today), has already engaged ~**130** Brokerages, Franchises, Associations, and MLS organizations.



The core issue is whether buyer agent commissions have remained artificially high because of rules in place requiring home sellers to offer compensation to the buyer-broker.



The plaintiffs are home sellers who claim that the National Association of Realtors (NAR) and some major brokerages have conspired to keep commissions high and reduce competition.



The defendants, NAR and the brokerages, deny any wrongdoing and say that their rules are pro-competitive and pro-consumer.

# The Participation Rule

- The rule required sellers to pay a commission to both their own agent and the buyer's agent when listing their home on the Multiple Listing Service (MLS).
- The NAR participation rule was a policy that governs who can access and use the Multiple Listing Service (MLS), which is a significant database of home listings in the United States.
- The rule — which varied in some locations: MLS only members — aimed to create an environment whereby only licensed brokers who are members of the National Association of REALTORS® (NAR) and who actively engage in real estate brokerage can participate in the MLS.



# The Arguments - Plaintiffs

- The lawsuits went after the “participation rule” because they claim that it violates antitrust laws and harms consumers.
- The plaintiffs argue that the rule creates a monopoly for NAR and its affiliated brokerages, and that it inflates the commissions that sellers have to pay.
- They also alleged that the rule reduces competition and innovation in the real estate market, and that it prevents sellers from choosing alternative or lower-cost ways of selling their home.



# The Arguments - Defendants

- The defendants, NAR and the brokerages, deny these allegations and defend the participation rule as pro-competitive and pro-consumer.
- They contend that the rule benefits sellers by attracting more buyers and agents to the market, and that it ensures high standards of professionalism and ethics among participants.
- They also assert that the rule does not prevent sellers and agents from negotiating different commission rates, and that it allows for various business models and services to coexist in the market





# The Verdict: Sitzer/Burnett

- The **Sitzer/Burnett case** was a class action lawsuit filed by **home sellers** in Missouri against the National Association of Realtors (NAR) and some major brokerages, including Keller Williams, RE/MAX, Anywhere, and HomeServices of America.
- Anywhere and RE/MAX Settled Prior To Trial. **On February 1, 2024, Keller Williams reached a settlement agreement.** (All Combined ~ \$208M ~ 11%) Several more recently: COMPASS (\$57+M) and REAL Brokerage (\$9+M). On 4/15, SCOTUS denied the HSOA petition.
- The case went to trial in October 2023, and the jury ruled in favor of the plaintiffs, awarding them nearly **\$1.8 billion in damages.**



**Note: Sell side claims, NOT Buy side claims**

# The Settlement?

- **Anywhere**, company-owned operations unilaterally no longer require NAR membership and encourage franchisees to do the same.
- **RE/MAX** company-owned regions unilaterally no longer require NAR membership and encourage franchisees to do the same.
- **Redfin** – a nonparty – also unilaterally no longer requires agents to be NAR members.

**Note:** There is no procedure at the local association of REALTORS® for having a hybrid membership brokerage: you are all in or all out. (Currently A Monopoly) An agent could be advised to “change firms!”

**Significant :**



# The Settlement?

- **Anywhere + RE/MAX** (and now others) will prohibit their brokerages and agents from claiming buyer agent services are free.
- They will require agents to include the listing broker's offer of compensation for prospective buyers' agents as soon as possible in each active listing. (This has been public info for some time)
- Agents will be required to disclose that commissions are entirely negotiable and not set by law.
- No minimum commission requirements are set by the firm
- No technology or manual methods that enables the sorting of listings by commissions offered

**The Right Thing –  
Nothing Really New:**



Sitzer/Burnett

= 1 Case on the Sell Side Only

\$1.8 Billion before punitive ~ \$5.4B

23 to 26 More at least 2 on the “Buy Side” Not Covered In The Settlement

Gibson case -  
Missouri

Moehrl - Illinois

Leeder/Batton 1 -  
Illinois

Batton 2 - Illinois

Nosalek -  
Massachusetts

Burton - South  
Carolina

March - New York

QJ Team - Texas

Phillips - Georgia

Spring Way/Kay -  
Pennsylvania

Parker - Florida

Grace - California

Martin - Texas

Umpa - Missouri

Friedman - New  
York

Tuccori - Illinois

Masiello - Arizona

Whaley - Nevada

Latham -  
California

Fierro - California

Jensen - Utah

Boykin - Nevada

# Top Agent Network's Pocket List Case vs. NAR and San Francisco Association of REALTORS®

[The suit was filed in 2020, dismissed](#), and reopened three times. The 9th Circuit on 4/12/24 ordered the trial court to reopen.

**What is at issue in this case:** Private listing service Top Agent Network sued NAR and SFAR in May 2020, challenging the Clear Cooperation policy, which requires an agent or broker to submit their listing to the MLS within one day of marketing the property to the public.

**TAN CEO David Faudman** argues that NAR's Clear Cooperation policy essentially locks private listing services out of local markets. In August 2021, he described the policy to Reuters as "just another anticompetitive attempt by the NAR to use its monopoly power to crush market alternatives."

**NAR's perspective:** A spokesperson for [NAR told Real Estate News](#) said that the Clear Cooperation policy "ensures brokers and agents serve the best interest of their consumers and promote equal opportunity for all."





# Consolidation

**Status:** A multidistrict litigation panel denied the request on 4/12/24, yet they did not rule out the possibility of consolidating in the future

**Details:** The panel cited the recent settlement as one reason, among others.

**Venue:** U.S. Judicial Panel on Multidistrict Litigation in Washington, D.C.

# Other Developments

## Buyer/Broker Agreements



The Consumer Federation of America analyzed 43 buyer agreements and concluded that they generally served to protect agents but offered few benefits to buyers.



The CFA report pointed to a number of "unfair provisions" in buyer agreements from 37 states.



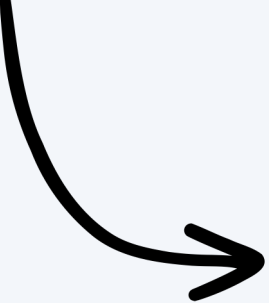
The CFA said some agreements provided loopholes for agents to inflate commissions even if compensation rules change.



As buyer agreements become more common, brokers and agents may need to "grow more flexible about agreeing to customer requests," the CFA said.

# DOJ Statement of Interest

**The statement of interest filed for the Nosalek case in Massachusetts provided a possible blueprint for changes the DOJ would seek if it takes on the compensation structure of the industry as a whole.**



**The filing went into some detail about what kind of competition could result from the change, including agents charging flat fees or hourly rates instead of percentage commissions. The DOJ wrote at length about how commission fees have remained in the 5-6% range for so long despite all the technology-driven changes to the homebuying and selling process.**



**There was plenty devoted to the topic of competition in the 38-page document submitted by Jessica Leal of the DOJ's antitrust division.**



## Justice Department Says Settlement Too Lax In Real Estate Commission Case

The DOJ has asked a federal judge in Boston to reject a consumer settlement that it said fails to protect home buyers and sellers from industry practices that inflate real estate broker fees.

The government's legal team said the central issue that the parties and court should address is not the amount that a seller should offer *"but whether a seller should set buyer-broker compensation at all."*

The Justice Department suggested adopting an order that would prohibit offers of buyer-broker compensation.

Reference:  
Jennifer Nosalek et al v. MLS Property Information Network et al, U.S. District Court for the District of Massachusetts, No. 1:20-cv-12244-PBS.

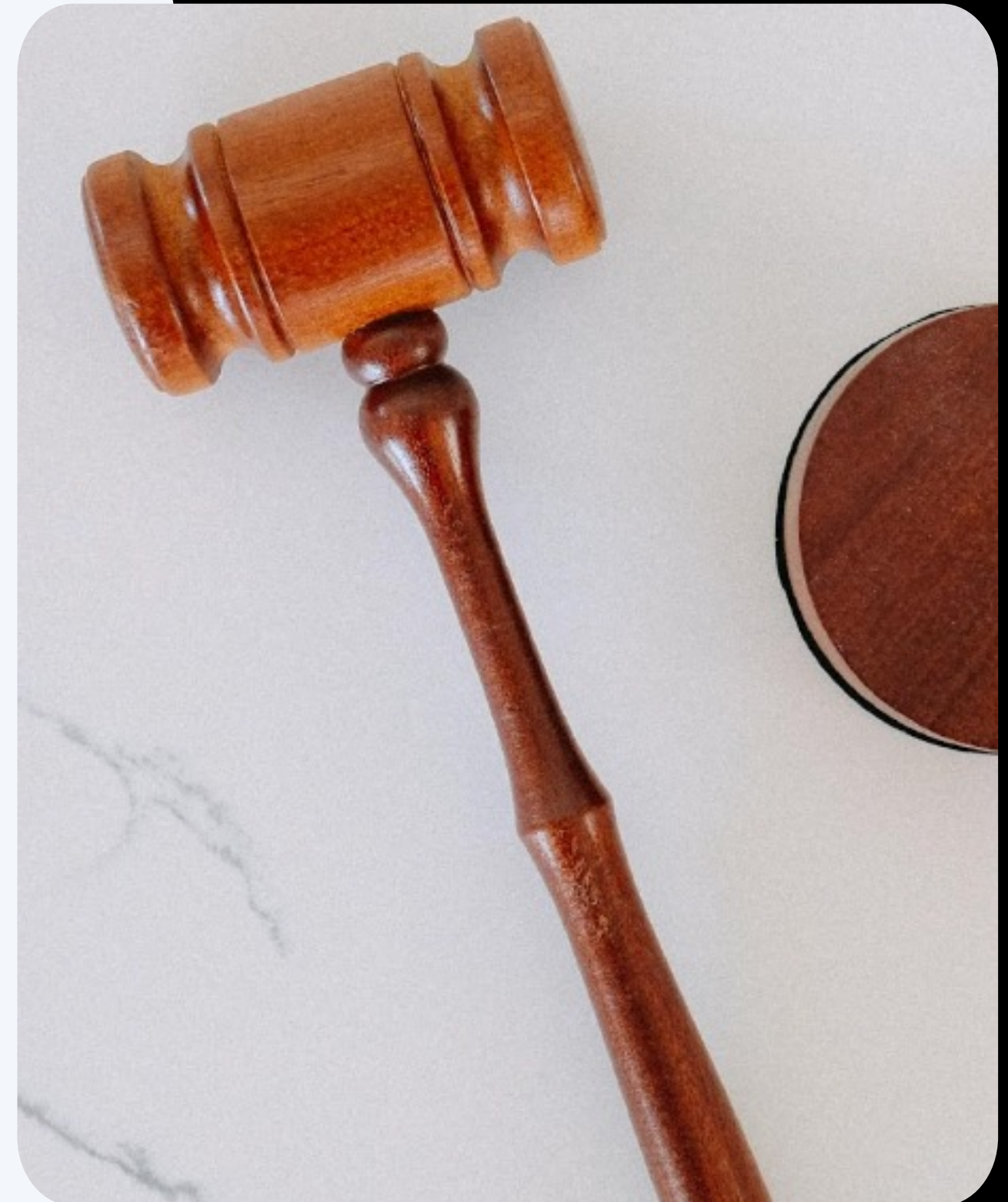
# Plaintiff's Cases in a Nutshell

- MLS unilateral offer of compensation policy
- NAR dominance & governance of MLS policies
- Large broker representation in NAR decisions
- [MLS clear cooperation policy](#)
- 3<sup>rd</sup> highest commission rates in the world



# The Outcome: Settlement

- NAR and other defendants settled on 3/15/24
  - Brokerages Over \$2B in Sales Not Covered by NAR Settlement
  - COMPASS – Settled 3//22/24 at \$57.5M
  - REAL – 4/8/24 at 9.25M
- Contractual Offers of Compensation in the MLS are removed.
  - A Seller “concession” field emerges.
  - NOT for offers of compensation!
  - Brokers and listing agents can DISPLAY offers of compensation on a brokerage website.
- Buyers’ agents are either paid by the buyer (directly or financed) or paid by the seller through the purchase agreement.
  - Unrepresented buyers = leading cause of post-sale disputes
- Consumers go directly to listing agents.
  - Historically has been 10 to 15% of transactions
  - Dual agency issues = another leading cause of post-sale disputes
- All 50 states pass mandatory buyer rep agreements.
  - 16 states currently do this.
- NAR lobbies legislative policy changes so buyers’ agent compensation can be financed inside the mortgage. Fannie Mae issues guidance on 4/15/2024 = see supplemental slide info,



# Implication

The **“decoupling” of compensation** in the MLS will require **residential agents** to ***negotiate and communicate*** like never before - on every transaction.

*More often – as a standard of practice - commercial real estate agents have operated this way for some time.*

*Will Buyers Pay For:*

*~ 105 + Project Steps In A  
Typical Buy Side Residential  
Sale?*



# Consider This: Broker + NAR Study

**20 - 40**

number of hours to service a listing

**40 - 80**

number of hours to service a buyer

What Is An Hour Of Your Time Worth?

# Preparing Your Students? Run Your Real Estate Practice Like A Small Business



Ethics in Business Practices – Consumer Representation



**Negotiation Skills**



Creating and Articulating A Value Proposition



Communicating Your Services and Fees Effectively - Selling A Service is different v. a Product



Calculating the Value of Time and Project Steps in a Typical Sale



Becoming a Competent Listing Agent – List to Last



Learning to Learn - New Models and Career Paths Will Emerge

## Fee For Service?

Someone will do it - fee for service

There will always be competition

Someone more expensive

Someone less expensive

Someone similar

Find YOUR tribe

For Agents and REALTORS®:

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I have never taken a percentage "%" to the bank. I have taken dollars "\$'s."

Start thinking dollars, not percentages.






# More Questions Than Answers!



# Thank You!

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*Open To:*

- Adjunct Opportunities
- Consulting and Research Projects
- White Paper, Textbook Creation or Review



# SUPPLEMENTAL INFORMATION



**Approach your  
buyers the same  
way you approach  
your sellers.**

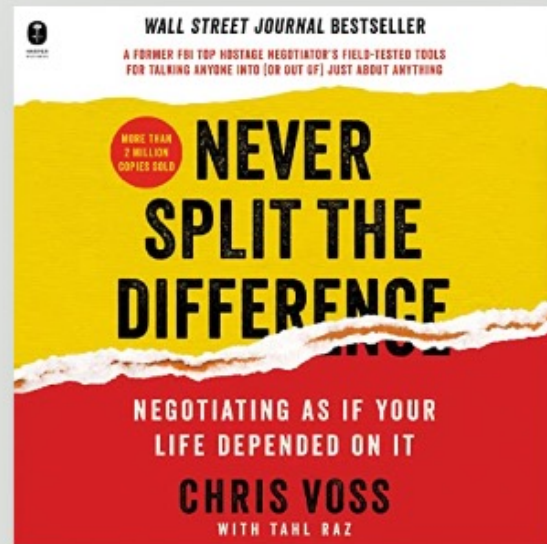
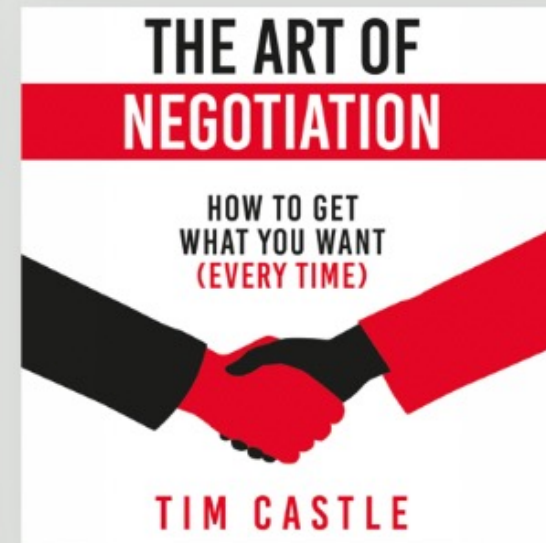
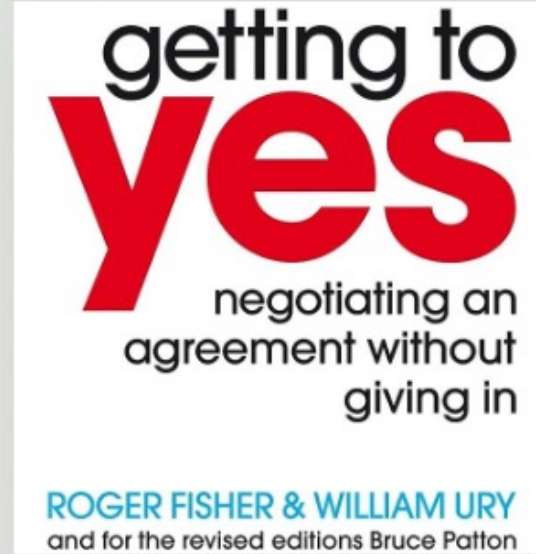
# What Agents Can and Can't Do:

## BRIGHT MLS

- They can not state buyer representation is “free.”
- They can not offer compensation through the multiple listing service, including private remarks or the seller concession field
- They can not proceed without a buyer broker agreement
- They can recommend a SELLER provide some type of buyer agent compensation and display that offer on a brokerage website

- Earn the **RENE** (Real Estate Negotiation Expert) Certification.
- Earn the **ABR** (Accredited Buyer Representative) Designation.





Work on your  
**negotiation skills.**

Role play and learn different  
contract structures.

# The Problem

Real estate agents are constantly struggling with negative consumer perception.

**What exactly do you do?**

**Why should I pay that much?**





**Rayse** automatically tracks agent activity and shows progress to clients in real time ●



April, 15, 2024

# FannieMae Bulletin

## SELLER CONCESSION CHEAT SHEET FOR REALTORS

Loan Type	Property Type	Down Payment	Contribution type	Max. Seller Contribution
Conventional	Primary & Secondary Home	Less than 10%	Closing Costs, Prepaid Items, & Discount Points	3%
		10-25%		6%
		More than 25%		9%
Conventional	Investment	15% or More	Closing Costs, Prepaid Items, & Discount Points	2%
FHA	Primary	3.5% or More	Closing Costs, Prepaid Items, & Discount Points	6%
VA	Primary	N/A	Closing Costs, Prepaid Items, & Discount Points	Unlimited (Up to 2 Discount Points)
			Can Include Debt Payoff	4%
USDA*	Primary	N/A	Closing Costs, Prepaid Items, & Discount Points	6%

# Fostering Consumer-Friendly Real Estate Marketplaces

The screenshot shows the top navigation bar of the National Association of Realtors website. It includes the NAR logo, a search bar, and links for REALTOR® Store, Contact, Pay Dues, and Sign In. Below the navigation bar is a blue header with menu items: Real Estate Topics, Membership, Research & Statistics, Advocacy, Education, News & Events, About NAR, and More. The main content area features a large image of a smiling woman and man. The article title is 'Fostering Consumer-Friendly Real Estate Marketplaces'. Below the title is a sub-header with links: REALTORS® as Champions, Consumer Access & Opportunity, Fostering Business Competition, FAQs, and In the News. The article text begins with 'NAR's CEO Sets Record Straight on Commissions' and states that most consumers work with a real estate professional because they recognize that technology is no substitute for an expert helping them to navigate risk, avoid pitfalls, and obtain results. The article concludes with 'NAR has led our industry forward for more than 100'.

NATIONAL ASSOCIATION OF REALTORS®

Search

REALTOR® Store Contact Pay Dues Sign In

Real Estate Topics Membership Research & Statistics Advocacy Education News & Events About NAR More

Real Estate Topics

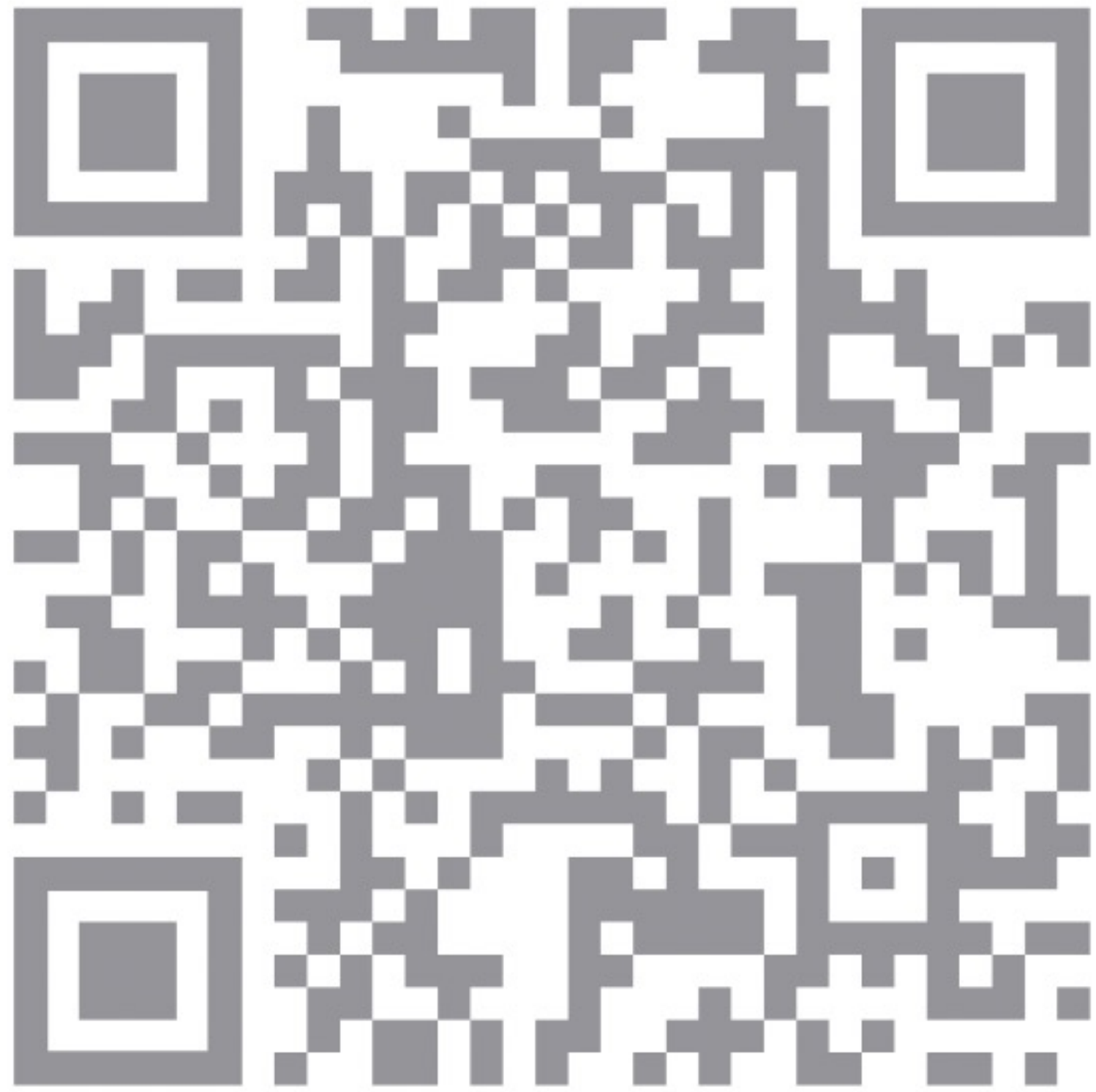
## Fostering Consumer-Friendly Real Estate Marketplaces

REALTORS® as Champions Consumer Access & Opportunity Fostering Business Competition FAQs In the News

### NAR's CEO Sets Record Straight on Commissions

Most consumers work with a real estate professional because they recognize that technology is no substitute for an expert helping them to navigate risk, avoid pitfalls, and obtain results.

NAR has led our industry forward for more than 100



*Scan the QR Code To Access NAR's*

# **“105 Ways”**

*Agents Help Buyers Manual*