



CONSUMER **POLICY**
C E N T E R

**HOME BUYERS & SELLERS MAY
SAVE \$10,000 PLUS
WITHOUT SACRIFICING HIGH QUALITY**

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Most home buyers and sellers overlook thousands, if not more than \$10,000, in savings on each home sale. This is not to argue that they stop using real estate agents, whose knowledge and expertise can be very valuable,¹ just that they've been grossly overpaying for those agents' services due to a lack of effective price competition among agents.

With only about four million home sales annually in the United States,² two sides to each transaction, and approximately two million licensed real estate agents,³ competition for clients is fierce. Yet, unlike other service providers, most residential real estate brokers have historically successfully resisted competing on price! In any location, most agents have long charged the same 5-6 percent-of-the-sale-price commission,⁴ typically divided equally between the buyer's and seller's brokers.

¹ This article does not question how much value agents provide, however some have pointed out that the licensing requirements for becoming an agent are very low, see Stephen Brobeck, *A Surfeit of Real Estate Agents 2: Is Entry Too Easy*, CONSUMER FED'N AM. (Oct. 2, 2023), <https://consumerfed.org/reports/a-surfeit-of-real-estate-agents-2-is-entry-too-easy/>. Others find that most agents are not actively practicing their craft. See Andrea Brambila, *71% of real estate agents didn't close any deals last year*, Inman News, Jan 24, 2025, <https://www.inman.com/2025/01/24/71-of-real-estate-agents-didnt-close-any-deals-last-year/>. Meanwhile, according to the National Association of Realtors (NAR), in 2024 10% of home sellers did not get assistance from an agent and 6% were For Sale By Owner (FSBO)s. See <https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics>. Undertaking a FSBO, however, requires that the seller undertake a significant number of tasks for which they are likely not expert, see *infra* section I.E.2, even if they pay an agent a small flat fee to place their listing on the local multiple listing service.

² This is down from more than 6 million in 2021 and more than 5 million in 2022. See *Number of existing homes sold in the United States from 2005 to 2024, with a forecast until 2026*, STATISTA, <https://www.statista.com/statistics/226144/us-existing-home-sales/> (Mar. 2025).

³ According to ARELLO. there are more than 2 million licensed residential real estate agents. See McCoy Worthington & Fran Metz, *Here's How Many Real Estate Agents There Are in the US . . .*, HOMELIGHT (Jun. 28, 2024), <https://www.homelight.com/blog/how-many-realtors-in-the-us/>. About 1.5 million were members of the NAR in 2024, the annual turnover is about 200,000 agents, and about one third make less than \$20,000/yr, while about 20% make over \$100,000/yr. See Stephen Dubner, *Are Realtors Having an Existential Crisis?* (Jan. 17, 2025)(quoting Lawrence Yun, NAR), <https://freakonomics.com/podcast/are-realtors-having-an-existential-crisis/>

⁴ See, e.g., Rupkatha Banerjee & Andrew Paciorek, *Commissions and Omissions: Trends in Real Estate Broker Compensation*, FEDS Notes, May 12, 2025 <https://www.federalreserve.gov/econres/notes/feds-notes/commissions-and-omissions-trends-in-real-estate-broker-compensation-20250512.html> (finding that most of the small gradual reduction of commission rates over time can be explained by an increased proportion of higher-priced homes); Tracey Velt, *Average Real Estate Commission Rate at Highest Level Since 2013*, REALTRENDS VERIFIED (July 5, 2025) <https://www.realtrends.com/blog/2023/04/26/average-real-estate-commission-rate-at-highest-level-since-2013/>; Jordan Barry, Will Fried & John William Hatfield, *Et Tu, Agent? Commission-Based Steering in Residential Real Estate*, 110 IA. L. REV. 1473, 1493-95 (2025); Stephen Brobeck, *Real Estate Commission Rates in 35 Cities: Uniformity and Variability*, CONSUMER FED'N AM (April 2022), <https://consumerfed.org/wp-content/uploads/2022/04/Real-Estate-Commission-Rates-Uniformity-Report-4-25-22.pdf>; Panle Jia Barwick & Maisy Wong, *Competition in the Real Estate Brokerage Industry: A Critical Review* BROOKINGS (2019), <https://www.brookings.edu/wp-content/uploads/2019/12/ES-12.12.19-Barwick-Wong.pdf>.

While court decisions, including the Supreme Court in 1950, prohibited agents from explicit price-fixing,⁵ that has proved to be a Sisyphean task. When a fall 2023 jury verdict found that the typical real estate commission mechanism represented a price-fixing conspiracy among Kansas City-area brokers, awarding \$1.8 billion in damages,⁶ it looked like that might end that practice, but a 2024 NAR nationwide settlement⁷ failed to do so and tacit price fixing continues,⁸ leaving commission rates little changed,⁹ despite the dramatic cost reductions that technology has created.¹⁰

Clearly, the industry has an enormous incentive to avoid price competition. Experts have estimated that the introduction of price competition could transfer \$30 billion or more annually from real estate brokers to consumers.¹¹ This has led traditional brokers to pursue

⁵ See, e.g., *United States v. Real Estate Boards*, 339 U.S. 485 (1950); FEDERAL TRADE COMMISSION STAFF REPORT, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY, Vol. 1, at 195-98 (1983) [1983 FTC Report], <https://web.archive.org/web/20051130083414/http://www.ftc.gov/opp/workshops/comprealestate/index.htm> (chapter 4: F-G); Barry, et al, *supra* note 4, at 1493 n.126 (providing a compilation of antitrust cases filed against real estate brokers by state and federal authorities).

⁶ <https://www.mow.uscourts.gov/sites/mow/files/ca/19-cv-332-1294.pdf> See *Sitzer v. Nat'l Ass'n of Realtors*, <https://www.mow.uscourts.gov/ca-cases/19-cv-332>; Debra Kamin, *Home Sellers Win \$1.8 Billion as Jury Finds Commissions Conspiracy*, N.Y. TIMES, Nov. 2, 2023.

<https://www.nytimes.com/2023/10/31/realestate/nar-antitrust-lawsuit.html> also <https://www.mow.uscourts.gov/sites/mow/files/ca/19-322NARHomeServicesMLSFinalSettlementOrder.pdf>
⁷ See <https://www.nar.realtor/sites/default/files/documents/nar-settlement-agreement-download-2024-04-19.pdf> (Apr. 19, 2024)(NAR settlement).

⁸ Industry leaders have assured agents that the settlement need not affect their fees. See, e.g., Barry, et al, *supra* note 4, at 1566; as with carefully crafted buyer agent agreements. See Tanya Monestier, *Objection to the Proposed National Class Action Settlement with the National Association of Realtors and to Plaintiff's Request for Attorneys' Fees at 18-42* (Oct. 28, 2024) [Monestier Objection], <https://www.law.buffalo.edu/content/dam/law/content/faculty-staff/settlement-objection-monestier.pdf>. See also Debra Kamin, *Some Accuse Residential Realtors of Blocking Lower Fees*, N.Y. TIMES, Mar. 23, 2025. <https://www.nytimes.com/2025/03/15/realestate/sellers-buyers-realtors-high-commissions.html>. Debra Kamin, *Readers Commiserate on Brokers' Commissions*, N.Y. TIMES, <https://www.nytimes.com/2025/03/29/realestate/real-estate-agents-commissions.html> (not in print edition).

⁹ See Jon Stubbs, *Average Real Estate Agent Commission Rates*, CLEVER, <https://listwithclever.com/average-real-estate-commission-rate/#calculator> (Dec. 27, 2025) (showing average 2025 rates slightly higher than averages for 2021-2024); Mark Worley, *Buyer's Agent Commissions Tick Up to Pre-NAR Settlement Levels*, REDFIN NEWS, (Aug. 12, 2025) <https://www.redfin.com/news/commissions-q2-2025/>; *5 Months After NAR Settlement - Commission Rates Back to Normal*, ACCOUNT TECH (Jan. 21, 2025) <https://accounttech.com/resources/blog/commission-rates-post-nar-settlement/>; but see Paige Tepping, *Commissions Still (Slightly) Down One Year Post-Settlement*, RISMEDIA, Sept. 8, 2025, <https://www.rismedia.com/2025/09/08/commissions-still-slightly-down-one-year-post-settlement>.

¹⁰ See, e.g., Expert Class Certification Report of Prof. Einer Elhauge Dr. Nicholas Economides ¶¶ 226-34 (revised Mar. 8, 2022), *Moehrl v. Nat'l Ass'n of Realtors*, No. 19-cv-01610, 2023 WL 2683199 (N.D. Ill. Mar. 29, 2023) [Elhauge Report], available at <https://www.cohenmilstein.com/wp-content/uploads/2019/03/Redacted-Corrected-Elhauge-Class-Report-Realtors-Moehrl-06072022.pdf>.

¹¹ Residential real estate brokers have received commissions of around \$100 billion annually, although that varies depending on total sales revenue. See, e.g., KEEFE, BUYETTE & WOODS, *COMMISSION IMPOSSIBLE: WILL LITIGATION RESHAPE THE HOUSING MARKET?* 36-38 (Oct. 3, 2023)[KBW Report]. If such fees faced price competition there are estimates that consumers could save \$30 to \$50 billion annually, that is half to a third of the typical \$24,000 paid on the sale of a \$400,000 home. See Chang-Tai Hsieh & Enrico Moretti, *Can Free*

a number of tactics: First, it has led the industry to exercise political power. Funded by its 1.5 million agents, its national and state associations can thwart legislative or administrative threats to the status quo.¹² Second, the industry appears to strongly discourage agents from openly disclosing their rates, unless necessary, thereby reducing consumer awareness and incentive to negotiate over rates.¹³ Third, the industry has long tried to sabotage brokers offering lower prices by steering clients away from deals that involve “low-fee” brokers or agents on the other end of the sale, as discussed in more detail in section II, below.

How much do typical consumers overpay? If fees were closer to those in many other nations or those currently charged by low-fee brokers in the United States, on a \$400,000 home,¹⁴ a fee reduced from 3% to 1.5% would net the seller \$6,000 more on a sale, and at least \$12,000 more on an \$800,000 home. Buyers using similar low-fee agents could also save those same amounts.¹⁵

So then why haven’t home buyers and sellers flocked to brokers offering 1-1.5% listing fees or pressured traditional brokers to reduce their 2.5-3% fees? There are many reasons.

Entry be Inefficient? Fixed Commissions and Social Waste in the Real Estate Industry, 111 J. POL. ECON. 1076, 1116 (2003) (estimating that commissions would fall be half); Mark Nadel, *Obstacles to Price Competition in the Residential Real Estate Brokerage Market*, 18 Berkeley Bus. L.J. 90, 98, 114-15 (2021) [Nadel, Berkeley]. Buyer-agent fees in comparable nations average about 1.3% compared to 2.7% in the U.S. KBW Report, id. at 33. Listing agent fees averaged 1.4% in those nations compared to 2.7% in the U.S. Id. at 36. Since the rise of the internet, commissions across surveyed nations declined by an average of 40-45% in contrast to the decline in the US of 2%. Id. at 38-39. Some predict even greater decreases. See Prentiss Cox, *Reclaiming Homeowner Wealth: A Conversation with Barry, Fried and Hatfield*, (unpublished Nov. 7, 2025 draft, forthcoming in I.A. L. REV. Online) (estimating between \$42 and \$68 billion/year in savings); Gi Heung Kim, *The Equilibrium Impacts of Broker Incentives in the Real Estate Market* (Apr. 2, 2025), https://giheungkim.github.io/files/jmp_main.pdf; (estimating a 53% reduction in commissions from decoupling); <https://therealdeal.com/national/2024/04/16/commission-model-predictions-post-nar-settlement/> (commissions would be cut in half) <https://therealdeal.com/national/2023/01/31/commission-suits-could-spell-armageddon-jason-oppenheim/> (Armageddon). *But* see a conservative estimate of \$13.7 billion. Expert Class Certification Report of Dr. Nicholas Economides ¶¶ 9 & 96 (revised Mar. 8, 2022), *Moehrl v. Nat’l Ass’n of Realtors*, No. 19-cv-01610, 2023 WL 2683199 (N.D. Ill. Mar. 29, 2023), available at <https://www.cohenmilstein.com/wp-content/uploads/2019/03/Redacted-Corrected-Economides-Class-Report-Moehrl-Realtors-06072022.pdf>

¹² The \$86 million that the NAR spent on lobbying in 2024 dwarfed that of most other associations, including the next two highest spenders, US Chamber of Commerce (\$76 million) and Big Pharma (\$32 million), *Top Spenders*, OPENSECRETS, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2024>; KBW Report, *supra* note 11 at 62. This ignores lobbying and donations by state associations of realtors and state real estate rules may do even more harm to consumers. For example, nine states prohibit buyers’ agents from rebating a portion of any co-op fee they receive. See Nadel, Berkeley, *supra* note 11, at 109 (listing 10 states, but LA no longer bans rebates).

¹³ See Stephen Brobeck, *Hidden Real Estate Commissions: Consumer Costs and Improved Transparency*, CONSUMER FED’N AM. (2019), <https://consumerfed.org/wp-content/uploads/2019/10/Real-Estate-Commissioner-Report.pdf>.

¹⁴ As of second quarter 2025, the median price of a home in the US was \$417,000. See Niccolo Conte, *Charted American Income vs. Home Prices 1985-2025* (July 30, 2025), <https://www.visualcapitalist.com/charted-american-income-vs-home-prices-1985-2025/>

¹⁵ See note 11, *supra*.

Consumers with close friends or family who are real estate agents are apt to be uncomfortable denying them their business or negotiating with them to get a lower fee. Many also trust these agents more than complete strangers, reducing potential stress, a key goal of most home buyers or sellers. Many others have little understanding of how real estate agent services are priced (due in part to the lack of disclosures) and are, understandably, focused on the timing and price of the home,¹⁶ so they fail to shop around for better prices.¹⁷ One real estate brokerage firm manager observed that “Most people spend more time picking a restaurant than they do picking a real estate agent.”¹⁸ Others, particularly sellers who are downsizing and expecting a large windfall, may view a savings of 1 or 2% on commissions to be too little to worry about, though many may not realize that it could amount to more than \$10,000.¹⁹

Media coverage of the \$1.8 billion dollar verdict and 2024 settlement has informed many more consumers about real estate agents fees and how excessive they are, but while most home buyers and sellers still appear unaware of lower-rate options, that may be changing. As publications such as the June 2025 Consumer Policy Center (CPC) report – “Reducing Real Estate Commissions: Are Low-Fee Brokers a Viable Alternative for Home Sellers?”²⁰ – and this piece get wider attention consumer awareness should increase. The analysis below supports the earlier CPC report by challenging the resistance that consumers may have to low-fee agents.

Most consumers are apt to suspect that low-fee agents offer less than meets the eye. It’s how most consumers view suspiciously low bids from a contractor to replace their roof or kitchen. When one bid is dramatically lower than all the rest, it suggests that the bidder is offering less service or lower quality than the others. After all, if the provider was offering a comparable quality and quantity of service at such a reduced price, they would, presumably, be attracting throngs of business, forcing their competitors to cut their prices

¹⁶ See, e.g., Jamie Cattanch, *64% of Homebuyers or Sellers Who Asked Their Real Estate Agent for a Lower Commission Rate Were Successful* (Feb. 26, 2024), <https://www.lendingtree.com/home/mortgage/real-estate-survey/>; Stephen Brobeck, Consumer Federation of America, Comments before the DOJ-FTC Workshop (Jun 5, 2018), <https://consumerfed.org/wp-content/uploads/2018/06/CFA-comments-DOJ-FTC-public-workshop-on-competition-issues.pdf> ; Nadel, Berkeley, *supra* note 11, at 95 n.24.

¹⁷ A 2017 NAR survey found that 74% of sellers and 70% of buyers signed a contract with the first agent they interviewed. National Association of Realtors, 2017 Profile of Home Buyers and Sellers at 6-7. <https://www.nar.realtor/sites/default/files/documents/2017-profile-of-home-buyers-and-sellers-11-20-2017.pdf>. This is the same reason that many fail to save tens of thousands of dollars on their mortgages. See Maggie Davis, Shopping Around for Mortgage Could Save Borrowers \$80,000+ Over Lifetime of Loan (Jun. 3, 2025) <https://www.lendingtree.com/home/mortgage/mortgage-shopping-study/>.

¹⁸ Joanne Kaufman, *How to Choose a Real Estate Broker*, N.Y. TIMES, Dec. 30, 2018, at RE6 (quoting Kathy Braddock of William Raveis NYC). <https://www.nytimes.com/2018/12/28/realestate/going-for-broker.html>

¹⁹ Many consumers lack solid understanding of how percentage fees work. See, Stephen Brobeck, *How Percentage-Based Commissions Can Harm Home Buyers and Sellers, and What They Can Do About It* CONSUMER POL’Y CENTER (Mar. 2025) <https://consumerpolicy.org/wp-content/uploads/CPC-Percentages-and-Dollars-Report.pdf>

²⁰ Stephen Brobeck & Wendy Gilch, *Reducing Real Estate Commissions: Are Low-Fee Brokers a Viable Alternative for Home Sellers?*, CONSUMER POL’Y CENTER (Jun. 2025), <https://consumerpolicy.org/wp-content/uploads/Reducing-Real-estate-commissions-final-with-appendix.pdf>

or lose customers. An April 2025 national survey revealed that 82% of homeowners expressed concern that a low-fee broker would not provide all the services that they needed to successfully sell their home, with 36% noting that they would be “extremely” or “very” concerned.²¹ Only 42% of the sample said they would “probably” or “definitely” consider a broker charging 1 or 1.5% instead of 2.5-3%.²²

As home purchases and sales are likely to be the largest investments most consumers make, they are appropriately skeptical of offers that appear too good to be true. They want to avoid anything that smells like it could be a scam or simply be unnecessarily risky. Thus, when home buyers or sellers ask traditional agents to match the lower rates of non-traditional brokers, they are apt to believe the excuses that traditional agents give in defense of their fees, such as:

- You get what you pay for!
- Good agents deserve the typical 2.5-3% commissions.
- Only the least competent agents are willing to work for discounted rates.
- Using low-fee buyer agents will force buyers to pay their agents out of their pocket, rather than amortizing that fee in the mortgage.
- Traditional agents, representing most buyers and sellers, will discourage their clients from considering options involving low-fee agents.

All of these statements sound true and persuasive, but the analysis below demonstrates that all but the last are misleading in the context of the residential real estate brokerage market. ***One should not assume that real estate agents offering low rates are any less qualified than those charging two or three times that fee.***

I. Don't Worry That Agents Cannot Charge 1.5% or Less and Offer High Quality; Ask: Why Are Most Agent Commissions – at 2.5-3% – So High?

A. Real Estate Agent Fees Do Not Signal the Quality of Service Provided

The saying “you get what you pay for,” is a useful warning to consumers that providers offering much lower prices than their competitors are likely to be providing an inferior product or service. The prices of expensive cars, washing machines, or bottles of wine usually reflect superior materials, craftsmanship, and/or customer service or scarcity. Similarly, lawyers or architects with demonstrated superior skills usually charge more than others. Those charging less may provide satisfactory performance, but the quality of their service is generally inferior.

When a vendor offers a price that is half or less of the going rate buyers should be skeptical; they should ask the vendor how that is possible. Do sellers buy in much higher volumes, yielding lower costs? Are they willing to take a short-term loss to break into a new market?

²¹ Big Village Study, Online Caravan commissioned by Consumer Policy Center. Big Village, formerly Opinion Research Corp, surveyed a representative sample of 1,006 adult Americans, 588 of whom were current homeowners, on April 18-20, 2025.

²² *Id.*

Are they using new lower-cost materials of equal quality or are their labor costs much lower because they outsource to lower-cost, but equally-qualified, workers.²³ More likely, they use lower quality inputs or providers and omit some expected features or services.

But there is another possibility, which applies to residential real estate broker commissions: low-fee broker rates look suspiciously low, because traditional agent commission rates are usually unreasonably high! For decades, the traditional real estate industry has successfully protected a pricing structure that grossly inflates their fees above the rates that would prevail if they were subject to the same form of price competition that limits prices for most other goods and services.

Conclusive evidence is clear from an example. A traditional listing broker, charging a 3% commission for their role, would collect \$9,000 for providing all of the high-quality services most sellers expect on the sale of a \$300,000 home. Yet if two years later prices spiked, as the neighborhood was gentrified, and the same home sold for \$900,000, the listing broker would charge \$27,000 for the very same services.

Traditional brokers will contend that a low-fee broker charging only a 1% commission (\$9,000) to sell the second home could not possibly be providing the same quantity and quality of services that they are providing for \$27,000. Clearly the low-fee broker must be skimping on the quantity and/or quality of services they provide. But homeowners should turn the tables and challenge the traditional broker! They should ask why the broker should get \$27,000 when they were happy to accept \$9,000 for doing the same work when the home was selling for \$300,000.

Consumers should consider what they pay other professionals when preparing their homes for sale. Painters and plumbers typically charge based on the number of hours and supplies they need to complete a job. Some might set higher prices for homes in a wealthier neighborhood if they thought they could still get the job, but most would recognize that raising their prices would risk losing the job to a competitor who charged their normal rates, particularly if they tripled their price for a home selling for \$900,000 compared to one selling for \$300,000. Price competition pressures prices down to cost-based levels.

B. The Percentage-of-the-Revenue Commissions That Work for Most Salespeople Are Not Economically Justifiable for Real Estate Agents

What leads consumers to pay such excessive prices to real estate agents when they would not pay them to other expert service providers? It's probably because real estate agents have successfully convinced consumers that, as *salespeople*, they deserve to be paid on the same basis as most other salespeople: a percentage of the sales revenue. Consumers may also consider that they set tips to service providers as a percentage of the price of the meal or purchase. Yet these cases differ from real estate agent fees in important ways.

²³ See, e.g., Alex Travelli & Hari Kumar, *India Is on a Hiring Binge*, N.Y. TIMES, Apr. 7, 2025, <https://www.nytimes.com/2025/03/26/business/india-jobs-global-capability-center.html>.

It makes sense for an employer to pay percentage commissions to most salespeople because it gives salespeople an incentive to sell more and generate greater profits for the employer. After all, employers generally set their sale prices at some percentage, say 30%, above their own cost of inputs so that they can pay the salesperson, say a 10% commission, and retain a 20% gross profit to cover their other costs plus a net profit. Under these conditions, an employer is happy to pay a salesperson twice as much for doubling their sales revenues because that doubles the employer's gross and net profits.

But homeowners do not set their price based on their cost plus a profit margin and hope to sell multiple items. They only want to sell one home at the best price they can get. Selling a \$900,000 home does not generate triple the "profit" of selling a \$300,000 home. The typical sales commission model does not fit residential real estate agents, and is not a good proxy for measuring the incremental value contributed by agents.

1. Current Commission Rates Create Insufficient or Negative Incentives

Still, many listing agents defend a percentage commission – which multiplies their fees for higher priced homes despite no additional work – by claiming that the arrangement aligns the interests of the listing agent and the seller. But examples reveal the flaws in this argument.

First, suppose agent F charges a 3% fee and does a disappointing job of only securing a \$390,000 price on a home estimated to be worth \$400,000. Agent F still collects a \$11,700 fee. Meanwhile, agent A does an excellent job of securing a \$410,000 price on an identical home; but agent A collects only \$12,300, which is only \$600 more than agent F. What kind of incentive system rewards an excellent job by paying only about 5% more than for a disappointing job? A reasonable system of compensation would pay substantially more for the excellent performance.

Second, unlike standard sales commissions, there is no reason to believe that real estate commissions motivate listing agents to work harder, i.e., invest additional time to secure a higher price and faster sale for the seller, partly because it is unclear what working harder would mean. Even so, suppose an agent believed that investing an additional 10 hours of their time marketing a property was likely to increase its sale price by \$5,000. While such work would be worth almost \$500/hour of value to the seller, if the listing agent receives a 3% commission and must share that with its broker, commonly leaving it with only a 1.5% commission, then they would receive only an extra \$75 for those 10 hours or only \$7.50/hour. This additional compensation would seem unlikely to motivate the agent to do that additional work.²⁴

In fact, the industry itself recognizes the weakness of its "alignment of interest" rationale when it defends paying buyers' agents a percentage commission, which rewards buyer

²⁴ Agents also have an incentive to settle quickly, even if being more patient would be likely to yield a higher price. Thus, there is evidence that agents selling their own homes wait longer and get higher prices than agents selling the homes of others. See Steven Levitt & Chad Syverson, *Market Distortions When Agents Are Better Informed: The Value of Information in Real Estate Transactions*, 90 REV. ECON. & STATS. 599 (2008).

agents if their buyer pays *more*. In that case the industry acknowledges that *the incremental impact of the commission is too little to matter!* Instead, it admits that what motivates agents to provide great service is the prospect of pleasing clients who will return and recommend them to future clients.

Interestingly, if sellers want to strongly motivate listing agents to get a higher price, they should offer fees of more like 30%, but only to the portion of the sale price that the agent could claim responsibility for creating. That is, the 30% or so commission would only apply to the amount the sale price exceeded some benchmark price. Sellers would ask competing listing agents to make proposals comprised of 3 elements: 1) a benchmark price for the home, which the listing agent believed that they could virtually guarantee they could get, 2) a percentage share, like 30%, of what they would be entitled to for the amount the sale price exceeded the benchmark, and 3) a flat fee to cover paperwork and other routine costs, which the agent would receive whether or not it exceeded the benchmark price. When sellers were selecting a listing agent, they would consider these figures in combination with the competing agents' experience, personality, and knowledge of the local market. Creating an economically rationale formula for paying buyer agents is more difficult.²⁵

2. Tipping is Also an Inappropriate Model

Tipping service providers is also very different from paying a real estate agent. Those who tip intend their tip to go to the employee(s) who provided them service rather than the entity that employed those employees. The assumption is that the employer underpays their workers, leaving it to customers to cover the rest. But the commission home sellers pay is paid to the broker, not to the agent and not because the agent is underpaid by their brokerage firm. Many consumers also pay substantial tips to curry favor with service providers they expect to see again. This also doesn't apply to real estate agents. Finally, customers generally set their tips as a percentage of the total bill because it usually correlates with their ability to pay and thus how much they can easily afford to give away as a token of thanks to an appreciated service provider. Though the sale price of a home also indicates a homeowner's ability to pay, homeowners do not view the commission as a token of thanks.

C. High Quality Agents May Choose to Charge Lower Rates

Traditional agents often claim that agents who charge lower fees do so to compensate for their inferior service; they would charge higher fees if they could offer higher quality service. After all, what would lead a highly qualified agent choose to work for a 1% commission when they could collect 2.5–3% working for a traditional broker? There are two possible reasons.

The first is sales volume. A typical full-time agent is apt to only handle a handful of transactions in a year. Suppose a traditional agent handles one "side" of eight different

²⁵ Some proposals for economically rational ways to compensate both buyer and listing agents are discussed in Mark S. Nadel & Daniel A. Nadel, *New Ideas for Promoting Real Estate Brokerage Price Competition*, ANTITRUST CHRONICLES 29-34 (Mar. 2024).

sales of \$400,000 homes, where each side generated a 2.5-3% (call it 2.75%) commission. Then the agent would generate \$88,000 in commissions (and \$44,000 of compensation if their broker kept half).²⁶ Advertising a 1% commission can serve as a major marketing campaign, leading agents to spend much more time assisting buyers and sellers and much less time prospecting for clients. If this feature allowed the agents to handle three times as many sales, or 24 sides annually, that would generate \$96,000 in commissions.²⁷

Now, it is reasonable to ask whether agents would be able to provide full quality service on 24 sides/year. That depends on how time-consuming it is to provide the service that buyers and sellers need and want. Experts estimate that a typical home sale requires agents to devote no more than 40 hours, not including paperwork handled by others in their office, and on average more like 20 hours.²⁸ That is, handling 24 sides would require an agent to spend less than 12 40-hour weeks of work per year. Granted that home sales are not evenly distributed across the calendar – most occur from March to August – but spreading 12 weeks of work over 6 months would not seem to create any significant danger that these agents would be unable to provide high quality full service.²⁹ One prominent Minnesota real estate attorney and licensed real estate agent handled 50 deals in 2024 by himself!³⁰

Second, because of the relative glut of traditional real estate agents, those agents typically devote a large portion (as much as 75% or more) of their time prospecting for clients.³¹ Brokers or agents commonly spend funds to advertise their services and to purchase “leads” from firms that secure contact information of individuals who have showed signs online that they are looking to buy or sell a home. Listing agents are typically willing to pay about 25% of their side’s commission for a referral that leads to a sale.³² Most agents are likely to prefer providing real estate services to help consumers, rather than spending their time prospecting for clients.

This is not to deny that some agents have such superior reputations that they can spend almost all, if not all, of their working hours serving clients rather than prospecting for new ones. As long as demand for their services at commissions of 2.5-3% for their side is

²⁶ $.0275 \times \$400,000 \times 8 = \$88,000$. Note, NAR data indicates that the median income of an agent is about \$45,000. See Dubner, *supra* note 3 (quoting Yun).

²⁷ $.01 \times \$400,000 \times 24 = \$96,000$.

²⁸ See, e.g., Megan Walz, *Unlocking Efficiency: How Many Hours Do Realtors Spend per Client?* (Mar. 28, 2024) <https://www.avetransactions.com/blog/title-unlocking-efficiency-how-many-hours-do-realtors-spend-per-client> (“The average real estate transaction takes about 40 hours from start to finish. However, out of those 40 hours, 30 of them are all administrative /unlicensed tasks.”).

²⁹ Then again, a recent survey found that only 10% of agents closed on 25 or more sides in the year and only 5.4% between 20-25 sides. Jason Aleem, *Adapting to Change: Redfin’s 2025 Industry Survey*, REDFIN NEWS, Apr. 2, 2025 <https://www.redfin.com/news/2025-industry-survey/>

³⁰ Douglas Miller, in email to the author, Sept. 7, 2025.

³¹ See sources cited in Nadel, Berkeley, *supra* note 11, at 97-98 n.41.

³² See, e.g., Stephen Brobeck, *Real Estate Referral Fees: Do They Harm Consumers?*, CONSUMER FED’N. AM. 5 (2020), <https://consumerfed.org/wp-content/uploads/2020/09/Real-Estate-Referral-Fees-Report-9-21-20.pdf>; <https://www.luxurypresence.com/blogs/real-estate-referral-fees/> (Dec. 2024); <https://www.marketleader.com/blog/referral-commission-for-real-estate-agents/> (Oct. 17, 2022).

sufficient, this group does not have an incentive to work for lower rates, but if other excellent agents offer lower rates and attracted clients away, this could change.

D. Lower-Priced Buyer Agent Fees Can Be Included as Part of the Mortgage

Many traditional agents have defended the traditional pricing structure – whereby the seller and listing agent determined how much the buyer agent will be paid – by presuming that if the buyer negotiates the amount of the fee that their agent will receive, then the buyer will be required to pay that fee to their agent out of pocket, rather than allowing it to be included in the price of the home and thus amortized in the mortgage. They claim that this creates a new obstacle that unfairly discriminates against minorities or any lower income individuals.³³ But requiring buyers to negotiate the buyer agent fee does *not* prevent buyers from including that fee in the price of the home and the amount of the mortgage.

In fact, when most home sellers set their asking price they recognize that most home buyers will expect them to offer to pay the buyer’s agent’s commission (also known as a co-op fee). Although the NAR settlement prohibits sellers from displaying those co-op fees in NAR-affiliated multiple list service (MLS) databases.³⁴ The fees may also appear as concessions, which are available for payment of the buyer’s agent fee. And even when the asking price has not been set to include a payment to the buyer agent, home buyers can offer a bid that expressly states the price they are willing to pay to the seller plus the additional amount they are adding for the seller to pass on to the buyer’s agent. The seller should only care about the amount they net after the agents are paid, so if the first part of the buyer’s bid is the best net offer, the seller should not care about the additional amount that is merely passed through to the buyer agent. Meanwhile, mortgage banks have long recognized that the sale price of a home includes the amounts paid to both the buyer’s and seller’s agents, so it should not matter to them who determines the buyer’s agent fee as long as it is *bona fide*.³⁵ Real estate Broker REX used this approach without problems³⁶ and the Veterans Administration has revised its rules to permit such fees to be included in VA mortgages.³⁷

³³ See, e.g., Ann Schnare, Amy Crews Cutts & Venessa Gail Perry, *Be Careful What You Ask For: The Economic Impact of Changing the Structure of Real Estate Agent Fees* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4106600;

sources cited in Nadel, Berkeley, *supra* note 11, at 112 n.134.

³⁴ NAR settlement, *supra* note 9, at 27 (¶158(ii))

³⁵ See Nadel, Berkeley, *supra* note 11, at 112-13.

³⁶ See Barry, et al, *supra* note 4, 1574 n.261.

³⁷ While VA loans formerly disallowed payments to buyer agents to be included in the loan amounts, the VA now permits reasonable real estate agent fees. See Veterans Benefits Administration, Temporary Local Variance for Certain Buyer-Broker Charges, Jun. 11, 2024

<https://www.benefits.va.gov/HOMELOANS/documents/circulars/26-24-14.pdf>

E. Agent Services are Not Significantly Related to the Sale Price of a Home

A review of the specific tasks that real estate agents perform fails to reveal a justification for consumers to pay fees based on the sale price of a home. None of those rationales fit the tasks provided by real estate agents.³⁸

1. Rationales for Percentage Fees

Incremental value. As discussed above concerning the commissions of most salespeople, it would be reasonable for agents to demand a share of any incremental value they generate, but as observed earlier, the sale price of a home is not a proxy for the extra value that a listing agent produces – how much higher-than-expected the sale price is.³⁹ As also noted, designing a fee based on incremental value is not simple for listing agents, and hard to even imagine for buyer agents.⁴⁰

Higher costs. In some cases, to at least some degree, selling higher-priced homes costs agents more time and money, but those cases would not nearly directly correlate with home prices. The errors and omissions liability insurance that brokers and agents take out to cover costs if they face lawsuits are priced based on expected total sales volumes, that is the sale prices of homes. Yet the annual total cost of such policies – in the ballpark of \$1,000 – is too little to warrant any significantly higher fees for higher-priced homes.⁴¹ Similarly, it appears that higher priced homes are apt to be larger and have other characteristics that lead to slightly higher time commitments for agents, as listed below, but again, the additional time incurred would not seem to be significant enough to warrant more than a few hundred extra dollars.

Unique talents and joint ventures. Agents could also justify percentage of sale price commissions if they had something unique to offer and could justify a fee that treated them as in a joint venture. For example, a seller of a very unusual home might be quite willing to pay a significant percentage of the sale price of the home to an agent who had relationships with or at least had an efficient way to reach the small set of most likely potential buyers, who were apt to be missed by standard marketing efforts. Another listing agent might be willing to invest extra time and their exceptional skill in staging to raise the selling price of the home in return for a significant share of the sale price. Joint ventures between investors and agents aimed at “flipping” homes – buying, maybe renovating, then quickly reselling – would justify percentage payouts.

A buyer seeking a home with many unusual characteristics due to the physical or mental conditions of themselves or their dependents might well be willing to pay an unusually high

³⁸ This is analyzed in more detail in Mark Nadel, *A Critical Assessment of the Standard, Traditional, Residential Real Estate Broker Commission Rate Structure*, 5 CORNELL REAL ESTATE REV. 10-20 (May 2007) available at <https://ecommons.cornell.edu/handle/1813/70631> (Nadel, Cornell)

³⁹ See *supra* Section I.B.

⁴⁰ *Id.*

⁴¹ Premiums are based on the maximum liability limit the agent chooses. Still, annual premiums for such insurance tend to run only hundreds of dollars, though sometimes more than \$1,000 per year. See, e.g., Market Leader Team, *What Is E&O Insurance? (For Realtors & Real Estate Agents)*, Jun. 12, 2023. <https://www.marketleader.com/blog/what-is-eo-insurance-for-realtors/>

fee for a buyer's agent with exceptionally extensive knowledge of neighborhoods and contacts therein to find them the best match, though that would make more sense as a higher hourly fee since it would not be related to the price of the home. The buyer might have a child with exceptional skills in a sport or the arts and want to find a home where local school coaches and teachers were particularly adept at helping develop those talents.

Risk of failure. Agents could also observe that unlike most other professionals, they take risks. They do not get paid unless a home is purchased or sold. Factoring in this possibility would support a demand for a higher fee than a consumer might otherwise be inclined to pay. Still, the cost of the time they wasted on an unsuccessful deal would not vary significantly with the sale price of the relevant homes.

2. Tasks Performed by Real Estate Agents

Reviewing the set of individual tasks that listing agents provide⁴² and thus their costs, in terms of time and out-of-pocket costs indicates that they have little relation to the sale price of the home, let alone directly correlated to that price. Services typically provided by a listing agent include:

Initial evaluation. The time an agent spends on an initial introduction and explanation of the process and services could vary depending on how curious and/or educated a seller is, but it would not seem to vary at all with the price of the home. Discussing the optimal price that a seller might ask for a home could take a bit more time for a much larger home with many more special features. Still, agents familiar with comparable homes in the market, aided by assessments and more helpful algorithms (like those used by ibuyers⁴³), and AI, would not seem to spend significantly more time to estimate a reasonable asking price of a higher-priced home.

Creating a description of the property. Creating a detailed description and "staging" a home for optimal appeal, and then taking photos, if not videos, takes more time for a larger home with more special features. Still, this task is generally outsourced to a professional stager, photographer or videographer, with the extra time for more expensive homes costing, maybe, a few hundred dollars more.

Disseminating the listing. Disseminating the listing to the MLS, and any of the other databases that appeared likely to reach bona fide potential buyers would not seem to vary at all based on the price of the home. It is possible that for very special, expensive homes, personal networking would be appropriate, but this would likely apply to a very small portion of the market.

Showings. The cost of locked boxes do not vary with the price of the home, although sellers of some more-expensive homes may refuse to use these time savers in place of listing agent visits. Although open houses for the most expensive homes might want to include

⁴² A more detailed description of services provided by residential real estate agents is provided in Nadel, Cornell, *supra* note 38, at 26-46.

⁴³ See Nadel, Berkeley, *supra* note 11 at 123 n.204.

freshly baked treats, this extra cost would add only a small amount and might be unnecessary anyway as there is no evidence that open houses are very effective at selling homes.

Receiving and evaluating bids and negotiating. The time spent on this would depend most on how hot the market was for homes in the relevant price range and the extent of constraints faced by the seller, that is whether they needed to close by a specific date because they needed funds by then or were more flexible. It might also depend on how reasonable the seller was in terms of negotiating. The price of the home, however, would not seem to affect the time required.

Getting to closing. Preparing a seller for closing – such as ensuring that any promised repairs were made or documents sent to the buyer – would also seem independent of the sale price of the home. If the seller used a lawyer, their fee would likely be a fixed amount or depend on the number of hours involved. It would not vary with the price of the home.

The services typically provided by buyer agents include:

Creating a search profile. The time needed for an agent to identify a buyer's budget, needs, wants, and unacceptable attributes, would depend upon how self-aware and prepared a buyer was and not seem to have any relation to the price range of the home sought.

Identifying the neighborhoods best matching the buyer's search criteria. While higher priced homes are apt to be in different neighborhoods from lower-priced homes, an agent familiar with the local market would not seem to require any more time to match the buyer to the relevant markets.

Visiting homes. The time spent visiting homes could vary greatly depending on whether the buyer needed to relocate to the new area by a set deadline and whether they were willing to settle for something within their price range or whether the buyers had no need to move, but were just curious to see whether they could find the perfect home at an affordable price, for the future, if not how. These would not seem to correlate with the price of the home.

Presenting a bid to the seller. In a hot market, buyers would likely have to make more bids to get one accepted. Again, the time spent trying to get a bid accepted would not seem to vary based on the price of the home.

Negotiating over price, timing, and other contingencies. The time spent on negotiations would depend on how reasonable the buyer and seller were as negotiators and whether they were less than rational at times. This would not seem to have any connection to the price of the home.

Closing. The time spent preparing the paperwork for the purchase, making sure the mortgage and title insurance were set and other papers signed would not seem to vary based on the sale price of the home.

A review of these services indicates that ***the time and costs incurred by residential real estate agents is generally unrelated to the sale price of a home***. That is, none would seem to increase significantly with the sale price of the home.

Most of an agent’s fee is compensation for their time. And while an experienced, expert agent might demand and deserve a much higher hourly rate than a new agent, basing fees on sale prices of homes does not serve that end. It merely encourages the best agents to compete to work with buyers and sellers of the highest-priced homes, even when their special expertise may be unneeded. If, instead, the agents with the most experience and/or skill were to advertise them and their higher fees – as do lawyers, accountants, etc. – then those who would benefit most from those attributes and could afford them would seek them, even if their homes were not the priciest.

II. Steering

Unlike the misleading claims made by traditional agents addressed earlier, there is some truth to their warning that many traditional buyer agents will try to avoid showing their buyers a home represented by a low-fee agent and that many may disparage a bid from a buyer represented by a low-fee agent.⁴⁴ Yet, this “shunning” or informal boycott of those agents may be diminishing.

A. Traditional Agents Still Try to Steer Clients Away from Consumers Represented by Low-fee Agents

Traditional agents have long viewed low-fee agents as an invasive species that threatens their local environments, which have generally been free of effective price competition for decades. They worry that if consumers sample high-quality, full service at dramatically lower prices, leading to successful sales, traditional agents will be forced to match those prices or lose business. As discussed above, the introduction of such price competition among agents could reduce real estate agent fees by tens of billions of dollars per year.⁴⁵ Therefore, traditional agents have long tried to force low-fee brokers out of business: sabotaging them⁴⁶ steering their clients away from dealing with sellers or buyers represented by low-fee brokers. That is, traditional buyer agents are apt to give low priority, if not omit, visits to homes represented by low-fee agents even when they offer market-based buyer agent fees and traditional listing agents are apt to comment negatively to their sellers on bids presented by low-fee agents.⁴⁷ Zillow also segregated listings from REX and For Sale By Owner (FSBOs) from those of traditional broker listings, on a page where many buyers were likely to miss them.⁴⁸

⁴⁴ See Barry, et al, *supra* note 4; Panle Jia Barwick, Parag A. Pathak & Maisy Wong, Conflicts of Interest and Steering in Residential Brokerage, 9 AM. ECON. J: APPLIED ECON. 191 (2017).

⁴⁵ See *supra* note 11.

⁴⁶ See Barry, et al, *supra* note 4, at 1490-91, notes 105-09, and accompanying text; Nadel, Berkeley, *supra* note 11, at 118.

⁴⁷ REX offered to add the commission the buyer agent and buyer agreed to the purchase price, but many buyer agents were unwilling to accept that. After all, it would show the buyer that they were actually paying for their buyer agent. See Barry, et al, *supra* note 4, at 1540-42

⁴⁸ When Zillow became a member of the NAR, it interpreted sections 18.3.11 and 19.23 of the NAR’s Multiple Listing Issue and Policies handbook as prohibiting the display of listings from non-Realtors alongside those of Realtors. This rule was repealed in 2025. See, e.g., Taylor Anderson, *Listings are quietly ‘commingling’ on*

What fosters steering is the interdependence of real estate agents with others in the market – the nature of a collaborative industry.⁴⁹ This has enabled them to avoid the fate of stockbrokers and travel agents. When the New York Stock Exchange freed brokers from fixed prices in 1975, large fee reductions came quickly,⁵⁰ and the 1978 Airline Deregulation Act, freeing airlines from regulated rates, also quickly unleashed greatly reduced airfares.⁵¹ The agents/brokers in those industries did not have to worry that their competitors would try to frustrate their sales. In residential real estate markets, however, both low-fee agents and traditional agents who are willing to deal with them are susceptible to retaliatory practices by competitors.⁵² These tactics helped kill many low-fee real estate brokers, including Foxton and Purple Bricks.⁵³ As a May 2025 Federal Reserve FEDS Note observed: “individual sellers and buyers find it costly to deviate from the norm, given the possibility of incurring substantial losses from poor performance of low-commission listings on the market or *lack of cooperation* from brokerage agencies.”⁵⁴

The Federal Trade Commission and Antitrust Division of the U.S. Justice Department have long understood that such steering hinders the opportunity for effective price competition,⁵⁵ but a combination of factors have prevented them from ending these practices: 1) evidence of steering is not easy to collect⁵⁶ and 2) most experts believe that the current antitrust laws do not prohibit steering because there is no “conspiracy” among agents; after all, higher-priced agents are simply acting in conscious parallelism⁵⁷ to serve their own interests in preserving high commissions.⁵⁸

Zillow again after 4-year hiatus, INMAN NEWS, Apr. 22, 2025, <https://www.inman.com/2025/04/22/listings-are-quietly-commingling-on-zillow-again-after-4-year-hiatus/>

⁴⁹ See Jordan M. Barry, John William Hatfield, Scott Duke Kominers & Richard Lowery, *Not from Concentrate: Collusion in Collaborative Industries*, 108 IA L. REV. 1089, 1091–92 (2023). John William Hatfield, Scott Duke Kominers & Richard Lowery, *Collusion in Brokered Markets*, 80 J. FIN. 1417 (2025).

⁵⁰ See *NYSE Was Revolutionized by SEC Abolition of Fixed Commissions*, WASH. POST, July 20, 1985, <https://www.washingtonpost.com/archive/business/1985/07/21/nyse-was-revolutionized-by-sec-abolition-of-fixed-commissions/8726b8b1-8013-4bcf-aad8-776fcc65f417/>.

⁵¹ See Marc Scribner, *Airline Deregulation: Past Experience and Future Reform*, REASON, Apr. 6, 2023, <https://reason.org/policy-brief/airline-deregulation-past-experience-and-future-reforms/>

⁵² See Barry, et al, *supra* note 4, at 1497-99 & passim; Nadel, Berkeley, *supra* note 11, at 115-17.

⁵³ See Nadel, Berkeley, *supra* note 11, at 94 n.18.

⁵⁴ See Banerjee & Paciorek, *supra* note 4 (emphasis added).

⁵⁵ See, e.g., 1983 FTC Report, *supra* note 5 at I:155-59 (Chapter 4: F-G); Nadel, Berkeley, *supra* note 11, at 99.

⁵⁶ See, e.g., Barry, et al, *supra* note 4 at 1478-79.

⁵⁷ See Jeffrey Amato & Tom Neuner, *Antitrust 101: Tacit Collusion* (Dec. 5, 2022), <https://www.winston.com/en/blogs-and-podcasts/competition-corner/antitrust-101-tacit-collusion>

⁵⁸ This author disagrees, believing that traditional agents try to avoid dealing with low-fee agents out of fear that other traditional agents have conspired to retaliate against such actors. While all traditional agents would prefer not to fight pressure to lower their rates, when a single agent has the chance to close a deal and please a grateful client, one would expect them to conclude that their selfish interest would favor dealing with the low-fee agent to secure the best deal for their client, rather than supporting the tacit boycott. It seems a simple example of the collective action problem. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

B. The Impact of Steering May Be Diminishing

Two factors, however, may be diminishing the relative impact of such steering: (1) as increasing numbers of home buyers find it easy to use the tools on websites like Zillow and Redfin to alert themselves to homes that meet all of their search criteria, it is becoming riskier for buyer agents to ignore such listings, though they may still disparage them; and (2) as more consumers are more insistent on securing lower fees for brokers and traditional brokers do not want to lose those potential clients, more traditional agents appear to be more willing to offer their services for lower fees through referrals from low-fee firms. Meanwhile, the harm to sellers from steering is not so different from the harm to sellers when traditional agents encourage them to accept a bid after only being exposed to buyers with access to their private networks. Both may be denied access to the buyer willing to make the best offer.

1. Increasing Numbers of Potential Buyers Are Apt to Discover Their Desired Home Even if Their Agent Would Prefer to Steer Them Away

The harm due to steering by buyer agents should continue to decline as it becomes even easier for buyers to create a search profile on Redfin or Zillow or with some AI-agent designed to alert them to any homes that satisfy that profile even after hiring a real estate agent. Now agents may continue to steer buyers away from homes represented by low-fee agents, confident that they can defend themselves if their clients confront them about those omissions. They can claim that they thought the negatives of the home strongly outweighed the positives and thus, they did not want to waste the buyer's time. Yet as noted earlier, agents who engage in this practice risk losing their clients, especially as consumer awareness of low-fee agents increases and they see that the omitted homes are represented by low-fee agents, leading them to suspect disloyalty and fire their agent. Buyer agents anxious to avoid such buyer dissatisfaction will feel increasing pressure to diminish, if not stop, steering. If, instead, traditional buyer agents alert their clients to the homes represented by low-fee agents, but recommend skipping them, at least buyers will be aware of those options and prepared to overrule their agents.

2. More Traditional Agents Are Accepting Referrals from Low-Fee Firms

While the 2023 \$1.8 billion dollar verdict against real estate brokers and the March 2024 NAR settlement has not unleashed the hoped-for price competition among real estate agents,⁵⁹ media coverage of these events and the requirement that buyers establish a rate with their agents has led more consumers to inquire about lower fees.⁶⁰ Meanwhile, the recent dramatic drop in annual home sales from six to four million⁶¹ has left traditional brokers hungrier than ever for clients and apparently more willing to accept lower net fees. Given that agents have willingly paid referral fees of 20-35% of their side of current commissions,⁶² increasing numbers of traditional brokers and agents are willing to accept

⁵⁹ See note 8, *supra*.

⁶⁰ See Aleem, *supra* note 2929 (more than half of the agents reported that more clients are negotiating over fees).

⁶¹ See *supra* note 2.

⁶² See *supra* note 32.

reduced net commissions by “moonlighting” through referral services, like Clever, Ideal Agent, and Houzeo.

Brokers and agents appear to tolerate these aberrations from the local norms just as many retailers will offer heavily discounted (but still profitable) prices on over-priced items to those who know to ask but try to keep the existence of that option hidden from shoppers who can afford the regular high prices. Thus, Clever claims to partner with more than 15,000 independent agents; Ideal Agent, with more than 2,000.⁶³ It appears that an opposing agent would usually not be aware that the partnering agent was working with a low-fee agency because the latter would identify themselves under the name of their traditional broker.

Individual traditional agents and their broker employers face a tension between their long-term interest in combatting price competition by steering and their short-term interest in closing a deal. To the extent that they find that breaking the tacit boycott will not lead to substantial retaliation, as it formerly would have, they will be less inclined to observe the boycott.

3. Many Traditional Brokers Also Initially Limit Buyer Access to Their Listings

Almost all home sellers want to get the best net price for their home, although some have a hard deadline to sell and most are willing to take somewhat less for a quicker, easier process.⁶⁴ Thus, most sellers want to maximize the chances of reaching the buyer willing to offer them the best package of price and other conditions by attempting to get their listing seen by all bona fide potential home buyers.⁶⁵ Anything that would limit a seller from reaching a significant number of potential buyers compromises that goal.

Admittedly, using a low-fee broker may well reduce the exposure a seller’s home receives due to steering by traditional agents, but, interestingly, many sellers tolerate a similar harm when using some of the major traditional brokers, like Compass or Douglas Elliman, who, at least initially, restrict their listing to their “private networks,” greatly limiting its exposure. These brokers hope that this will enable one of the buyers that their agents represent to make a quick bid. The listing agents can then encourage the seller to complete a sale, avoiding any additional time, effort, and hassle involved in the normal selling process. The broker’s agent can then collect commissions from both sides of the sale. This practice also

⁶³ See Brobeck & Gilch, *supra* note 20, at 10.

⁶⁴ See, e.g., Zillow Research, Home Sellers and Private Listing Networks: Insights From a Recent Survey (Jan 21, 2025).

<https://www.zillow.com/research/pln-sellers-survey-34755/>

⁶⁵ See, e.g., Bright MLS, On-MLS Study Measuring the Benefits of an Open and Transparent Housing Marketplace (Aug. 2023), <https://image.m.brightmls.com/lib/fe2b11747364047b741278/m/1/6534ddd0-6f2e-42dc-b05b-634e7b1ad23a.pdf>. Of course, this survey does not focus on the net amount received by the seller after paying commissions. Some sales between parties without agents may be at lower prices than comparables, but net the seller more.

helps brokers attract buyers eager for access to homes “coming soon” homes that may never reach the MLS and other agents.⁶⁶

Brokers defend their private networks as providing some advantages that low-fee brokers do not offer. Some use their networks to test high prices before making homes “publicly available,” to avoid the danger of generating a high “days on the market” statistic, which leads many to presume that a home is probably overpriced. Some sellers may be happy to give up a significant amount to avoid the hassle of multiple visits by potential buyers.⁶⁷ Sellers looking to downsize and without a strong desire to maximize their net worth may feel comfortable forgoing the chance to reap substantial additional funds. Certainly, sellers have the right to make that choice. Still, given the strong incentives that traditional brokers have for keeping the sale within their brokerage, as noted above, there is reason to worry that listing agents may not be presenting the option to sellers in a completely unbiased manner.⁶⁸ Sellers using low-fee agents would not necessarily reach fewer potential bona fide buyers than sellers listing only on private networks.

III. Combatting Steering

Both buyers and sellers, whether using a traditional or low-fee broker, should be aware and try to compensate for agent attempts to steer clients away from homes or disparage buyers or sellers represented by low-fee agents. Ideally, consumer advocates and the media will warn buyers and sellers using traditional agents to be on the lookout for bias by their agents against buyers or sellers represented by low-fee agents. They should not blindly accept their agents’ advice to disregard a bid or ignore a listing associated with a low-fee agent, since that counsel may actually be based on the self-interest of their agent. All home buyers and sellers should consider the following advice:

A. Home Sellers Should Retain Control Over Funds They Allocate for, But Do Not Pay Out to, the Buyer’s Agent; Home Buyers Should Insist That Any Fee Paid by the Seller to the Buyer’s Agent Above the Agreed Upon Amount Be Rebated to the Buyer

Though traditional brokers may resist, home sellers should try to ensure that their listing agreement allows them to control any amount saved by not paying out the full amount they may have allocated for a buyer’s agent as a concession. They should not allow any such savings to flow, passively, as a bonus to their listing agent, which is typically the case.⁶⁹

The NAR settlement was supposed to address the harm from sellers setting the commission for buyer agents. It requires that buyers negotiate the fee paid to their

⁶⁶ See Nadel Berkeley, *supra* note 11, at text accompanying n.189.

⁶⁷ Some use ibuyers – who flip their homes. See *supra* note 43

⁶⁸ See, e.g., *National Consumer Alert – Avoid “Pocket Listings,”* Consumer Advocates in American Real Estate, <https://www.caare.org/national-consumer-alert-avoid-pocket-listings/>.

⁶⁹ See Elhauge Report, *supra* note 10, at ¶¶ 207-11. The standard listing agreements post-settlement often still divert this savings to the listing broker. See e.g., Minnesota and South Carolina Realtor Associations. (on file with author).

agents.⁷⁰ It expressly states that buyer agents cannot receive more compensation than the specific amount they have negotiated to receive with their buyer client in a written contract.⁷¹

When sellers sign a listing agreement with a listing agent, it should state the amount that they will pay to the listing broker for all of their services, preferably substantially less than the 2.5-3% typical commissions.⁷² The listing might also note that the seller is willing to pass on any bona fide fee that the buyer has agreed to pay to their agent out of the total sale price, although buyers could simply make this part of their bids. Still, as they have done for decades, listing agents are apt to explain to their clients that, irrespective of the buyer agent fee negotiated by the buyer, they should offer to pay the buyer's agent at least a "market rate" co-op fee to incent them to favor their homes over others offering lower fees.⁷³ To the extent that they offer more than the buyer had agreed to pay, they might be viewed as offers of bribes to the buyer's agent to bring their client to the home.⁷⁴

Although the NAR settlement prohibits listing agents from displaying those co-op fees in NAR-affiliated local MLS databases,⁷⁵ it is carefully worded to state that it does not prevent offers of compensation from being offered outside the MLS⁷⁶ – something many had hoped it would prohibit. This has led listing agents to continue to offer co-op fees outside the MLS, which buyer agents can discover by calling the listing agent if they are not already aware of that agent's or broker's current practices. Many agents even interpret the settlement as legalizing co-op fees outside the MLS, something it could not do.⁷⁷

Furthermore, even though the NAR settlement expressly prohibits buyer agents from receiving more than the amount agreed to in their buyer agent agreement, many in the industry have undermined that constraint. Buyer agents are often still apt to steer buyers to homes offering a co-op fee above the amount they had agreed to accept because they have learned that buyers frequently allow them to *amend the buyer agent's agreement after the co-op fee offered by the seller is known*.⁷⁸

When they negotiate a buyer agent agreement, buyer agents will explain that almost all sellers are willing to cover the fee that the buyer agrees to – that sellers set the sale price to include "concessions" available to pay the buyer's agent – so the buyer will not be required

⁷⁰ NAR settlement, *supra* note 9, at p29 (¶58(vi)).

⁷¹ *Id.* at p29 (¶58(vi)(c)).

⁷² It may offer to pay something extra if the buyer is unrepresented and the agent needs to do extra work to get the deal to closing, although an extra fee of more than \$1,000 is probably excessive.

⁷³ See Nadel Berkeley, *supra* note 11, at 103-05.

⁷⁴ *Id.* at 104.

⁷⁵ NAR settlement, *supra* note 9, at 27 (¶58(ii)).

⁷⁶ *Id.* at 30-31 (¶58(xiii))

⁷⁷ When the settlement states that it does not prevent co-op fees from being offered outside the MLS, it merely means that it does not address issues outside the MLS. Such offers could well be the target of a future antitrust lawsuit against the real estate broker industry. The only ones who could make such practices legal would be the state legislature or a court's interpretation of associated laws.

⁷⁸ Although this would seem to violate the settlement, it is happening. A detailed discussion and examples of such amendments is provided in Monestier Objection, *supra* note 8, at 18-33.

to pay any more than the sale price. Some buyer agents are even willing to agree to accept a very low figure, with the expectation that the buyer will be willing to renegotiate once they are clear that the seller is willing to pay.⁷⁹

So, what happens when a buyer's agent has agreed to accept a fee of 2%, while the seller has agreed to pay a buyer's agent 3%? It depends on the actions of the buyer and what the listing contract states. When the buyer's agent tells the buyer that the seller has agreed to pay them 3% many will ask the buyer to amend the prior agreement to agree to pay 3%.⁸⁰ Since the deal still hasn't closed, a buyer is unlikely to want to deny their agent a significant sum that does not seem to cost the buyer anything.⁸¹ If they agree to the amended agreement⁸² then the critical element of the settlement – requiring the buyer to negotiate their agent's fee – has been effectively eviscerated.

But does allowing the buyer's agent to collect an extra 1% actually not cost the buyer anything? That depends on the listing agreement. If the listing agreement is written to commit the seller to pay a total commission of 5-6%, as typical listing agreements did prior to the settlement, and the listing agent offered to pay buyer agents up to a 3% co-op fee, then the listing agent might well be entitled to keep the 1% and so the buyer's agent would be correct that amending its agreement to pay them more would not cost the buyer anything.⁸³ Still, buyers could include in their original buyer agent agreement the requirement that their agent rebate to them any amount offered by the listing agent above the amount the buyer agent agreed to accept, assuming that they were not in the nine states that prohibit such rebates.⁸⁴

On the other hand, what sellers should request, if not demand, in the listing agreement is that any amount designated to be available to pay the buyer's agent that is not actually paid out to the buyer's agent is retained by the seller. That is, the 1% in this example would belong to the seller. Remember, this 1% is not some trivial amount; rather on an \$800,000 home it is \$8,000. But this does not end things. A smart buyer will argue to the seller that the 1% savings is due to the negotiations of the buyer and should be allocated to the buyer in the form of a price reduction of about 1%. In fact, when the buyer made their bid, after learning that there was an extra 1% available, they would almost certainly inform the seller that while their offer price might be a bit lower than others, the seller would also be able to keep the 1% excessive fee built into the asking price. In any case, the allocation of this 1% between buyer and seller would be implicit in any price negotiations.

As an example, suppose a buyer had agreed to pay their agent 1.5% of the sale price while the seller of a \$500,000 home had agreed to pay a 3% commission to the buyer agent. Thus, the seller was willing to give up \$15,000 of the sale price to the buyer agent, but the

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 21.

⁸² Monestier explains why this does not actually represent an amended contract, since the agent receives a large additional amount while the buyer receives no additional consideration. *Id.*

⁸³ See note 69, *supra*, and accompanying text.

⁸⁴ See Nadel, Berkeley, *supra* note 11, at 109.

buyer only needed to pay the agent \$7,500. If the listing agreement gave the seller full control over the additional \$7,500, the buyer and seller can negotiate over how to allocate it. They could even split it so the buyer saves \$3,750, paying only \$496,250, while the seller nets \$3,750 more they would have \$473,750 compared to \$470,000.⁸⁵

B. Buyers Should Direct Their Agents Not to Screen Out Homes That Do Not Expressly Offer Buyer Agent Co-op Fees

Buyers should direct their agents *not* to screen out homes whose sellers do not offer to compensate the buyer agent. Buyer agents may offer to avoid such homes, presenting it as a way to serve the buyer's interest: to avoid saddling them with having to pay the negotiated fee to the agent *in addition* to the sale price offered on the home, rather than just the latter. But there is good reason for all buyers to reject this offer.⁸⁶ Buyers should care about the *total* amount they must pay to purchase the home, including agent fees, but it should not matter to them whether their agent fee is initially included in the advertised price of the home or not. For example, if a buyer has agreed to pay their agent \$10,000, they would not want to ignore a home priced at \$500,000 which does not offer to pay anything to the buyer agent, over an equally desirable home, whose seller agrees to pay the buyer agent a 3% co-op fee but is priced at \$515,000. The first home is a better deal for the buyer by at least \$5,000. The settlement agreement prohibits buyer agents from surreptitiously screening out homes that do not offer a co-op fee;⁸⁷ buyers should not permit buyers agents to convince them that such analogous screening is actually in their best interest. Don't request it.

C. Buyers Should Keep Searching on Their Own to Keep Their Agent Honest

Buyers should consider using their own search tool on Zillow, Redfin, or possible similar AI alternatives to alert them to listings that meet their search criteria. If they spot a home that sparks their interest and it is represented by a low-fee agent, and their own agent doesn't mention it they should ask their agent about it. When listening to the agent's reply, they should be somewhat skeptical of any negative comments about the property, given their agent's self interest in frustrating low-fee agents. If their agent refuses to show them the home, they should also consider contacting the listing agent or seller directly.

One low-fee broker gets calls directly from potential buyers, often followed by one from the buyer's agent. He explains to the buyer's agent that if the agent is not willing to present a bid on behalf of his client, then the listing agent is obligated to deliver the buyer's bid to the seller without the involvement of the buyer agent. This almost always leads the buyer

⁸⁵ \$500,000 - (\$15,000 (listing agent) - 7,500 (buyer's agent) - \$3,750 (share of savings)) = \$473,750 vs \$500,000 - 15,000 - 15,000 = \$470,000.

⁸⁶ Certainly a buyer has a legal right to accept this offer.

<https://www.realestatenews.com/2025/01/27/unfiltered-narlawyer-on-settlement-dos-donts-and-risks> (NAR general counsel confirming that a "buyer can direct their agent" to only show them homes that offer compensation to buyer broker). There is simply no good reason to accept it.

⁸⁷ NAR settlement, *supra* note 9, at 30 (¶158(x)).

agent to bring the potential buyer to the home. If this doesn't occur, low-fee listing agents can explain to the buyer the conflicting interests of their buyer's agents.

D. Sellers Need to Accurately Understand the Net Value to Them of Bids Involving Low-Fee Agents

Sellers should be aware that their agent may misrepresent the value to them of a bid of a buyer using a low-fee agent. Buyers can try to warn the seller of the listing agent's incentive to do so, but this may be impractical.⁸⁸ Sellers should not focus on the gross value of the bid. The dollar figure that should matter to the seller is the amount they net *after* both agents are paid. In fact, a lower bid from a low-fee agent's client may yield a higher net payment to the seller than a higher bid subject to larger fees. Buyers might try sending a note to the seller explaining this attached to their bid.

An example is helpful. A seller has agreed to pay both its listing agent and a buyer's agent 3% commissions. Suppose buyer T, using a traditional agent whom the buyer has agreed to pay to a 3% commission offers \$400,000. This bid would yield the seller $\$400,000 - 3\%$ ($\$12,000$) to listing agent - 3% ($\$12,000$) to buyer's agent = $\$376,000$ after both agents are paid. Suppose buyer L offers only \$395,000, but they are using a low-fee agent, who has agreed to a buyer agent fee of only \$5,000. Then this second bid could yield the seller about $\$395,000 - \$12,000 - \$5,000 = \$378,000$.⁸⁹ That is, the \$395,000 offer, which appears \$5,000 lower than the \$400,000 offer, could actually yield the seller about \$2,000 more! It is important for buyers represented by low-fee agents to make this impact clear to sellers and not necessarily trust that the seller's agent will do so.

IV. Conclusion

Most home buyers and sellers can save many thousands of dollars if they are not afraid to use a low-fee real estate agent. As explained above, consumers should not assume that low-fee agents offer inferior levels of service. Rather, they should recognize that the great disparity between rates is because traditional agent fees are often ridiculously excessive, like many stockbroker and travel agent commissions prior to the 1980s. Home buyers and sellers should continue to select an agent based on multiple attributes: how well they believe that agent's skills and experience in the local market will aid them; how compatible they find the agent's style and personality; how well the agent understands them and their strategy; and fee. A lower fee should be a plus, not a minus in such an evaluation.

The 2024 NAR Settlement has not produced the kind of price competition among real estate agents that consumers and regulators had hoped for as rates remain fairly uniform and at pre-lawsuit levels, aided by steering. Nevertheless, by formally uncoupling the

⁸⁸ Agents typically do not disclose the name of the seller, but this information is often available through online county property records, which give the name of the owner and the property tax information about the property. Alternatively, a buyer might ring the doorbell of a neighbor to try to get that information.

⁸⁹ This assumes that the listing agreement allowed the seller to retain any amount designated for the buyer's agent that was not paid to the buyer's agent and that the buyer's agent did not convince the buyer to "amend" the signed buyer agreement for \$5,000 to allow the buyer agent to receive \$12,000. See III.A., *supra*.

listing agent's commission from the fee offered to the buyer agent, and requiring buyer agents to negotiate their fee with buyers, the settlement has removed two major obstacles to price competition. It has also widened the door for low-fee brokers and agents.

Given the bias that traditional agents generally continue to have against low-fee agents, even consumers using traditional agents should be alert for any signs of "steering" due to this bias and consider the advice offered in section III.