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# Alaska REAL ESTATE BY DAVE WINDSOR

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## Real Estate Upheaval - *Charles Darwin Might Have Something To Say About This*

After decades of acceptable business practice, the way real estate licensees are paid is under an evolutionary shift.

Recent headlines about the Class Action Lawsuits involving the National Association of Realtors (NAR) and some other large Brokerage organizations has certainly tripped a circuit breaker.

Although the media always dramatizes aspects of a story in order to create excitement, there is an underlying truth here. **Buyers and Sellers have the right to negotiate fees paid for services.**

Without going into the complex details of those lawsuits and resulting settlements in motion, it may be said that the competition between brokerage companies seeking your business is accelerating, which may save you money in future transactions, although outcomes are uncertain at this time.

Competition results in Natural Selection (just as Charles Darwin described in his 'Origin of Species' classic) – among species of life, and among licensees seeking fruit from the real estate tree.

What we will see, as early as July of this year, is a separation between how a buyer pays for representation in a transaction and how the seller pays, or at least how that fee is established.

Current practice is that, when a seller lists property for sale, they negotiate a total commission that includes a payment to the buyer's representative. This has meant that the homebuyer does not have to worry about further expenses beyond a down payment to the lender and closing costs, and can still be represented.

How each Brokerage company deals with the new landscape is yet to be clarified but here are some things you should know.

### 1) Some licensees are members of

**the National Association of Realtors** and a smaller number are not. If your prospective representative calls himself, or herself, a "Realtor", that simply means they are a member of the Association. In fact, only members can use that term! Non-members are a Licensee, or perhaps an Associate Broker (as in my own case), but NOT a 'Realtor'.

Since the National Association of Realtors fell foul of these lawsuits they may well lose membership and, indeed, this is already happening. In the State of Alaska a "Licensee" is not required to be a member and the law simply requires the appropriate License for someone to work as a real estate professional.

So, whether your representative is a Realtor or not is of no particular significance. The important issue is how well they may service your needs. A non-member Licensee can be just as

effective while not belonging to the organization.

**2) All fees that a consumer agrees to pay to a Brokerage through that company's Licensees are entirely negotiable.**

3) When you, as a homebuyer, choose to work with a particular Licensee, be sure to have them explain how they expect to be paid, by you, or by some other party included in the transaction.

Many Licensees use a **Buyer Representation Agreement** to detail this contract between you, as a buyer, and their Brokerage company. It is easy to be confused at this point so do not sign it without fully understanding the terms to which you are agreeing.

Until now, I have never used such an agreement but relied on the goodwill and mutual understanding generated by our relationship, not by a contract. However, in the light of these recent developments, I will be having homebuyers sign such an agreement from now on that explains how I will be paid for representing them.

Also, keep in mind that most all the Buyer Representation Agreements contain a provision that you may cancel it if the Licensee does not perform.

If you want to switch representation, write to that Licensee and tell them you are not happy with the service. They will be hard pressed to enforce the previously signed agreement. I will add my own 100% personal guarantee to that effect on my agreement with buyers.

**4) Since a homebuyer is unlikely to find homebuying affordable if they now have a fee to pay their real estate licensee,** it is likely that some form of middle ground will be found that contains an appropriate legal and ethical procedure enabling your engaged homebuyer representative still to pass on those fees in a Purchase and Sale Contract to the Seller.

It is likely that Sellers will continue to offer payment to the Buyer's representative licensee but this will no longer be published. The buyer's licensee will need to ascertain that compensation offered in some private manner but not through MLS as is now currently the case.

Homesellers need to understand that this practice of offering to pay for the buyer's representation is not illegal, and really necessary, because sellers need a buyer, and buyers generally can't afford to pay a licensee on top of their loan expenses and downpayment.

The lawsuit was about how the administration and function of the practice prevented competition and how NAR encouraged it. So let the games begin. Feel free to talk to me and discuss the services I offer and how I recommend you proceed. I think you will remain satisfied with that which I offer and the mechanism proposed.

**5) Be patient as natural selection and evolution take place.** It is the solemn obligation, not to mention an action with potential legal consequence, for all Brokerage companies to explain to the consumer how they are paid and what services you will receive if you engage them.

I predict that, unless the State Real Estate Commission creates new regulations and laws to specify future procedure, that individual Brokerages will carefully provide clarification of how you are affected by their, and their Licensees', compensation policy. I certainly will.

Dave

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**POSTSCRIPT:** Our own local MLS and Real Estate Brokers have been meeting to navigate the 'post-legal settlement' procedures and policies now needed.

It appears that Buyer Representation Agreements will become mandatory to agree terms of that representation, including fees.

Sellers will likely have Listing Agreements modified to allow a concession from the seller to facilitate potential coverage of buyer representation fees. Lenders also will be modifying practices to reflect the new model.

The State Legislature may, later this year, be encouraged to revise Real Estate Statutes to reflect the new approach to compensation.

Evolution will take place and, once we all get used to the new landscape, it will no longer be a drama and you will continue to be serviced well by the local industry.