

## **Update on National Association of REALTORS® matters and Larson law firm news**

**November 20, 2006**

This newsletter provides an update on issues involving National Association of REALTORS® policies affecting MLSs and on news involving the Larson law firm:

1. [Intellectual property assignment provisions](#) – change in NAR policy effective January 1;
2. [New NAR policy about listings on the Internet](#) adopted earlier this month;
3. Thoughts on report and recommendations of [NAR's "MLS Future presidential advisory group"](#);
4. Comments on the [NAR data protection toolkit](#) released this year;
5. [Year-end legal projects](#);
6. [Reminder](#) regarding copyright notices;
7. [Other firm news](#).

### **Intellectual property assignment provisions in NAR policy**

NAR adopted a policy in May, to be effective January 1, that prohibits MLSs from requiring brokers to assign copyrights in their submissions to MLS as a condition of participation. If you have participant or subscriber agreements that include an assignment, you will need to modify them before January 1 or risk being out of compliance with NAR policy.

The solution I have adopted for my clients since May has been to give listing brokers a choice: If the broker assigns its copyright to MLS, MLS will provide certain additional services and assurances; if the broker does not assign, MLS will not provide those services and assurances.

Please let me know if you want to discuss modifying your existing documents, including participant and subscriber agreements and rules, if necessary.

### **New NAR policy regarding 'exclusive agency' listings on IDX and public sites**

NAR adopted a new policy at its New Orleans governance meetings which effectively requires all NAR-affiliated MLSs to send all active listings of participants in feeds to IDX sites and public web sites (such as Realtor.com and MLS-operated public web sites), except where the seller or listing broker requests that a listing be withheld.

The policy permits an exception, allowing an MLS to withhold any listing where 1) the web site receiving the listing would display its address and 2) the seller displays on the property a "For Sale By Owner" sign or another sign or notice indicating that the seller is soliciting direct contact from buyers." MLSs choose as a matter of local option whether to implement this exception. Note that the new policy expressly permits brokers who operate IDX sites to exclude exclusive agency listings of other brokers from their web sites.

I have argued in an [Inman News column](#) (the [text also appears on my own web site](#)), that this new policy will be effective in reducing the number of FTC investigations faced by MLSs. Admittedly, it does so by forcing MLSs that previously excluded exclusive agency listing from IDX and other sites to change their policies. But, as I noted in my column, those policies were not likely effective in achieving meaningful objectives anyway. I understand this policy is effective as of January 1, 2007. If you need help adjusting your business practices or amending rules and regulations to comply with this policy, please let me know.

### NAR's MLS Future Presidential Advisory Group

As you probably know, NAR President Tom Stevens appointed a presidential advisory group, or "PAG," to study the future of MLS. Its charge is to "develop a vision for the future of MLS based on the assumption that no current structure exists and that no barriers exist for its design and implementation." In my view, this exercise is an important component of a strategic plan for the industry's future, and I applaud NAR for beginning this discussion. I wanted to share some thoughts about particular aspects of the PAG's first, partial report (dated October 2006 and made available at the convention in New Orleans).

The PAG offers a vision for the MLS of the future: It "will be the gateway to real property information for real estate industry professionals." The foundation for this gateway would be a national database of real property information, ideally covering every parcel in the country. This concept has already been adopted with success by some MLSs. For example, my client Hawaii Information Service has developed its own MLS software, which makes the public records system the foundation for the multiple listing system. As the PAG suggested, properties for sale in HIS are "flagged" on the public records system, and the listing broker adds additional information. This model is worth considering on the local level, even if NAR's vision for a national model does not work out.

The PAG suggests that information regarding properties on the gateway would include information from "authoritative sources" (presumably such as taxing entities, preparers of hazard data, etc.); information from listing brokers on those properties for sale; and "enhancements and corrections" offered by other brokers. This last notion, that brokers might be able to comment on the listings of other brokers or on properties that are not listed at all, is interesting. Some existing public web sites permit visitors to post comments on property records. For example, owners can add information to

their own properties on Zillow.com, and any registered visitor can add a comment to a real estate listing on Propsmart.com. Clearly, at least some folks *believe* consumers will find this information useful. There is also some risk of legal liability where a person other than the property owner posts a false comment. Overall, it is unclear whether this feature really adds value or is merely a fad.

The future MLS would retain the requirement for brokers to cooperate (subject to certain exceptions) and to arbitrate disputes between them. The language regarding inter-broker compensation, on the other hand, is a bit cryptic: "Participants *will have the opportunity* to offer compensation for cooperative services. Offers of compensation, *if any*, can be customized." This language casts into doubt whether the future MLS would have a requirement for interbroker compensation, something that is a mainstay of the current MLS model. (I've written an [Inman column](#) on this topic as well; you can also find the [text of it on my web site](#).)

The PAG proposes that the gateway entity will be "a participant-owned cooperative governed by real estate broker-principals" and that "it will not subsidize or underwrite unrelated activities or operations, including associations of REALTORS® at any level." This strongly suggests a disassociation from the community of organized real estate. I nevertheless predict that if NAR attempts to realize this vision, its leaders will want some kind of oversight and control.

According to the PAG, the gateway would have "streamlined, consistent business rules" and a "standardized data structure which can incorporate local customization and content." These elements appear directly to address complaints by leading brokers and others that unnecessary variations in data and rules across MLSs create unnecessary costs for brokers. If managed properly, national standards of this kind could be invaluable. On the other hand, many folks are likely to think back to the days of "RIN" and "X.12" and surrounding waste of time and money.

The PAG's vision for existing MLSs: they will provide data to the future MLS; they will provide "front-end" tools to participants; they may provide arbitration, rule enforcement, and other local services on behalf of the future MLS.

The PAG's October report intended only to address what the "professional" side of the future MLS would be. The PAG is still working on what the "consumer" side would look like, presumably tackling questions about IDX (or its successor) and public sites like Realtor.com.

I suggest that MLSs not worry so much about what would happen if the PAG's vision were realized. Instead, I would use it as guide to thinking about ways in which MLSs with a local and regional presence now can achieve some of the benefits of the gateway without having to wait for the PAG's dream to materialize. For example, a nation-wide group of large MLSs recently discussed the possibility of moving their databases to a single platform, opening the opportunity for further standardization of their offerings. MLSs have tried such efforts before – a group of large MLSs considered similar proposals in 2000-2001 – and failed to deliver the desired collaborations. But each

passing year creates new incentives for cooperation – if the PAG’s report is another straw on the back of the “status quo” camel, it is worth the resources NAR devoted to creating it.

### Comments on the NAR data protection toolkit

NAR has worked for nearly a year with attorney John Rees of Callister, Nebeker & McCulloch, of Salt Lake City, to develop a series of model documents that MLSs can use to resolve certain copyright and data use issues. The result, last updated on September 28 and [available on REALTOR.ORG](#), is a very good starting point for any MLS that has not already tackled these issues. Each model document comes with a brief implementation guide that explains how to use it.

***Please note that NAR does not require you to implement any of these documents.*** I understand there was some confusion arising from a “webinar” that NAR did in September on the toolkit; some folks left it believing they had to implement one or more of these documents. These new documents do not arise from a new NAR policy, however, and whether you adopt them is up to you.

Some of these documents are more important to implement than others. Here is the list of documents in the tool kit placed in descending order of importance, based on my opinion:

1. Participant agreement, to allocate rights and responsibilities between MLS and brokers;
2. Subscriber agreement, to allocate rights and responsibilities between MLS and salespeople;
3. IDX vendor license agreement, to govern the provision of data to IDX brokers and vendors;
4. Terms of use/click-through, used on sites where consumers access listing information;
5. Third-party contractor agreement, to obtain rights from anyone (who is not an MLS employee) contributing copyright-protected content to the MLS, e.g., MLS photographer;
6. Volunteer agreement, used by MLS to secure assignments from committee volunteers, etc.;
7. Listing agreement assignment/license language, to obtain permission to use any copyright material the seller provides to the broker;
8. Brokerage independent contractor language, used by brokers in independent contractor agreements to obtain rights from their licensees; and
9. Database software development and web site development agreements, used by MLS with providers of database and web site development services.

The most critical agreements are between the MLS and its participants and subscribers, who are the most significant contributors and users of MLS data content. The IDX vendor license agreement and the web site terms of use/click through agreement are important because IDX exposes MLS data to the whole world on the Internet. The remaining documents may or may not be useful depending on

your MLS's business practices. I actually recommend you not adopt listing agreement language, for reasons I'd be happy to discuss with clients.

If you decide to use the NAR model documents, I strongly advise you to consult with your attorney (either local counsel or me) to discuss customizing them to make them work best for you. My firm uses a different set of model contract documents that I customize on behalf of clients. In them I have incorporated the useful provisions of the NAR documents as well as my experiences over the years with dozens of MLSs.

### Year-end legal projects

It seems every year we get a spate of legal projects from clients in December who want work done and invoices delivered by December 31. Organizations with legal projects to be done in the next couple months usually prefer to have them done in 2006 in order to take the tax deduction in the earlier year. If you expect to have projects of this kind, please get them to us as soon as possible so that we can schedule them properly.

Projects worth considering at this time of year include:

1. Reviewing your rules and regulations, drafting language to keep you compliant with NAR policy, and suggesting provisions that other MLSs have found useful;
2. Reviewing your current participant, subscriber, IDX and other license agreements to ensure they contain the valuable elements in NAR's and my firm's model documents;
3. Assist you in preparing an implementation plan for the new documents, such as participant and subscriber agreements, click-through agreements, etc. – implementation is not a trivial matter, but I have experience planning it with many MLSs.

### Reminder to update copyright notices

One other year-end project you will not want to overlook: updating the copyright notices on your MLS system and print publications. The proper form for the notice beginning January 1 will be "Copyright 2007 Your Org, Inc." You may substitute "©" for "Copyright" but do not use "(c)" or other abbreviations. The "All rights reserved" you sometimes see in copyright notices is not necessary (but it does not hurt either). You may wish to direct your staff or vendors now to update all your publications effective January 1.

## Other firm news

This year has been a good one for my firm. I've had the privilege to do work for many of my long-time clients and also to take on projects for a host of new clients. Here are some items of particular interest about the previous year and the coming one:

- In 2006, I completed work with Professor Genelle Belmas on an article titled "Clicking Your Speech Rights Away: The Enforceability of 'Gagwrap' Clauses." The article, which will appear in the January edition of the academic journal *Communications Law & Policy*, explores efforts by software manufacturers to squelch public commentary about their products by including 'gag' clauses in shrinkwrap and click-through software licenses.
- I published a number of industry-specific articles on Inman News and other sites regarding virtual office web sites, FTC and DOJ actions against REALTOR® associations, and the future of interbroker compensation.
- I gave numerous presentations for clients to groups of MLS and association executives and to association and MLS leaders to aid strategic planning and decision-making processes. Topics included MLS strategic and operational issues updates, MLS data security, broker rights in data copyrights, and limited service and new brokerage model issues.
- I began my third year as an adjunct teacher at the University of Minnesota Law School. This work has become one of my passions, and I find that teaching others how to lawyer continually improves my own skills as a practitioner.
- Beginning in January 2007, one of my former students will begin performing work for me as a part-time law clerk. This student was a star in my 2005-2006 class. He will be helping with research and some routine drafting tasks.

*Nothing contained in this newsletter should be construed as legal advice. Consult with attorneys and other business advisors where appropriate before acting on any information contained herein.*