

# Advertising Another Broker's Listing

Current Rule:

## **NAR Listing Procedures Section 2.7**

A listing shall not be advertised by any participant other than the listing broker without the prior consent of the listing broker. **M**

### **Issue: Has the time come to modify our rules to allow agents to use MLS data, including other agent's listings, to obtain new clients?**

To a major extent this has in fact already occurred. The entire IDX system was designed to allow agents the opportunity to use other agents' listings to obtain new business. In California, we extended this idea to print media with our neighborhood market report rules (Rule 12.8.1). Additionally, the original IDX concepts have continued to expand and grow so that NAR now mandates all sold data after 2012 be included in the IDX feed.

The challenges for both the compliance and licensing departments is the limitations imposed by a ruleset that had always been built upon the concept that MLS data should only be used for the purposes of representing an existing client and should not be used to obtain a new client. It has forced us and licensing to turn down some good potential products for the industry because they do not fall within the technical framework of IDX. Additionally, as new technologies and mechanisms for communicating with both prospects and clients continues to develop, the ruleset is always far behind the technology. CRMLS has had to stop individuals from using their preferred methods of communication, simply because the based on the principles of never advertising other agent's listings could not be overcome.

The following is an excerpt from an article posted by Rob Hahn which covers some of the history and current issue. <https://notorious-rob.com/2019/03/role-of-the-mls-defender-of-the-realtor/>

## **The Changing Understanding of the MLS**

Let us jump in the hot tub time machine and travel back to the ancient days of 2006. Our destination is the chambers of the House Committee on Financial Services' Subcommittee on Housing and Community Opportunity. Today's hearing is on the important topic of Real Estate Sales and the Internet.

In the 2006 hearing, which roughly coincided with the DOJ antitrust action against NAR, the issue was whether the real estate industry was discriminating against new Internet-enabled brokerages that were saving consumers money. But a major subtext of the hearing was whether the MLS should be regulated as a public utility. Consumer Federation of America led the charge on that, and its Executive Director, Stephen Brobeck, testified before that committee and suggested this:

*Second, because the MLSs and Realtor.com so dominate listing services, they function as a near-monopoly and should be regulated as a public utility. This regulation should ensure, most basically, more complete and accessible home sale information both to all service providers and to consumers.*

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Glenn Kelman of Redfin also pointed to the MLS as the barrier to innovation, at least back in 2006. He has since changed his mind on the subject. But still, we don't whitewash actual history here. The following is not in his written testimony, but from the transcript (at 2:11:12):

*Listing services stifle innovation not just in business models, but in how Web sites share data. I do not think we have focused on this enough today. You can find out more on the Internet about an eBay beanie baby than you can about a \$1 million home. Multiple listing services have told us we cannot allow public commentary on a listing. We cannot let people search by time on market. We cannot display for sale by owner listings alongside commission properties, and that we have to register our users. Rules like this are a thousand tiny shackles on Internet businesses.*

In response, industry representatives like Pat Vregood-Combs, President of NAR in 2006, and Geoffrey Lewis, Chief Legal Officer of RE/MAX, defended the industry in general and the MLS in particular.

Pat Vregood-Combs, President of NAR in 2006, testified as follows:

*Real estate reform advocates maintain that the MLS is a necessary utility, and as such, should be available to the public for use. As indicated above, the MLS is a cooperative that not only operates for the use and benefit of its members in serving their clients and customers, but it is created and operated, and its inventory provided by, the very members it serves.*

Geoffrey Lewis, Chief Legal Officer and SVP of REMAX, was even more blunt:

*The MLS was designed as a B2B vehicle, not a business-to-consumer vehicle. It was designed as a mutual sharing of information by industry peers to facilitate the sale of and search for properties. The idea was that cooperating brokers and agents would work to earn their own customers using their own assets and then share listings via the MLS. **The concept is simple: you earn a customer, you get to use the MLS with the customer. The concept is not: you get free access to the MLS and then you use it to advertise the properties of your competitors in order to attract customers.** [Emphasis added]*

Whether the arguments of Vregood-Combs and Lewis prevailed on the Subcommittee, or the power of NAR as a lobby convinced Congress not to act, fact is nothing was done to force the MLS to become public utilities. Instead, as we all know, NAR settled the antitrust lawsuit brought by the DOJ, entered into a consent decree (which expired last year), and some of the rules of modern online real estate were established. What we care about, however, is what those testimonies tell us about the industry's own understanding of the MLS and the value that it provided.

But that was in 2006. Even then, though, the MLS was already involved with exactly what Geoff Lewis was arguing against: lead generation, via IDX. Since that time, it is evident that the industry's understanding of the MLS has changed. It is no longer merely the utility you get to use with a customer once you have earned a customer. It has a major role in helping brokerages and agents use its data in order to attract customers. Think about Sold over IDX. Think about broker AVM. Think about all of the syndication battles we have been in, because some brokerages want the MLS to be the conduit to portals, while others do not.

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## What is the Role of the MLS in 2019?

Has the time come to update our ruleset for the expectations of the 21<sup>st</sup> century? One simple, but extremely impactful option would be changing the general rule that you can never advertise another agent's listing without their written permission, to being allowed to always advertise other agents' listings with very specific conditions.

The updated advertising rule could look something like:

1. Any Broker may advertise any On-Market listing(s) submitted to the MLS to a Prospect only if the Advertising Broker makes their role clear and understandable to a reasonable Prospect that the Advertising Broker is not the Listing Broker for the listed On-Market property advertised or for any listed property used in any advertisement.
2. There shall be a rebuttable presumption that an Advertising Broker has made their role as an Advertising Broker clear and understandable to a reasonable Prospect if the advertisement includes ALL of the following:
  - a. Name of the Listing Broker;
  - b. Name of Listing Agent (Optional per local Rule);
  - c. Contact method specified by the Listing Agent in the MLS to be used for the Listed Property in any advertisement by other brokers.
3. Any and all information, statuses and price contained in the advertisement must be accurate, updated and consistent with the MLS Listing being advertised.
4. Advertising shall not include, and any limitations in this rule shall not apply, to:
  - a. Any communication between a Broker and their Client;
  - b. Any communications between a Broker and their Customer where such communications:
    - i. originate or are derived directly out of the MLS system, or
    - ii. originate or are derived directly from an MLS product that is provided as an MLS benefit, or
    - iii. which is provided to the Customer by the Broker as a result of a written request of the Customer for the Advertising Broker to send the Customer available listings.
5. For purposes of this Rule:
  - a. A Client is any individual or entity that has signed an Agency Agreement or an Agency Disclosure Form identifying the Advertising Broker.
  - b. A Customer is any individual or entity who receives information, services, or benefits from the Advertising Broker at the request of the Customer, but has no contractual relationship or any other legally recognized relationship with the Advertising Broker.
  - c. A Prospect means any consumer or potential purchaser, seller, tenant, or landlord who is not subject to a representation relationship with a broker and has not made a written request to receive information from the Advertising Broker.

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- d. A Broker may elect to opt out of having that broker's own listings advertised by other brokers in the MLS, only if the broker opting out does not advertise in any way any other broker's listing without first obtaining written permission for each specific listing being advertised.
- e. Advertising a listing shall not occur on any platform, website or other location that is offensive, vulgar or inappropriate. An Advertising Broker must immediately remove any advertisement from any such platform, website or location upon written notice of the Listing Broker that specifies the reasons for the objection to the advertisement on the objectionable platform, website or location.

### **PHILOSOPHICAL PRINCIPALS:**

1) MLS Listing Data should be used primarily by cooperating brokers to help their existing Clients to locate and value a suitable property for that Client's needs. As such, Listing Agents should not be entitled to attribution within the existing Buyer Client-Broker relationship.

2) Potential Buyers that are consumers (Prospect), but not a Client should have the freedom to choose whether to contact the Listing Agent for an Advertised Property, or the Advertising Agent. To make that choice the Prospect needs to understand clearly who is the Listing Agent and who is the Advertising Agent.

3) MLS Listing Data also has value in attracting prospects who are not yet a Client to an Advertising Agent. The benefit to the Advertising Agent using the MLS Listing Data for a property is substantial. The cost for this substantial benefit is that the Advertisement of the property must provide attribution, including the ability for the Prospect to easily understand who is and how to contact the Listing Agent. Both agents cooperate in the process and both receive a benefit.

### **IMPACT OF RULE:**

1) Benefits to Listing Agents:

- a. Full and meaningful attribution for their listings in all formats and settings.
- b. Easy for a Prospect to contact the Listing Agent directly from the advertisement should the Prospect prefer to speak with the Listing Agent that has secured the listing.
- c. Additional exposure for the listed property beyond the efforts and costs incurred by Listing Agent.

2) Benefits to the Advertising Agent:

- a. Get to use other agent's listings to attract potential new clients.
- b. May use technologies and communication methods beyond just a "website" as is currently the case in the IDX rules.
- c. Expands innovation and freedom to use the MLS data to obtain a client, rather than the current limitations to only use the MLS data to service a client (with the sole exceptions being IDX and VOW).

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3) Eliminates all IDX Rules by creating a uniform standard for using MLS data to advertise a listing that does not belong to you for all existing communication and technology platforms.

a. Easy to understand and to enforce.

b. Opens up innovation for other products and services that do not fall into the IDX website exceptions for using MLS data.

c. Reasons for separate VOW feed are still accommodated in the rule, as no attribution is needed when communicating with their own client.