THE RED DOT

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MLS of Choice

MLS & Associations Edition

Observe. Orient. Decide. Act.

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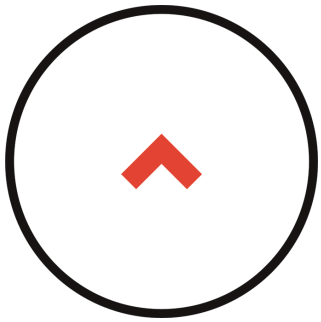


Observe.

Introduction

As of July 1, when this Report gets published, the changes to NAR's MLS Policy Statement 7.42 and 7.43 (collectively referred to in the industry as "MLS of Choice") go into effect.

These changes have been the subject of much discussion in the real estate industry, particularly amongst the MLSs. I believed that the *Stross v. Redfin* decision (covered in the May Red Dot) and what we learned from the Q1 results of Zillow, Redfin, and Realogy (covered in the June Red Dot) were more important. But some recent events have pushed the issue of MLS of Choice to the top of the pile in terms of importance.

Furthermore, even some of the most informed MLS leadership still don't know exactly what to expect once the MLS of Choice policies go into effect. Brokerage and tech company leaders, for the most part, have not paid all that much attention.

Fact is, entire industries are born out of loopholes in policies, where taking advantage of loopholes means meeting customer needs or wants. Examples abound from e-cigarettes to the growing popularity of "AR pistols" to tax shelters in the Grand Caymans.

So, in keeping with our theme of making it easier to observe, orient, decide and act, we give MLS of Choice the unique Red Dot treatment this month.

Robert Hahn
June, 2018

Executive Summary: MLS & Associations

In November of 2017, the National Association of REALTORS (NAR) Board of Directors approved changes to its MLS Policy Statements 7.42 and 7.43, following the recommendations of the Multiple Listing Issues and Policies Committee.

These changes collectively have been referred to as "MLS of Choice" since the very beginning as the concept is somewhat similar to NAR's "Board of Choice" policy, implemented in 1994, and made mandatory in 1996.

The basic idea is a simple one: give real estate agents the ability to pay only for the MLS whose services they want to use. Yes, that means the previous policy meant some agents were paying for MLS memberships that they did not want or use.

Much of that potential disruption comes from the familiar places where rules and policies are concerned: loopholes aka, unintended consequences.

Summary of Changes

The changes to 7.42 and 7.43 are as follows:[1]

> Effective July 1, 2018, that MLSs be prohibited from requiring participation by all offices of a real estate firm within the shareholder association(s) jurisdiction and that MLSs be required to provide a no-cost waiver option of MLS fees, dues and charges for licensees affiliated with an MLS Participant

[1] This comes from NAR's guide "Changes to MLS Policy Statements 7.42 and 7.43 – "MLS of Choice"" located at: https://www.nar.realtor/about-nar/policies/changes-to-mls-policy-statements-742-and-743-mls-of-choice. I have removed the strikeouts, additions, etc. from the original to make the new policy more legible.

who can demonstrate their subscription to another MLS. Further, that references to MLS "jurisdiction" or "territory" be changed to "service area" to reflect the true nature of the location, and help eliminate confusion over the jurisdiction of shareholder association(s).

Section 6: Jurisdiction of Association Multiple Listing Services (Policy Statement 7.42)

The service area of multiple listing services owned and operated by associations of REALTORS® is not limited to the jurisdiction of the parent association(s) of REALTORS®. Rather, associations are encouraged to establish multiple listing services that encompass natural market areas and to periodically reexamine such boundaries to ensure that they encompass the relevant market area. While associations are encouraged to work cooperatively to establish market area multiple listing services, the absence of such an agreement shall not preclude any association from establishing and maintaining a multiple listing service whose service area exceeds that of the parent association(s) jurisdiction.

MLSs may ***not*** require that each other offices of a firm's offices located within the jurisdiction of the association(s) that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement to participate in the MLS if any office of that firm participates in that MLS.

Section 1 Waivers of MLS Fees, Dues, and Charges (Policy Statement 7.43)

Recurring MLS fees, dues, and charges may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant when related to the operation of a computerized MLS system that provides information and services in addition to the compilation of current listing information.

However, an MLS participant may not be assessed any charges or subscription fees for printed MLS sheets/cards/books with respect to any individual who is engaged solely and exclusively in a specialty of the real

> estate business separate and apart from listing, selling, leasing, or appraising the type of properties which are required to be filed with the MLS.
>
> However, MLSs must provide participants the option of a no-cost waiver of MLS fees, dues and charges for any licensee or licensed or certified appraiser who can demonstrate subscription to a different MLS where the principal broker participates. MLSs may, at their discretion, require waiver recipients and their participants to sign a certification for nonuse of its MLS services, which can include penalties and termination of the waiver if violated.

These changes completely remove the ability of an MLS to force offices of a Participant brokerage to join the MLS, and provides a way for brokerages to not have to pay for all of its agents.

The Waiver Process

An MLS must provide participants the option of a no-cost waiver.

There are two separate requirements:

1. The principal broker is a Participant in the other MLS; and
2. The agent being waivered can demonstrate subscription to that other MLS.

In connection to #2, the policy further specifies that the MLS granting the waiver can require the agents and brokers to sign a document certifying non-use, "which can include penalties and termination of the waiver if violated."

MLS of Choice is a Non-Issue?

Generally speaking, reading what has been written by others, and in webinars and FAQ's and conversation, the consensus within the MLS and Association circles appears to be that the whole MLS of Choice policy change is a big yawn.

The overall consensus is that the local MLS delivers so much value to actual practitioners that MLS of Choice is really a non-issue for the vast majority of subscribers, participants, and MLSs.

However, MLS of Choice policy creates enormous potential for disruption.

Much of that potential disruption comes from the familiar places where rules and policies are concerned: loopholes aka, unintended consequences.

Silences and Omissions in MLS Policies

There are four key silences, omissions, or lack of clear definition that impact the MLS of Choice and turn it from a non-issue to a potential disruptor.

What is an MLS?

The first is a threshold issue: just what is an MLS?

What limits, if any, exist on the ability of any organization or company to claim that it is a Multiple Listing Service?

NAR's definition of what an MLS is comes from MLS Policy Handbook, Section 1:

> A multiple listing service is:
>
> - a facility for the orderly correlation and dissemination of listing information so participants may better serve their clients and customers and the public
> - a means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law)
> - a means of enhancing cooperation among participants
> - a means by which information is accumulated and disseminated to enable authorized participants to prepare appraisals, analyses, and other valuations of real property for bona fide clients and customers
> - a means by which participants engaging in real estate appraisal contribute to common databases

Under the definition above, an MLS is essentially a database with a blanket unilateral offer of compensation to other participants.

A key note here is that *there is no requirement that an MLS be owned and operated by a board of REALTORS*. That has to be the case as there are markets in the U.S. with broker-owned or private MLSs.

Third Party MLSs

The door is wide open for a wide range of so-called "third party" MLSs to come into being.

The best example today is State Listings Inc., a privately held New York corporation, which operates NY State MLS and My State MLS. From the FAQ on MyStateMLS.com:

> Unlike a local MLS, NY State MLS has no boundaries as to where you can list. This means no more "out of area" listings. My State MLS is the same, but is the MLS for any state in the USA.
>
> ...
>
> Low cost is one of the best features of the MLS. Whether a single broker, or an office of dozens of agents the MLS is competitively priced, without any extra fees or fines.

It is no longer a question of *if*, but *when*, and *whom*.

Private Listing Clubs

As the rules stand today, there is no reason why Top Agent Network and similar "listing clubs" could not become an MLS by putting a blanket offer of compensation into place.

As long as a private listing club sets up a database of listings and sold records, then requires its members to make blanket offers of compensation to other members, it is an MLS.

In combination with the agent team issue discussed below, this can be an important source of disruption.

National Franchises, Brokers, and Teams

Similarly, there is no reason why real estate franchises, large brokerages, or even multi-state teams could not become an MLS by requiring that their brokers and agents make blanket offers of compensation to others in their companies.

For example, Keller Williams, which already has a company-wide database called Keller Williams Listing Service, can become an MLS and offer it *free of charge* to every one of its 175,000 agents.

That does two things for KW:

1. KW can now require that all of its franchisees input all of their listings into KWMLS; and
2. KW can make it very easy for its agents to waiver out of REALTOR MLSs.[2]

What Constitutes Use?

An interesting omission in the policy is that "use" is not defined anywhere.

Everyone seems to assume that use and non-use are black and white. There are vast gray area in between.

For example, a brokerage could setup an intranet for its agents. A waivered agent uses that brokerage intranet. Has the agent "used" the MLS?

But defining "use" and "access" means that there are cascading consequences for technology providers, for brokerages, and for agents.

Rodney Gansho, Managing Director of the Member Policy Department at NAR, confirmed that there is no written policy, or guidelines, or interpretations around definitions of key terms like "use" or "access." He said that NAR would need to look at refining the policy as it is implemented, and as situations arise.

There are a host of issues that arise with trying to define what constitutes "use" or "access" to the MLS.

If the local MLS tries to define "use" or "access" around the data of the MLS, then you almost immediately run into the derivative products problem.

[2] Note that a prospective KWMLS is not bound by MLS of Choice rules, since it would not be a REALTOR MLS.

Does using Remine or Revaluate constitute use or access?

If Zillow gets a feed from the MLS, does a waivered agent's use of Zillow constitute "use" or "access"?

There are real challenges for technology companies in complying with any sort of "use" and "non-use" policy. For example, can AVM companies somehow segregate MLS data by the status of the subscriber?

But defining "use" and "access" means that there are cascading consequences for technology providers, for brokerages, and for agents.

The Problem of Agent Teams

Another area where silence poses an issue has to do with teams.

While the topic of agent teams is an enormous one in its own right, for our purposes, the important point is that the team leader exercises control over his team members. A team is unified in ways that contemporary brokerages are not.

The problem for MLS of Choice changes is how agent teams would interact with the new waiver rules.

All for one, one for all

The prevailing assumption—as was made clear in the CMLS webinar referenced above—is that the local MLS can require that if one member of an agent team waivers out, all members waiver out. Conversely, the MLS can require that if one member of a team joins an MLS, then all members of that team join the MLS.

The problem is that this team policy does not exist anywhere in writing or in documented form. According to Rodney Gansho of NAR, the Advisory Board discussed and debated the issue of teams, but did not recommend or pass any formal policy around teams.

Therefore, the local MLS can require that the entire team join, or the entire team waiver out.

There are two issues here. One is around formulating such local policy. The other is a definition problem.

Local Team Policy

Let's start with the fact that since 7.42 and 7.43 are completely silent on the issue of teams, any local MLS that creates a waiver policy around teams is doing so on rather thin and unstable grounds. There is no language anywhere along the lines of "local MLS has an option to create team policy."

Given that 7.42 and 7.43 is mandatory NAR policy, and there is no empowering language about local options, it is not at all clear that the local MLS does in fact have the right to create local team policies at all—despite what Mr. Gansho believes.

What Constitutes a Team?

The second problem is similar to the "use" and "access" problems discussed above. There is no definition of a "team" anywhere in NAR policies, or for that matter, anywhere at all.

Mr. Gansho rightly observed that most teams self-identify as a team, since "team" is a marketing concept.

However, post 7.42 and 7.43, there are strong incentives for an agent team to do otherwise.

A team could designate a single agent as a Primary Buyer Specialist in one MLS and waiver everyone else out and does not include that Specialist in the marketing of the team. No more self-identification.

Now what?

The local MLS would have to undertake the not-so-simple and not-easy-at-all task of defining what constitutes a team.

Some states have defined the term "team" in their license laws, but it is unclear how effective those definitions are, as courts would have to interpret statutory language.

In states where the license law does not define "team", the local MLS is without any guidance whatsoever.

Jurisdiction vs. Service Area: A Pandora's Box in the Making

Another significant issue is something I believe to be an unintended consequence: the change from MLS "jurisdiction" to MLS "service

area." I put this under omissions as I think it may have been an oversight not to go look at how this policy would work.

There are no limitations on "service area" going forward. Larger MLSs with statewide or regional aspirations are taking advantage of these changes already.

The mechanics of how this works, of course, is that Participants in an MLS are *required* to submit listings in that MLS's service area.

The Clash of the Titans

The basic assumption behind touting competition, of course, is that the big guys will eat the little guys, but stay out of each other's way.

So you might have CRMLS get aggressive with Big Bear and Rim O' The World, but not with San Francisco Association of REALTORS.

What has *not* been considered is what happens when two or more big guys compete against one another. It is hardly a secret that many large MLSs have long aimed at becoming the statewide MLS.

What happens when large MLSs, that their participant brokers cannot live without, all declare the same service area? We have now created the "overlapping market disorder" across the whole country.

Granted, the titans will never clash, because they each control a de facto local monopoly with large market areas under the old pre-MLS of Choice regime. The large MLSs do not compete with each other; indeed, they form cooperative organizations, such as the Cove Group (a group of the biggest MLSs in the country), or MLS Grid.

So this hypothetical situation of the clash of the titans is just that: purely hypothetical. Isn't it?

Big Brother is Watching... Carefully

On June 5th, the Department of Justice and the Federal Trade Commission held its "What's New in Residential Real Estate Brokerage Competition" workshop.

Various regulators and Congress itself may be more interested than usual in issues of competition in real estate.

In this environment, the mere *appearance* of chumminess on the part of large MLSs is a real problem. The truth may be prosaic and noncontroversial. Nonetheless, in politics, appearance often trumps

reality. And the MLS industry can ill-afford even the appearance of impropriety, not right now.

Enforcement?

The final major omission or silence with MLS of Choice is that there are no procedures or processes for enforcement of these policies. It is actually shocking just how little thought was given to enforcement.

Noncompliance by the MLS

First up, we have the problem of noncompliance by the MLS.

What happens if an MLS refuses to grant a waiver?

First question is, who has the actual right to file a complaint or a grievance to demand enforcement of the MLS of Choice policies?

Second, assuming we can answer that, to whom exactly does the aggrieved party complain?

There are a hundred questions one could ask about enforcement but suffice to say that there are no real answers because NAR passed a policy without specifying exactly how it would be enforced, and by whom, and under what process. Not yet.

NAR Supremacy Clause?

Another interesting aspect of the enforcement question is whether NAR policies trump local rules if the policy is silent on an issue.

For example, NAR has defined what constitutes an MLS in its MLS Policy section 1, quoted above. Given that, does the local MLS have the right to create local rules that vary from NAR's definition?

Loopholes create entire industries when there is consumer demand that the loophole can address: the MLS is in that exact situation....

From Hypothetical to Mass Disruption: The Truth About MLS Subscribers

There is zero evidence to suggest that agents will attempt to waiver out if they hope to do any business in a local market actually helping consumers buy and sell homes.

So why are we spending time on MLS of Choice?

Because of the truth about MLS subscribers.

Most MLS Subscribers Are Not Producers

While there has never been any formal research done on this issue, most people involved with the MLS industry recognize that most of the licensed agents who are subscribers to an MLS are not producers. All of the evidence is anecdotal, but it is remarkably consistent.

For most large MLSs in the United States, roughly half of the subscribers do not complete a single transaction in a given year. If you look at agents who have two or fewer closed transactions in a year, the percentage is well over supermajority.

The truth is that the real estate industry is utterly dominated by a small percentage of agents who have outsized market share and do the vast majority of the transactions.

The operating (and correct) assumption of most of the MLSs is that the MLS delivers so much value that it more than justifies the cost of subscription. That is true, but it's true only for producing agents.

The flaw in the current thinking is not in the value of the MLS, but on the composition of the typical MLS subscriber.

The Low-Cost Alternative is Enormously Attractive

Our thesis is that there is a huge untapped market for low-cost MLS services.

Suppose that roughly 70% of subscribers to any given MLS is doing two or fewer transactions annually. Most of these agents are not actively seeking out business; rather, they more or less "fall into a deal" as leads come to them.

Any sort of system that promises some level of access to the data—when needed, a few times a year—at far lower cost is going to be *enormously* attractive.

Loopholes create entire industries when there is consumer demand that the loophole can address. The MLS is that exact situation: massive consumer demand, which can now be met through a giant loophole with many, many parts that are left unsaid and unspecified.

The Elites Can Self-Segregate

At the same time, today's industry leadership seriously underestimates the extent to which the elites of the industry would prefer to self-segregate if it were possible.

The proliferation of private listing clubs is but one piece of evidence. There is also a good deal of anecdotal evidence within the industry that listing agents often steer clients away from accepting offers from inexperienced or incompetent buyer agents because they don't want to do twice the amount of work for the same commission.

Furthermore, there is a growing gap between the top producing agents and everybody else that often shades into actual cultural differences.

What prevents the elites of the industry from complete self-segregation today is the MLS, operating as the great equalizer.

Going forward, there is now the possibility of the elite agents truly segregating themselves without having to go through the hassle of "off-market" listings and the paperwork that entails.

If the local MLS has passed a rule that prohibits listings from waivered agents, then none of the elite agents' listings make it into the local MLS. If, on the other hand, the local MLS has done the opposite—requiring that the participant broker enter all of its listings into the MLS—then we set up an interesting situation.

The first possibility is a revolt by the participant brokers.

The second possibility is that local brokerages work with their elite top agents to create non-participant brokerages, which nonetheless preserve the economics of having the agent team as part of the brokerage. The whole point would be to separate the Buyer Specialist from the team *on paper*, so as to prevent the listings being entered, while preserving the ability of the team to service buyers across the entire market.

The third possibility is that the elite agents, and their participant brokers, choose to stop participating in the local MLS. This is not as

crazy as it sounds initially, because the elite agents are elite precisely because they take a disproportionate percentage of listings.

Given these dramatic options, the local MLS may find itself negotiating with the elite agents to figure out how to accommodate their desire for segregation with the survival of the local MLS itself.

Inter-MLS Competition

Both of the above scenarios contemplate some kind of non-traditional third-party MLS taking advantage of the various loopholes. However, the more likely scenario is that existing traditional MLSs take advantage of them instead.

For example, there are no "anti-dumping" rules when it comes to MLS services.

Peeling off 50-60-70% of the subscriber base of a small MLS nearby would effectively kill it off. Furthermore, offering elite agents of that small MLS greater flexibility could be another effective strategy for competition.

Today, the gentlemanly rules of inter-MLS competition make that kind of open and naked competition unlikely. Those unwritten rules may continue to hold into the future.

Or, they might not.

Summary of Recommendations for MLS & Associations

Please turn to the Recommendations section at the end, for a much more detailed discussion of each of these.

- ### Formulate a Strategy

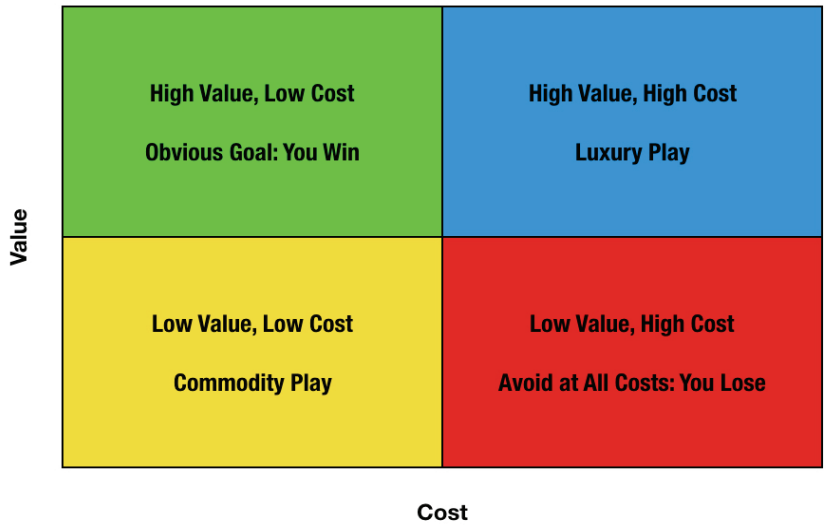
  The first recommendation for the MLS (and the Associations that own them) is to formulate a strategy around MLS of Choice:

  1. Ignore the issue
  2. Use MLS of Choice on offense
  3. Treat MLS of Choice as a threat & neutralize it
  4. Use MLS of Choice as offense and defense; requires becoming a non-REALTOR MLS.

Note that to become a non-REALTOR MLS, all it requires is a single share of stock being owned by someone other than an association of REALTORS, e.g., a brokerage.

• Value-Cost Paradigm

In thinking about offense vs defense, consider the basic Value vs Cost paradigm:



In your strategic planning, it is imperative that you be brutally honest with yourselves about where you fit in your competitive landscape.

• Define Use

The number one task is to define what constitutes "use" or "access" to the MLS.

"Access" will be easier to define than "use"; it should not be impossible to come up with a definition of "access" and its reverse, trespass.

The term "use" is far more difficult to define because it ends up being tied up with the data within the MLS, rather than the servers or systems of the MLS.

Even though the specific definition is something you and your leadership will need to work through, my general recommendation is to ground "use" in the definition of the MLS itself.

Is the action in question by the waivered agent tied to:

- orderly correlation and dissemination of listing information for serving clients, customers and the public?
- blanket unilateral offers of compensation?
- enhancing cooperation?
- accumulating or disseminating data to prepare appraisals, analyses, and valuations of real property?
- contributing appraisal data to common databases?

I would look to relate "use" to two or more factors above and draw the line ("attenuation") somewhere between two and four factors.

NOTE: Photo copyright will impact and be impacted by your defining "use" and "access." You will likely need to struggle with copyright issues as you try to define "use".

• Consider Non-REALTOR MLS Status

put, if you can attack others while they cannot attack you in the same way, you have an advantage.

Since MLS of Choice is mandatory for REALTOR MLSs, you have to think long and hard about whether the benefits of being a REALTOR MLS outweigh the costs.

Our recommendation generally is to offer ownership in the MLS to your local brokerages, as that keeps ownership (and control) "within the family" as it were, and could also help improve relationships with your brokers.

• Maximize Your Service Area (On Paper)

Going on offense in the MLS context means you are looking to expand. That necessarily means expanding your service area.

Therefore, we recommend going beyond the exact boundaries you have in mind.

There being no reason to tie your management team's hands in competition, we recommend maximizing your service area at least on paper.

- ## Offer Low Cost Services

Given that large percentages of your subscribers are not productive, it makes sense to investigate low cost offerings.

The ultimate model is First MLS in Atlanta, GA, which charges a percentage of the sale at the closing. But not everyone can adopt a whole new business model.

On a more traditional subscription model, it makes sense to investigate tiered subscription services. In effect, you want to try and combine the Low Value, Low Cost with High Value, High Cost, as it is easier to do that than to create High Value, Low Cost.

There are dozens, if not hundreds, of tactics. But the point is that the MLS has to consider a low cost offering of some kind.

- ## Offer Flexibility & Exclusivity to Elite Agents

On the other side of the spectrum, you should investigate some kind of structure that offers flexibility and exclusivity to elite top producers.

Understand the motivations of elite top producers and look at ways to address them from within the MLS.

- ## Incentives and Disincentives

One of the more important psychological changes that need to occur within the MLS is the idea that brokers and agents must do what you tell them to do. The MLS is a *de facto* monopoly, dependent on network effects. The MLS of Choice changes undermines a great deal of that de facto monopoly power.

Going forward, then, it is important for MLS leadership to start thinking more *competitively* and far less *monopolistically*.

- ## Be Careful of Not Competing

Given the political and regulatory environment, the MLS has to be careful of even the *appearance* of collusion.

You will want documents showing your valid reasons for not competing in certain areas, against certain other MLSs.

- ## Reevaluate Data Sharing

The only circumstances in which data sharing makes sense going forward is between two or more MLSs who do not wish to compete against each other (for valid reasons) but whose brokers and agents want the data across their collective markets. Furthermore, the MLSs involved in data sharing have to be more or less equal in the Value-Cost analysis.

Otherwise, the incentive to waiver out and use the data via data sharing is too great.

In almost all cases, if you are sharing data with neighboring MLSs, it may be time to discuss M&A instead or openly compete.

- ## Enforcement

In terms of enforcement of the waiver policy internally, you'll want to balance how much staff time and resources you'll want to devote to it versus benefits/revenues from doing so.

The major issue today is around enforcement of 7.42 and 7.43 *outside* of your own MLS.

If you decide that you have to get involved in disputes, get hold of NAR staff immediately and ask how they want you to submit complaints, supporting documentation/evidence, etc.

If you decide not to get involved, and put the burden of enforcement on your broker/agent, then you'll want a set of resources for them to use in trying to enforce the policy.

- ## Speak to Your Technology Partners

While you have numerous challenges and questions due to MLS of Choice, chances are that quite a lot of the enforcement efforts will necessarily involve various technology providers in and around the MLS itself. I advise you to immediately start conversations with technology companies to figure out what local rules to implement, and how.

Keep in mind that technology vendors are providing products and services to your participant brokers and their subscribers. Make

things too difficult for them, and you make things difficult for your subscribers, which is never a good thing.

In a real way, this recommendation is an extension of the "think more competitively, and less monopolistically" recommendation above.

Conclusion

The changes to 7.42 and 7.43 resulting in the new "MLS of Choice" environment are fairly minor. The goals of those changes were limited and straightforward: stop the practice of MLSs to charge people who are not its customers.

Nonetheless, because of silences in the policy, and the interaction between 7.42, 7.43 and other parts of MLS policies as they exist today, as well as the prevailing realities of the real estate industry, there are now wide open gaps in the overall MLS policy.

Loopholes create whole industries, and there are reasons to believe that these loopholes could be extremely disruptive. It may be that none of those things come to pass, and that MLS of Choice remains a much ado about nothing, as many experienced executives and leaders believe. In fact, it is likely that nothing much changes in the short-term.

Nonetheless, we strongly believe that strategy should always include contingency planning, even for unlikely contingencies. In the case of MLS of Choice, many of the contingencies are not only not unlikely, but will *definitely* be an issue: questions of what constitutes "use" of the MLS and how the policy will be enforced are two that come to mind.

And more generally, at a higher level, if the MLS of Choice ushers in an era of greater inter-MLS competition—one of the stated goals of the policy—then the MLS, Association, franchises, brokerages, agents and technology companies in real estate should be thinking hard about how they will change to meet the challenges and take advantage of opportunities in the new environment.

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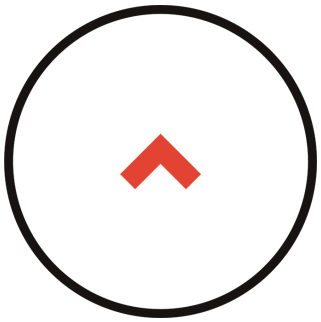

Orient.

Main Section

In November of 2017, the National Association of REALTORS (NAR) Board of Directors approved changes to its MLS Policy Statements 7.42 and 7.43, following the recommendations of the Multiple Listing Issues and Policies Committee.

These changes collectively have been referred to as "MLS of Choice" since the very beginning as the concept is somewhat similar to NAR's "Board of Choice" policy, implemented in 1994, and made mandatory in 1996.

The basic idea is a simple one: give real estate agents the ability to pay only for the MLS whose services they want to use. Yes, that means the previous policy meant some agents were paying for MLS memberships that they did not want or use.

It seems like such an obvious idea that it requires some explanation.

Background: Prior Policy

NAR Multiple Listing Policy Statement 7.42 covers the exciting topic of Jurisdiction of Association Multiple Listing Services. It has been in place since 2002.

Here is what it read, in full:

> The jurisdiction of multiple listing services owned and operated by associations of REALTORS® is not limited to the jurisdiction of the parent association(s) of REALTORS®. Rather, associations are encouraged to establish multiple listing services that encompass natural market areas and to periodically reexamine such boundaries to ensure that they encompass the relevant market area.
>
> While associations are encouraged to work cooperatively to establish market area multiple listing services, the absence of such an agreement shall not preclude any association from

> establishing and maintaining a multiple listing service whose territory exceeds that of the parent association.
>
> Where the territory of an MLS exceeds that of the parent association(s), the **authority of the MLS to require offices of a participant or a participant's firm to participate in the MLS** is limited to offices located within the jurisdiction of the association(s) of REALTORS® that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement.
>
> MLSs may, as a matter of local determination, require that each of a firm's offices located within the jurisdiction of the association(s) that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement participate in the MLS if any office of that firm participates in that MLS. [Line breaks and emphasis added]

This section went hand-in-glove with MLS Policy Statement 7.43, which deals with collecting fees for the MLS. The old 7.43 reads:

> Recurring MLS fees, dues, and charges **may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant** when related to the operation of a computerized MLS system that provides information and services in addition to the compilation of current listing information.
>
> However, an MLS participant may not be assessed any charges or subscription fees for printed MLS sheets/cards/books with respect to any individual who is engaged solely and exclusively in a specialty of the real estate business separate and apart from listing, selling, leasing, or appraising the type of properties which are required to be filed with the MLS. [Emphasis added]

Combine the two and the effect was that an MLS could require that every office of a brokerage who was a Participant, and every single agent in every office of that brokerage, pay the MLS dues, fees, and charges.

This became a major problem as some brokerages became larger and larger. A brokerage like Realogy's NRT unit has some 50,000 agents in more than 700 offices. In some cases, those offices would be on

the border between multiple MLSs, and have agents who worked different markets, but out of the same office.

For example, suppose a brokerage has three offices in County X, and one of them is close to the borders of County Y. Half of the agents in that office works in County X, and the other half works in County Y. There are two MLSs – one in each county.

Under the former rules, County X MLS could require the brokerage to have all three of its offices participate in its MLS under 7.42, and then under 7.43 require that all of the agents—including those who only work in County Y—pay for County X MLS *even though they don't use it*.

That led to all kinds of distortions, as outlined in the Council of MLS White Paper on the topic:

- Agents are required to participate in, and pay for, MLSs that they do not use.
- Brokers are creating costly workarounds, including setting up dummy offices or addresses for their agents outside of the MLS's territory.
- Brokers and agents are incurring additional MLS subscription fees than they might otherwise choose to pay.
- MLSs should earn their customers' business.
- Competition among MLSs may be reduced in areas served by multiple MLSs where agents are likely to choose one over another, if given the option.

Setting up "dummy offices" or separate offices outside of an MLS's jurisdiction costs the brokerage a significant amount of time, money, and effort. Being forced to pay for an MLS one doesn't use is unacceptable.

So the MLS of Choice changes were inevitable. And they're here now.

The New Rules

The changes to 7.42 and 7.43 are as follows:[3]

> Effective July 1, 2018, that MLSs be prohibited from requiring participation by all offices of a real estate firm within the shareholder association(s) jurisdiction and that MLSs be required to provide a no-cost waiver option of MLS fees, dues and charges for licensees affiliated with an MLS Participant who can demonstrate their subscription to another MLS. Further, that references to MLS "jurisdiction" or "territory" be changed to "service area" to reflect the true nature of the location, and help eliminate confusion over the jurisdiction of shareholder association(s).
>
> **Section 6: Jurisdiction of Association Multiple Listing Services (Policy Statement 7.42)**
>
> The service area of multiple listing services owned and operated by associations of REALTORS® is not limited to the jurisdiction of the parent association(s) of REALTORS®. Rather, associations are encouraged to establish multiple listing services that encompass natural market areas and to periodically reexamine such boundaries to ensure that they encompass the relevant market area. While associations are encouraged to work cooperatively to establish market area multiple listing services, the absence of such an agreement shall not preclude any association from establishing and maintaining a multiple listing service whose service area exceeds that of the parent association(s) jurisdiction.
>
> MLSs may ***not*** require that each other offices of a firm's offices located within the jurisdiction of the association(s) that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement to

[3] This comes from NAR's guide "Changes to MLS Policy Statements 7.42 and 7.43 – "MLS of Choice"" located at: https://www.nar.realtor/about-nar/policies/changes-to-mls-policy-statements-742-and-743-mls-of-choice. I have removed the strikeouts, additions, etc. from the original to make the new policy more legible.

participate in the MLS if any office of that firm participates in that MLS.

Section 1 Waivers of MLS Fees, Dues, and Charges (Policy Statement 7.43)

Recurring MLS fees, dues, and charges may be based upon the total number of real estate brokers, sales licensees, and licensed or certified real estate appraisers affiliated with or employed by an MLS participant when related to the operation of a computerized MLS system that provides information and services in addition to the compilation of current listing information.

However, an MLS participant may not be assessed any charges or subscription fees for printed MLS sheets/cards/books with respect to any individual who is engaged solely and exclusively in a specialty of the real estate business separate and apart from listing, selling, leasing, or appraising the type of properties which are required to be filed with the MLS.

However, MLSs must provide participants the option of a no-cost waiver of MLS fees, dues and charges for any licensee or licensed or certified appraiser who can demonstrate subscription to a different MLS where the principal broker participates. MLSs may, at their discretion, require waiver recipients and their participants to sign a certification for nonuse of its MLS services, which can include penalties and termination of the waiver if violated.

These changes completely remove the ability of an MLS to force offices of a Participant brokerage to join the MLS, and provides a way for brokerages to not have to pay for all of its agents.

The way that NAR has gone about this is through the "waiver process." There are some details here worth noting, as they'll come up in looking at some issues connected to MLS of Choice.

The Waiver Process

As the new language of 7.43 says, an MLS must provide participants the option of a no-cost waiver. However, said waiver must be granted only when the person being waivered "can demonstrate subscription to a different MLS where the principal broker participates."

There are two separate requirements here:

3. The principal broker is a Participant in the other MLS; and
4. The agent being waivered can demonstrate subscription to that other MLS.

In connection to #2, the policy further specifies that the MLS granting the waiver can require the agents and brokers to sign a document certifying non-use, "which can include penalties and termination of the waiver if violated."

The clear intent is to allow multi-MLS brokerages, who have agents in multiple offices, some of whom use MLS X and some other who use MLS Y, to only pay for the MLS they use.

In the CMLS webinar[4] on the topic, Matt Consalvo, CEO of ARMLS in Phoenix, recommended over and over that the local MLS have written policies if it is going to implement any sort of penalties for violation of the non-use certification.

I think that is entirely correct. I further think, given the language of 7.43, that the MLS must require signed certification of non-use in some fashion if it is to penalize agents and brokers for use of the MLS. The MLS cannot grant a waiver, then penalize the agent or Participant brokerage for using the MLS.

Much of that potential disruption comes from the familiar places where rules and policies are concerned: loopholes aka, unintended consequences.

MLS of Choice is a Non-Issue

Generally speaking, reading what has been written by others, and in webinars and FAQ's and conversation, the consensus within the MLS and Association circles appears to be that the whole MLS of Choice policy change is a big yawn.

There are a few separate reasons why the MLS professionals think so.

[4] "Implementing Mandatory MLS Waiver Policy" found at https://www.youtube.com/watch?v=tRs9RyLg8gs

1. Fact is that the local MLS is the de facto monopoly marketplace for properties for sale. Portals like Zillow and Realtor.com do show listings for sale, but their listing data comes from the local MLS for the most part.[5] Also, because of the opt-out rules governing syndication, many listings do not appear on the portals as the listing brokerage has refused to send that listing information to the portals.

2. Even if the portals and IDX websites have the basic listing information, there is quite a bit of information contained in the MLS such as showing instructions and cooperating compensation information that is not available outside of the password-protected, subscriber-only areas of the local MLS system.

3. Speaking of showings, many MLSs operate the lockbox system or in some cases showing services (e.g., Centralized Showing Services, ShowingTime, etc.). It would be near-impossible to show homes to buyer clients without being a subscriber to the local MLS.

4. Since the local MLS is the repository for all sold data information, other than the minimal amount available in public records, it would be difficult to put together comps for properties without being a subscriber.

5. Given all of the above, agents cannot possibly tell a home seller that they're not going to market the home in the local market covered by the MLS and hope to win the listing. There is even a question of whether an agent is fulfilling her fiduciary responsibilities to the home seller if she fails to promote the listing in the local MLS where the bulk of buyer agents are subscribers.

The overall consensus, therefore, is that the local MLS delivers so much value to actual practitioners that the MLS executives and NAR committee members who formulated the policy believe that MLS of Choice is really a non-issue for the vast majority of subscribers, participants, and MLSs.

[5] Do note, however, that at least Zillow also has numerous agreements with national franchises and with brokerages.

It is, to use legal language, narrowly tailored to achieve a specific goal: disallow the MLS from charging fees to people who do not work in its area and do not use its systems.

However, my research and analysis suggests that the intent and the reality are divergent. Whether because of oversight, or political realities at NAR to get the changes through, or because of a surplus of trust in the goodwill of industry stakeholders, the MLS of Choice policy creates enormous potential for disruption.

Much of that potential disruption comes from the familiar places where rules and policies are concerned: loopholes aka, unintended consequences.

Silences and Omissions in MLS Policies

Where loopholes exist, it's usually because of (a) silences in policy, or (b) terms that are open to multiple definitions. It is impossible, of course, for any policymaker or rule maker to think of every conceivable scenario that could arise. The MLS Issues & Policies Committee, and the MLS Technology and Emerging Issues Advisory Board, looked at a large number of issues and scenarios, but it is unreasonable to expect that they could close every loophole.

Or for that matter, whether a particular "loophole" could be closed at all.

There are four key silences, omissions, or lack of clear definition that impact the MLS of Choice and turn it from a non-issue to a potential disruptor.

What is an MLS?

The first is a threshold issue: just what is an MLS?

The plain language of the waiver policy requires that the agent requesting a waiver be a subscriber to, and her broker be a Participant in, another MLS.

But what exactly is the MLS? What limits, if any, exist on the ability of any organization or company to claim that it is a Multiple Listing Service?

Since the MLS of Choice changes are NAR policy changes, we must rely solely on NAR's definition of what an MLS is. That definition can be found in NAR's MLS Policy Handbook, Section 1:

> A multiple listing service is:
>
> - a facility for the orderly correlation and dissemination of listing information so participants may better serve their clients and customers and the public
> - a means by which authorized participants make blanket unilateral offers of compensation to other participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law)
> - a means of enhancing cooperation among participants
> - a means by which information is accumulated and disseminated to enable authorized participants to prepare appraisals, analyses, and other valuations of real property for bona fide clients and customers
> - a means by which participants engaging in real estate appraisal contribute to common databases

Under the definition above, an MLS is essentially a database with a blanket unilateral offer of compensation to other participants.

That unilateral offer of compensation is what separates a property portal (e.g., Zillow, Realtor.com, etc.) from an MLS. The portal has listings, orderly correlation and dissemination of listings, public records data, and a means of contributing to common databases. What it lacks is that unilateral offer of compensation.

A key note here is that *there is no requirement that an MLS be owned and operated by a board of REALTORS*. That has to be the case as there are markets in the U.S. with broker-owned or private MLSs, including major urban areas such as Seattle (Northwest MLS), Boston (MLS PIN), and Atlanta (First MLS).

Another key note is that there is no requirement as to the percentage of listings. As far as I can tell, one can be an MLS with 10% of the listings in a given market, as long as the five requirements above are met. In fact, a company could claim to be an MLS with *no listings* in a given market. Granted, an MLS with 10% of the listings is not all that useful to brokers and agents, which is why the local MLS is a de facto monopoly through the power of network effects. But there is

no policy requirement that a facility/means achieve a certain amount of market share in listings before it can qualify as an MLS.

There is no reason why real estate franchises, large brokerages, or even multi-state teams could not become an MLS by requiring that their brokers and agents make blanket offers of compensation to others in their companies.

Third Party MLSs

It turns out, under the current definition of what defines an MLS, and under changes to 7.42 and 7.43, the door is wide open for a wide range of so-called "third party" MLSs to come into being.

Traditionally, all MLSs are either owned by one or more REALTOR or by one or more brokers in a market area. These "third party" MLSs might be a for-profit entity in and of itself with no real linkage to brokers in a market, other than as customers, and no linkage with REALTOR Associations at all.

As a non-traditional, non-REALTOR MLS, third-party MLSs often tout lower cost, greater flexibility, and no boundaries.

The best example today is State Listings Inc., a privately held New York corporation, which operates NY State MLS and My State MLS. From the FAQ on MyStateMLS.com:

> Unlike a local MLS, NY State MLS has no boundaries as to where you can list. This means no more "out of area" listings. My State MLS is the same, but is the MLS for any state in the USA.
>
> ...
>
> Low cost is one of the best features of the MLS. Whether a single broker, or an office of dozens of agents the MLS is competitively priced, without any extra fees or fines.

I interviewed Dawn Pfaff, CEO of NY State Listings and My State Listings, for this report. Her view is interesting.

She is adamant that NY State MLS and My State MLS are real bona fide MLSs. She is intimately familiar with NAR's definition of an MLS and points out that her companies meet every single definition. She fully plans on taking advantage of MLS of Choice to recruit more

subscribers, saying at one point that they are getting phone calls every day from part-time agents.

On the other hand, she acknowledged that many traditional MLSs do not regard her companies as legitimate MLSs. She thinks much of that has to do with REALTOR bias stemming from decades of close affiliation between the MLS and local REALTOR associations. Some of it has to do with the fact that most of her subscribers remain subscribers to a "home MLS" and use her services as an add-on for syndication purposes or as an extra tool to tout during listing presentations.[6]

Ms. Pfaff, for her part, is puzzled that so many other MLSs consider her a competitor. She thinks of her companies almost as an "add-on" MLS on top of the home MLS by exposing listings to agents across the state (NY State MLS) or across the country (My State MLS).

Regardless, as of this writing, NY State MLS has roughly 30,000 members, which makes it one of the largest MLSs in the country. Most of those subscribers remain members of one or more local MLSs as well. But at $320/year per agent, NY State MLS is generating some $9.6 million in annual revenues. My State MLS is bound to grow over time as well.

That's enough of an opportunity for others to jump into the third-party private MLS game. This is no longer a question of *if*, but *when*, and *whom*.

Private Listing Clubs

As the rules stand today, there is no reason why Top Agent Network and similar "listing clubs" could not become an MLS by putting a blanket offer of compensation into place.

In speaking with MLS CEO's about MLS of Choice, I've learned that a few were surprised to learn that there is no requirement that an MLS accept all applicants as members. It appears that a private MLS with restrictions on who can become Participants and subscribers is absolutely valid under the NAR definition as it stands today.

The so-called Thompson States where the MLS cannot require REALTOR membership in order to subscribe are limited to

[6] Relatedly, I interviewed Chris Carillo, CEO of Metro MLS in Wisconsin, who said that his MLS would reject MyStateMLS as a legitimate MLS for the purposes of granting a waiver.

REALTOR status. None of those rulings suggest any kind of a right to join an MLS by virtue of having a real estate license.

NAR has certainly long held and fought for the principle that a REALTOR MLS can restrict membership to REALTORS. A non-REALTOR MLS is not bound by any NAR rule or policy or the Code of Ethics. Furthermore, there is no Code of Ethics provision that appears to require open access to the MLS.[7]

Most of the private listing clubs are focused on creating a network of top producing agents who would prefer to work with each other for a variety of reasons ranging from the venal to the wholly legitimate. The whole point behind these private listing clubs is to share listings between the elite members who belong to them.

As long as a private listing club sets up a database of listings and sold records, then requires its members to make blanket offers of compensation to other members, it is an MLS.

In and of itself, this prospect of the Top Agent MLS is not an issue. Every single one of those top producers belongs to a "home MLS" (or even multiple home MLSs).

But in combination with the agent team issue discussed below, this can be an important source of disruption.

National Franchises, Brokers, and Teams

Similarly, there is no reason why real estate franchises, large brokerages, or even multi-state teams could not become an MLS by requiring that their brokers and agents make blanket offers of compensation to others in their companies.

For example, Keller Williams—the largest real estate brand by agent count—could easily require that all of its franchisees become participants in a KWMLS, and all of the agents affiliated with KW become subscribers to KWMLS. There would be no cost, as the cost of KWMLS will be part and parcel of the normal franchise fees.

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[7] The exception is Article 10, which states: "REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity." REALTOR MLSs cannot restrict membership based on these categories, but there is an open question as to whether a REALTOR can join a non-REALTOR MLS that does.

It turns out, Keller Williams has had a service called Keller Williams Listing Service since 2015. It was launched as a KW proprietary platform for listing syndication in the aftermath of Zillow and Trulia refusing to take a feed from Listhub. But KWLS could be so much more. From the March 2015 post on the official Keller Williams blog describing KWLS:

> There are two ways that your listing can flow through syndication. If the KW Connector is available and your market center subscribes, your listing comes from the MLS through the KW Connector into the KWLS. **Alternatively, you can directly enter your listing information into the KWLS**. Once in the KWLS, you can import additional photos and expand on the listing description. The KWLS then syndicates to more than 300 sites through ListHub. As of April 7, 2015, the KWLS will also syndicate directly to Trulia and Zillow in addition to ListHub's network of syndication partners. [Emphasis added]

More recently, at the 2018 annual conference called Family Reunion, the Chairman and undisputed leader Gary Keller took to the stage and gave a lengthy presentation that KW called "The Vision Speech."

As I noted in a post on Notorious, during that Vision Speech, Gary Keller told the 175,000-plus agents of Keller Williams that "One of your greatest challenges is surviving NAR and your local boards, because they'll sell you out." He followed that up with, "You don't have to [keep giving data away]; you can boycott the MLS and walk out."

MLS of Choice hands Gary Keller the exact tools he needs to create an MLS of his own—a KWMLS—and offer it *free of charge* to every one of his 175,000 agents.

That does two things for KW:

3. KW can now require that all of its franchisees input all of their listings into KWMLS; and
4. KW can make it very easy for its agents to waiver out of REALTOR MLSs.[8]

Obviously, I use Keller Williams as the example as it is the largest brand by agent headcount, and because of statements by its leader which suggest real motivation to do something like this. However, any franchise, any network, any sufficiently large brokerage, or even an alliance of agent teams (see above, Top Agent Network) could do exactly the same thing.

But again, why would any producing agent want to waiver out of her primary MLS? That is where she buys and sells homes; free MLS through her franchise is all well and good, but why would she leave her MLS and be left unable to practice real estate brokerage for all intents and purposes?

We'll answer that below. For now, let us continue with the omissions and silences.

What Constitutes Use?

An interesting omission in the policy is that "use" is not defined anywhere. This failure is actually somewhat problematic, if completely understandable. I imagine that the normal people on the NAR committees were not looking for possible loopholes in some Clintonian way: "It depends upon what the meaning of the word 'is' is." We lawyers, like me and good ole Bill, do think in those ways.

It seems to me that the Committee thought of "use" in the common-sense way that most people do: if you log in to the MLS, then you have used it.

[8] Note that a prospective KWMLS is not bound by MLS of Choice rules, since it would not be a REALTOR MLS.

So, if you waivered out of an MLS, signed a certification of non-use, and then borrowed a friend's username and password to login to that MLS, that's a clear use. Simple.

But defining "use" and "access" means that there are cascading consequences for technology providers, for brokerages, and for agents.

Similarly, if you have nothing whatsoever to do with that MLS you waivered out of, as you list no properties in that area, show no properties there, pull no comps, and generally have nothing to do with that MLS. An agent in New Jersey has nothing whatsoever to do with MyFloridaRegional MLS in Orlando, Florida. That's clear non-use.

What's not so simple is the vast range of possibilities in between those two extremes.

Let me give you an example of such a gray area in between.

- Acme Realty is a brokerage and participant in MLS XYZ and MLS ABC. As a participant, Acme has full rights to and receives a RETS feed from both MLS XYZ and MLS ABC.
- Acme uses these RETS feeds to setup a corporate intranet site that its agents can use to do a variety of tasks, such as creating CMAs, Just Sold postcards, or scheduling home tours.
- Amanda the Agent, one of Acme's agents, has waivered out of MLS ABC as her primary area is MLS XYZ. But on request of a client, Amanda logs into Acme's corporate intranet and pulls a list of properties in MLS ABC's service area, and some comps using Acme's intranet CMA tool.
- Question: **Has Amanda "used" MLS ABC in violation of her certification of non-use?** After all, she didn't login to MLS ABC. She didn't access MLS ABC's systems. She used the broker's system, and the broker got the data to power that system from MLS ABC, as is its right under its participant agreement.

In researching for this paper, I interviewed Rodney Gansho, Managing Director of the Member Policy Department at NAR, and one of the key staff people involved with MLS of Choice changes. He confirmed that there is no written policy, or guidelines, or

interpretations around definitions of key terms like "use" or "access." He said that NAR would need to look at refining the policy as it is implemented, and as situations arise.

His suggestion was that perhaps local MLSs, in their agreements with Participants and subscribers, would need to define such terms like "use", "non-use", "access" and "share".

Trying to Define "Use" and "Access"

There are a host of issues that arise with trying to define what constitutes "use" or "access" to the MLS.

If the local MLS tries to define "use" or "access" around the data of the MLS, to try and forestall something like the corporate intranet problem above, then you almost immediately run into the derivative products problem.

For example, a brokerage might have a tool like Remine or Revaluate that scores the likelihood of a homeowner listing his home. Those tools use MLS data. Does using one of those tools constitute use or access?

What about searching on Zillow? If Zillow gets a feed from the MLS, does a waivered agent's use of Zillow constitute "use" or "access"?

In one updated MLS rules and regulations document I have seen, the local MLS has prohibited using the MLS's data in an AVM product or tool provided by a waivered agent. That places an interesting burden on technology providers. For example, a company named 8blocks provides a Wordpress plugin called Home Value.[9] After July 1, 8blocks will need to find a way to segregate out that MLS's data for Home Value plugin if a waivered agent wants to place it on her website.

There are dozens, if not hundreds, of such hypothetical scenarios I can come up with for discussion purposes. But the point is that without definition of "use" and "access", the waiver policy stands on rather shaky ground.

But defining "use" and "access" means that there are cascading consequences for technology providers, for brokerages, and for agents.

[9] https://homevalueplugin.com/

The Problem of Agent Teams

Another area where silence poses an issue has to do with teams. It has long been our position at 7DS Associates that the biggest change in the real estate industry over the past 20 or so years has not been technology, but agent teams.

Although I suspect that any Red Dot reader is intimately familiar with agent teams, for sake of completeness and for anyone not in the industry, let me briefly describe what I mean by agent team.

An agent team is basically a brokerage-within-a-brokerage. There is usually one top producing agent—the team leader—who is a very strong listing agent.[10] He generates an excess of leads, more than he can service by himself. So, he hires administrative staff—such as transaction coordinators, listing coordinators, and administrative assistants—and "brings on" some number of agents, often as buyer agents, underneath him. Those team members sign an agreement with the team leader, get put on an internal team split (usually 50/50), and receive leads from the team.

It has long been our position at 7DS Associates that the biggest change in the real estate industry over the past 20 or so years has not been technology, but agent teams.

While the topic of agent teams is an enormous one in its own right, for our purposes, the important point is that the team leader exercises far more control over his team members than a brokerage does over his affiliated agents. A team is unified in ways that contemporary brokerages are not.

The problem for MLS of Choice changes is how agent teams would interact with the new waiver rules.

All for one, one for all

The prevailing assumption—as was made clear in the CMLS webinar referenced above—is that the local MLS can require that if one member of an agent team waivers out, all members waiver out. Conversely, the MLS can require that if one member of a team joins

[10] To be sure, multi-leader agent teams exist and are proliferating. So instead of one top producing team leader, there may be two or more top producers with a team underneath them.

an MLS, then all members of that team join the MLS. Sam DeBord, a member of the MLS Technology & Emerging Issues Advisory Board of NAR, specifically said as much.

The problem is that this team policy does not exist anywhere in writing or in documented form. According to Rodney Gansho of NAR, the Advisory Board discussed and debated the issue of teams, but did not recommend or pass any formal policy around teams.

According to Gansho, the thinking of the Advisory Board is that if a licensee wants a waiver from an MLS, it's because she does not benefit from or use the service of that MLS. But with teams, it isn't a single individual who benefits or uses the service, but a whole team. Therefore, the local MLS can require that the entire team join, or the entire team waiver out.

There are two issues here. One is around formulating such local policy. The other is a definition problem.

Local Team Policy

Let's start with the fact that since 7.42 and 7.43 are completely silent on the issue of teams, any local MLS that creates a waiver policy around teams is doing so on rather thin and unstable grounds. There is no language anywhere along the lines of "local MLS has an option to create team policy."

7.42 and 7.43 as read today requires the MLS to provide a waiver to an agent with minimal requirements:

1. The principal broker is a Participant in the other MLS; and
2. The agent being waivered can demonstrate subscription to that other MLS.

For a local MLS to create a policy that places further restrictions on waivers based on team affiliation is, in my opinion, inviting a challenge.[11] Given that 7.42 and 7.43 is mandatory NAR policy, and there is no empowering language about local options, it is not at all clear that the local MLS does in fact have the right to create local team policies at all—despite what Mr. Gansho believes.

Perhaps some kind of "legislative history" of the discussions within the MLS Technology & Emerging Issues Advisory Board, the MLS

[11] We will spend quite some time on how such challenges get resolved when we talk about enforcement issues.

Policy & Issues Committee and NAR Board of Directors could provide support for the ability of the local MLS to create that policy. Certainly NAR is free to modify the policy to allow for the local option.

But that local option does not exist today, at least on paper.

What Constitutes a Team?

The second problem is similar to the "use" and "access" problems discussed above. There is no definition of a "team" anywhere in NAR policies, or for that matter, anywhere at all.

Mr. Gansho rightly observed that most teams self-identify as a team: The Sue Adler Team, the Creig Northrup Team, the Divas, the Jills, etc. Since "team" is not just an organization but a marketing concept, teams have to date always identified themselves as a team.

However, post 7.42 and 7.43, there are strong incentives for an agent team to do otherwise.

As an example, take a multi-MLS team similar to the Acme Realty example from above:

- The Joe Blow Team is an agent team active in MLS XYZ and MLS ABC. Joe Blow, the team leader, is a member in both MLSs and is the primary listing agent.
- Joe Blow Team has 10 buyer agents, half active in XYZ and half in ABC. The dues and fees of XYZ is half that of ABC.
- After the MLS of Choice is put into effect, Mr. Blow decides to designate one person, let's call her Annie, as the Primary Buyer Specialist in MLS ABC. Everyone else waivers out of ABC, and into XYZ, saving a lot of money.
- All buyer work in MLS ABC is funneled to Annie who uses MLS ABC to do all necessary work: find properties, run comps, etc. etc.
- Annie is a paid licensed assistant of Joe Blow Team, and earns a small bonus for each transaction done in MLS ABC. The "true" buyer agent would receive the bulk of the buy-side commissions via internal team accounting.
- However, because MLS ABC has passed a local team policy requiring the entire team to join, Mr. Blow designates Annie

> as someone not on the Joe Blow team, despite the fact that in reality, she is very much on the team. In fact, she's a paid staff employee of Joe Blow Team.

Now what?

To reach the Joe Blow Team, the local MLS would have to undertake the not-so-simple and not-easy-at-all task of defining what constitutes a team.

Some states have defined the term "team" in their license laws. South Carolina is an example. Here's the South Carolina definition of "team":

> "Team" means two or more associated licensees working together as a single unit within an office established with the commission and supervised by a broker-in-charge.[12]

It is unclear how effective this definition is for preventing Joe Blow Team from doing what he wants to do, as the court would likely need to investigate and rule on what constitutes "working together as a single unit."

In states where the license law does not define "team", the local MLS is without any guidance whatsoever.[13] The local MLS board would need to come up with a definition, as well as a written team policy (which it may not have the power to do), in order to do what people assume it can and will do.

Jurisdiction vs. Service Area: A Pandora's Box in the Making

Another significant issue that the new MLS of Choice changes brings up is something I believe to be an unintended consequence. I am talking about the change from MLS "jurisdiction" to MLS "service

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[12] South Carolina Code Section 40-57-30(30) located at: https://www.scstatehouse.gov/code/t40c057.php

[13] Further note that in many states, such as California, laws and regulations are much more concerned with how agent teams represent themselves to the public, rather than what constitutes a team. See, e.g., CA Bus & Professions Code § 10159.7 (2014) found at: https://law.justia.com/codes/california/2014/code-bpc/division-4/part-1/chapter-3/article-2/section-10159.7

area." I put this under omissions as I think it may have been an oversight not to go look at how this policy would work.

For this, it is useful to look at the changes made, even if a bit harder to read:

> **Section 6: Jurisdiction of Association Multiple Listing Services (Policy Statement 7.42)**
>
> The ~~jurisdiction~~ service area of multiple listing services owned and operated by associations of REALTORS® is not limited to the jurisdiction of the parent association(s) of REALTORS®. Rather, associations are encouraged to establish multiple listing services that encompass natural market areas and to periodically reexamine such boundaries to ensure that they encompass the relevant market area.
>
> While associations are encouraged to work cooperatively to establish market area multiple listing services, the absence of such an agreement shall not preclude any association from establishing and maintaining a multiple listing service whose ~~territory~~ service area exceeds that of the parent association(s) jurisdiction.
>
> ~~Where the territory of an MLS exceeds that of the parent association(s), the authority of the MLS to require offices of a participant or a participant's firm to participate in the MLS is limited to offices located within the jurisdiction of the association(s) of REALTORS® that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement.~~ MLSs may not, ~~as a matter of local determination,~~ require ~~that each~~ other offices of a firm~~'s offices located within the jurisdiction of the association(s) that own and operate the MLS or that are parties to a multi-association or regional MLS service agreement~~ to participate in the MLS if any office of that firm participates in that MLS. [Line breaks added for legibility]

Note that associations (and by extension the local MLSs) are encouraged but not required to establish "natural market area" boundaries.

There are clear signs that larger MLSs with statewide or regional aspirations are taking advantage of these changes already. In March, Inman News reported that CRMLS is getting more "aggressive" about expansion in light of the MLS of Choice changes. In its official coverage area map, CRMLS notes:

> Pursuant to NAR's MLS of Choice policy, some ZIP codes in these regions are considered part of CRMLS's service area based on current listing volume. CRMLS users doing business in these areas must enter listings into CRMLS, or submit a Seller Exclusion Form.

The intent behind the change is to ~~force~~ encourage consolidation of MLSs, as one of the major problems in the industry for years and years has been small, understaffed, poor MLSs operated by small local REALTOR Associations as a cash cow (and as a way of keeping competing brokers and agents out of their markets).

The FAQ on MLS of Choice from NAR clearly states:

> **12. Is the purpose of this change to force MLS consolidation?**
>
> No. While MLS consolidation is encouraged, the purpose of the policy change is to create a modern service structure that eliminates broker pain-points and embraces MLS competition and improves delivery of MLS services.

In the Inman article above, the three Association/MLS targeted by the giant CRMLS are all tiny: The High Desert Association of REALTORS, the Rim O' The World Association of REALTORS, and the Big Bear Association of REALTORS.

The mechanics of how this works, of course, is that Participants in an MLS are *required* to submit listings in that MLS's service area. Let's continue to use CRMLS as an example. Here's the requirement from CRMLS's MLS Rules and Regulations:

> **7.8 Mandatory Submission**. Within 2 business days after all necessary signatures of the seller(s) have been obtained on the listing or at the beginning date of the listing as specified in the contract, whichever is later, on any exclusive right to sell/lease or exclusive agency listing on one to four unit residential property and vacant lots located within the service area of the MLS, Broker Participants shall (1) input the listing to the service, or (2) submit a seller-signed exclusion in accordance with Section 7.9 (Exempted Listings) to the AOR/MLS. All necessary signatures are those needed to create an enforceable listing, which generally means all named signatories to the listing agreement. In the event there are known additional property owners not made a signatory to the listing, the Listing Broker shall disclose said fact to the AOR/MLS and state whether the listed seller will make the

> sale contingent on the consent of the additional property owners. In the event the listing agent is prevented from complying with the 2 business day time period due to seller's delay in returning the signed listing agreement, the Listing Broker must submit the listing to the MLS within 2 business days of receipt back from seller. The AOR/MLS may require the Listing Broker to present documentation to the AOR/MLS evidencing the seller's delayed transmission. **Only those listings that are within the service area of the MLS must be input**. Open listings or listings of property located outside the MLS's service area (see Section 7.10) are not required by the MLS, but may be input at the Broker Participant's option. [Emphasis added]

The expectations of everyone involved in MLS of Choice, and of the MLS industry in general, is that the big guys will eat the small guys. After all, a Participant is required to submit all listings in the service area to the MLS. If a broker belongs to three MLSs, and one is CRMLS and the other two are tiny Big Bears and High Desert MLSs, over time, all of his Big Bear and High Desert listings will be on CRMLS, and enough of the other brokers will have done the same thing, and he can eventually stop participating in the small MLS.

In plain terms, CRMLS is far more important to that broker's business than Big Bear is. Accordingly, over time, Big Bear will be forced to consolidate with CRMLS.

That's the idea, and why organizations like NAR and CMLS both tout the competitive benefits of MLS of Choice.

If these were normal times, I would agree 110% that contemplating competition between the large MLSs is purely academic. However, these are not normal times.

The Clash of the Titans

The basic assumption behind touting competition, of course, is that the big guys will eat the little guys, but stay out of each other's way.

So you might have CRMLS get aggressive with Big Bear and Rim O' The World, but not with San Francisco Association of REALTORS.

What has *not* been considered is what happens when two or more big guys compete against one another. It is hardly a secret that many large MLSs have long aimed at becoming the statewide MLS.

CRMLS is a prime example of such an MLS,[14] but other large MLSs are all thinking the same thing.

What happens when large MLSs, that their participant brokers cannot live without, all declare the same service area?

For example, take the great ~~Republic~~ State of Texas. There are four large urban MLSs in Texas: Houston, MetroTex (Dallas-Fort Worth), Austin, and San Antonio. Houston's ambitions to be the statewide MLS is no secret, since it has gone so far as to rename its website from Houston Association of REALTORS to Homes And Rentals, and take data feeds from across Texas.[15]

Let's say that Houston declares Texas to be its service area. What happens?

Large brokerages, such as Realogy's NRT, or HomeServices of America, will now be required to submit their listings in Dallas, San Antonio, and Austin to HAR.

In turn, it strikes me as distinctly unlikely that MetroTex, ACTRIS, and SABOR would sit idly by and watch Houston hoover up their listings without answering in kind. They too will declare Texas as their service areas.

Now, brokerages must submit their listings throughout Texas to *four* different MLSs—and they cannot afford to live without *any* of the four.

Now what?

There is the possibility that MLS of Choice changes could lead to the resurgence of Project Upstream. It had been written off as DOA by a number of industry observers, and it looked as if its main funding source—NAR—was looking to cut bait.

Should one or more titans end up competing and clashing, Upstream or something like it becomes a top priority technology tool for multi-MLS brokerages.

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[14] See, e.g., "California Regional MLS makes strides toward statewide MLS" found at https://www.inman.com/2014/09/12/california-regional-mls-makes-strides-toward-statewide-mls/

[15] See, Rismedia, "HAR.com Goes Live as a Statewide Texas Real Estate Resource" at http://rismedia.com/2015/03/30/har-com-goes-live-as-a-statewide-texas-real-estate-resource/

Granted, the titans will never clash, because they each control a de facto local monopoly with large market areas under the old pre-MLS of Choice regime. The large MLSs do not compete with each other; indeed, they form cooperative organizations, such as the Cove Group (a group of the biggest MLSs in the country), or MLS Grid.

So this hypothetical situation of the clash of the titans is just that: purely hypothetical. Isn't it?

Big Brother is Watching... Carefully

If these were normal times, I would agree 110% that contemplating competition between the large MLSs is purely academic. However, these are not normal times.

On June 5th, the Department of Justice and the Federal Trade Commission held its "What's New in Residential Real Estate Brokerage Competition" workshop. The reason was that the 1998 consent decree between the DOJ and NAR was due to expire this year.

But the other reason was the thought, sparked by a report released by the Information Technology & Innovation Foundation (ITIF) called "Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help" which, among other things, alleged that the real estate industry uses the MLS to limit access to data in order to restrict competition.

One could imagine that the industry—particularly the MLS industry—reacted poorly to that report. But whether you agree or disagree with ITIF, fact remains that various people in government took notice of it.

Two such people are Tom Marino (R) of Pennsylvania, and David Cicilline (D) of Rhode Island, members of the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law.

The subject of increased government interest in antitrust issues in real estate industry is and likely will be a future Red Dot topic in and of itself. For now, for our purposes, it suffices to note that various regulators and Congress itself may be more interested than usual in issues of competition in real estate.

In this environment, the mere *appearance* of chumminess on the part of large MLSs is a real problem. The truth may be prosaic and noncontroversial. Large MLSs—like any other company in any

industry—would go after low hanging fruit first, before trying to take on well-funded and well-operated competitors. The reason why the CEOs of the largest MLSs get together so often may have far more to do with the fact that their large MLSs can afford travel budgets and staff to keep things running at home while the boss goes to learn what's happening in the industry. They might sit on boards of organizations like CMLS, MLS Grid, and RESO not because they are a cartel, but because they have the most to offer to those organizations.

Nonetheless, in politics, appearance often trumps reality. And the MLS industry can ill-afford even the appearance of impropriety, not right now.

This issue of Big Brother watching will come up time and again as we discuss other issues with MLS of Choice.

Enforcement?

The final major omission or silence with MLS of Choice is that there are no procedures or processes for enforcement of these policies. It is actually shocking just how little thought was given to enforcement.

Noncompliance by the MLS

First up, we have the problem of noncompliance by the MLS. Remember, these changes are *mandatory* for all REALTOR-owned MLSs.

What happens if an MLS refuses to grant a waiver? That scenario is far from unlikely when it involves a third-party MLS (such as the aforementioned MyStateMLS).

First question is, who has the actual right to file a complaint or a grievance to demand enforcement of the MLS of Choice policies? Is it the agent who was denied the waiver? Is it the broker as the participant in the MLS? Is it the other MLS? Is it an Association Executive, or someone in the elected leadership?

Second, assuming we can answer that, to whom exactly does the aggrieved party complain?

I asked Rodney Gansho this question and his answers were somewhat confusing.

First, he said that when an MLS is not compliant with mandatory MLS policy, it's because the local MLS, its CEO, and the board of

directors do not understand the mandatory policy. It's a matter of explaining it to them.

Given that there's potentially a lot of money at stake, I suggested that perhaps the local MLS might not be confused about the policy, or misunderstand it, but either (a) have a genuine disagreement with interpretation of that policy (e.g., "that third-party MLS is not a qualifying MLS") or (b) chooses willful noncompliance.

In that unlikely case, Gansho suggested that the agent or broker contact the other MLS (presumably, her primary MLS, since she wants to waiver out of the other one which is now noncompliant). It isn't clear what that other MLS could do to help the agent, and when I spoke with MLS executives about that, every single one said they couldn't think of a single thing they could do to force another MLS to do anything at all.

Gansho also suggested that the aggrieved party contact NAR's "Association and Governance Area". After some research, it appears that he's referring to the newly created Member Experience group, as per this announcement by NAR:

> A newly formed **Member Experience** group will focus on ensuring REALTOR® associations and members are highly engaged and satisfied with the association and its offerings. NAR General Counsel and Senior Vice President Katherine Johnson will lead this area, which encompasses all functions related to legal, information services, association leadership development, and association and MLS governance.

As of this writing, there does not appear to be a way to directly contact the Member Experience group to file a complaint against a noncompliant MLS. But let's assume NAR sets up hotlines, phone numbers, email addresses, etc. when the policy takes effect on July 1.

As Gansho acknowledged, the MLS is not a member of NAR, nor is it party to any agreements with NAR. It is the local Association of REALTORS who own that MLS who is. So practically speaking, the only leverage that NAR has over a REALTOR MLS is revocation of its umbrella coverage under NAR's errors and omissions insurance policy.

Apparently, the revocation of NAR's insurance policy coverage is an *administrative* function, rather than a judicial or a policy function, even if it occurs in an enforcement scenario. Perhaps Katie Johnson's staff under Member Experience would grant a hearing to the MLS whose insurance coverage is about to be revoked, but perhaps not.

The normal process of resolving a policy violation—say the Code of Ethics—does not seem to apply.

This was, to say the least, news to me.

The only other leverage was for NAR to somehow bring the local Association which owns the MLS into some kind of a disciplinary situation for noncompliance with the MLS policy.

There are a hundred questions one could ask about enforcement but suffice to say that there are no real answers because NAR passed a policy without specifying exactly how it would be enforced, and by whom, and under what process. Not yet.

NAR Supremacy Clause?

Another interesting aspect of the enforcement question is whether NAR policies trump local rules if the policy is silent on an issue. Basically, whether there is such a thing as a supremacy clause[16] in NAR's rules.

For example, NAR has defined what constitutes an MLS in its MLS Policy section 1, quoted above. Given that, does the local MLS have the right to create local rules that vary from NAR's definition?

I spoke with Chris Carillo, CEO of Metro MLS in the Milwaukee Wisconsin market, whose MLS has had a voluntary waiver policy in place for years before these changes were put into place. He told me that Metro MLS only granted waivers to individuals who have joined another REALTOR MLS within the state of Wisconsin.

Does Metro MLS still have the right to have this rule after July 1? After all, the policy grants no local option, no local discretion in defining what constitutes an MLS. The language of 7.43 is fairly clear and straightforward.

[16] In American legal system, federal law is the supreme law of the land. To be fair, there are complicated legal doctrines around the supremacy clause, but basically, any state laws that are in conflict with federal law is void under the Supremacy Clause.

From Hypothetical to Mass Disruption: The Truth About MLS Subscribers

By now, the reader can be forgiven for thinking that all of the above questions and issues are a tempest in a teapot. They're all hypothetical, theoretical, and a lot of paranoid fearmongering. The MLS has been around for decades in its current form, and almost all of them are de facto local monopolies due to the power of network effect.

There is zero evidence to suggest that agents will attempt to waiver out if they hope to do any business in a local market actually helping consumers buy and sell homes. There is zero evidence to suggest that third-party MLSs will take off, or that national franchises will become an MLS, or that private listing clubs will go down that path.

All of that is true.

So why are we spending pages upon pages, thousands upon thousands of words on MLS of Choice?

Because of the truth about MLS subscribers.

Most MLS Subscribers Are Not Producers

While there has never been any formal research done on this issue, most people involved with the MLS industry recognize that most of the licensed agents who are subscribers to an MLS are not producers. All of the evidence is anecdotal, but it is remarkably consistent.

For most large MLSs in the United States, roughly half of the subscribers do not complete a single transaction in a given year. If you look at agents who have two or fewer closed transactions in a year, the percentage is well over supermajority.

I have periodically asked a number of MLS executives about how many of their members do not post a single transaction. None of them know for sure, as they haven't fully researched it, but numbers are routinely in the 40-60% range. For this paper, I have asked a number of MLS executives how many of their members post two or fewer closed transactions in a given year, and the numbers were in the 70-80% range. Having worked in a large MLS as an interim CMO, I

can verify that experience of looking through a huge spreadsheet full of names with 0's or 1's under the "Transactions" column.

In the CMLS Webinar, Shad Bogany of HAR casually mentioned that over half of the members of the MLS are part-time agents who might do a deal once every couple of years.

The truth is that the real estate industry is utterly dominated by a small percentage of agents who have outsized market share and do the vast majority of the transactions.

The agent team phenomenon has exacerbated that trend, as all transactions are credited under the team leader. That has led to some agents posting unbelievable numbers: hundreds of closed transactions, for hundreds of millions of dollars. Some of the closed transaction numbers suggest three, four, or more closed transactions every single week. That is impossible for a single human being; it requires a team.

To be fair, MLS fees are generally kept very low, averaging about $35 per month across the United States.[17] Quite a few subscribers are happy to pay a few hundred dollars a year, since commissions from even a single closed transaction more than pays for multiple years of MLS fees.[18]

The operating (and correct) assumption of most of the MLSs is that the MLS delivers so much value that it more than justifies the cost of subscription. That is true, but it's true only for producing agents.

The flaw in the current thinking is not in the value of the MLS, but on the composition of the typical MLS subscriber.

The Low-Cost Alternative is Enormously Attractive

Given the above, our thesis is that there is a huge untapped market for low-cost MLS services.

Suppose that roughly 70% of subscribers to any given MLS is doing two or fewer transactions annually. They're likely to be part-time agents, or on a team. Most of these agents are not actively seeking

[17] Source: Clareity Consulting

[18] Even if you include local, state and national REALTOR dues along with the MLS fees, we're talking about $1,000 a year or so in most markets.

out business; rather, they more or less "fall into a deal" as leads come to them.

Once again, I need to point out that there has never been, at least to my knowledge, any detailed and reliable study done on the composition of the MLS subscribers. So much of the evidence is anecdotal in nature. However, it's the only evidence we have today.

One such piece of anecdotal evidence comes from the customer service people at the MLS. Some of the larger MLSs have dedicated customer service teams; others have the MLS staff provide customer support as necessary.

The top customer support requests are all basic operations, such as:

- "How do I set a client up on saved search?"
- "How do I pull a CMA report?"
- "I can't login to the MLS."

The common thread to all of these tier 1 requests is that they are items that *no regular user of the MLS would need to ask*. The implication is that the agents contacting customer support are sporadic users of the MLS at best. And yet, they are paying the same annual fees as a power user who wouldn't dream of trying to practice real estate without the MLS.

Any sort of system that promises some level of access to the data—when needed, a few times a year—at far lower cost is going to be *enormously* attractive.

The various possibilities, such as the franchise brand as MLS, combined with the waiver policy of 7.43, will become very attractive to the majority (or super-majority) of today's MLS subscriber. The admonition that they shouldn't waiver out of the MLS in the market where they are working falls on deaf ears when they're not practicing real estate brokerage except sporadically anyhow.

Loopholes create entire industries when there is consumer demand that the loophole can address. The MLS is that exact situation: massive consumer demand, which can now be met through a giant loophole with many, many parts that are left unsaid and unspecified.

The Elites Can Self-Segregate

At the same time, today's industry leadership seriously underestimates the extent to which the elites of the industry would prefer to self-segregate if it were possible.

The proliferation of private listing clubs is but one piece of evidence. There is also a good deal of anecdotal evidence within the industry that listing agents often steer clients away from accepting offers from inexperienced or incompetent buyer agents because they don't want to do twice the amount of work for the same commission. There is a fair amount of evidence that brokerage brand reputation matters not to consumers (who have no idea and don't care) but to other agents, who want to work with agents from "reputable" brokerages.

Furthermore, there is a growing gap between the top producing agents and everybody else that often shades into actual cultural differences. The elite agents often own and operate teams, invest in technology and lead generation, hire staff of their own, attend different events and conferences from the non-elites[19], and socialize almost exclusively with each other.

What prevents the elites of the industry from complete self-segregation today is the MLS, operating as the great equalizer. Since everyone has to belong to the same MLS, and submit listings to it, and entertain offers from every member of that MLS, it tends to level the playing field between the elites and nonelites.

Going forward, there is now the possibility of the elite agents truly segregating themselves without having to go through the hassle of "off-market" listings and the paperwork that entails.

The scenario is a straightforward combination of two items discussed above: an elitist private listing club becomes an MLS, and the agent team designates a "Buyer Specialist." Here's how that would play out:

- The elite agents in a given market area all belong to some Top Producer Network ("TPN"), which has a website and a database that allows its members to promote their listings to other members of TPN.

[19] Best example might be the "mastermind" groups where agents often come together to share ideas and strategies. Elite mastermind groups are obviously restricted to elite agents, and participation is often by invitation only.

- TPN incorporates a blanket offer of compensation into its membership terms, thereby becoming an MLS. There are no additional fees to TPN members, who all already pay some monthly fee.

- Each elite agent forms a team and designates an agent as a "Buyer Specialist".

- The elite agents waiver out of the local MLS, together with everyone else on the team. They save money, but that's not the actual point for the elite agents. For them, it's to limit who can show their listings to other elite agents. Only the Buyer Specialist remains as a member of the local MLS, so she can see all of the listings from the non-TPN agents and work with buyers across both TPN and the local MLS.

- Note: an agent can belong to as many MLSs as she wishes. The only limitation is that she has to enter all of her listings into the MLS.

If the local MLS has passed a rule that prohibits listings from waivered agents, then none of the elite agents' listings make it into the local MLS.

If, on the other hand, the local MLS has done the opposite—requiring that the participant broker enter all of its listings into the MLS—then we set up an interesting situation.

Since this rule would affect all participant brokers who have elite agents, the first possibility is a revolt by the participant brokers. The MLS, after all, is a cooperative of brokerages. If the brokerages themselves rebel against the mandatory listing entry policy, depending on the makeup of the MLS, its governance setup, and the local market conditions (i.e., do a few brokerages have market power?), we could see a reversal of that policy at the local MLS level.

The second possibility is that local brokerages conspire with their elite top agents to create non-participant brokerages, which nonetheless preserve the economics of having the agent team as part of the brokerage.[20] The whole point would be to separate the Buyer

[20] Note that while license law prohibits sharing of commissions with any unlicensed person or entity, I am not aware of any that require *a reason* to share commissions. That is, as long as two brokerages are properly licensed, they can enter into a contractual arrangement to share commissions between

Specialist from the team *on paper*, so as to prevent the listings being entered, while preserving the ability of the team to service buyers across the entire market.

The third possibility is that the elite agents, and their participant brokers, choose to stop participating in the local MLS. This is not as crazy as it sounds initially, because the elite agents are elite precisely because they take a disproportionate percentage of listings. The 80/20 rule in real estate—that 20% of the agents do 80% of the business—becomes even more disproportionate when it comes to the all-important listings business. Many industry observers, broker-owners, MLS executives, and others believe that a handful of well-known, experienced, and powerful agents control the vast majority of all listings.

If a large number of elite agents defect out of the MLS completely, and start to utilize the elite private listing club as the MLS, it may very well mean that 80-90% of the listings end up in the new private listing club MLS. That spells the end of the local MLS.

Once again, I need to caveat that there has never been a disciplined and comprehensive study about this phenomenon.

But given these dramatic options, the local MLS may find itself negotiating with the elite agents to figure out how to accommodate their desire for segregation with the survival of the local MLS itself.

Inter-MLS Competition

Both of the above scenarios contemplate some kind of non-traditional third-party MLS taking advantage of the various loopholes. However, the more likely scenario is that existing traditional MLSs take advantage of them instead.

For example, there are no rules in MLS policy that prevents or prohibits an MLS offering special discounted rates to try and attract new subscribers. There are no rules that I'm aware of that prohibit a traditional MLS from offering different local policies to cater to elite agent teams.

In other words, there are no "anti-dumping" rules when it comes to MLS services.

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them as they see fit, with or without a referral, for nominal "services rendered" which could be any range of things.

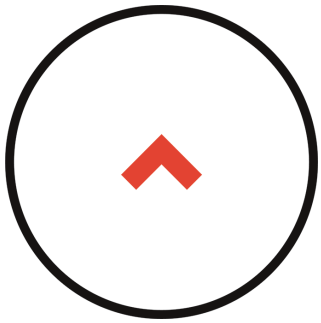
This is particularly relevant as it comes to the "Large vs. Small MLS" competitive dynamic. A large local MLS may start offering very low teaser rates to all new subscribers in a different small MLS's market area. It can afford to take a loss[21] while the smaller MLS cannot. That's basic market share strategy 101.

Peeling off 50-60-70% of the subscriber base of a small MLS nearby would effectively kill off nearby competitors. Furthermore, offering elite agents of that small MLS greater flexibility could be another effective strategy for competition.

Today, the gentlemanly rules of inter-MLS competition make that kind of open and naked competition unlikely. Those unwritten rules may continue to hold into the future.

Or, they might not.

[21] Given the nature of software services, it isn't clear that the large MLS would take a loss at all.



Decide. Act.

Recommendations: MLS & Associations

Given what we have discussed, there are several recommendations for MLSs and the Associations that own them. It goes without saying that your specific strategy and tactics will depend heavily on your local situation.

Having said that, the following general recommendations will apply to all MLSs.

Formulate a Strategy

The first recommendation for the MLS (and the Associations that own them) is to formulate a strategy around MLS of Choice. There are four possibilities, strategically speaking.

First possibility is to ignore the issue, believing as most MLS and Association leaders do today, that MLS of Choice is not a big deal. This approach may be entirely valid and grounded in solid reality of today. It is, in our view, strategically irresponsible in light of the above.

Second possibility is to use MLS of Choice as an opportunity for offense, to compete against other MLSs. That requires making a careful assessment of strengths and weaknesses compared to competing MLSs in your area and formulating tactics for taking market share. For example, given your particular MLS, its products, services, offerings, does it make sense to go after the Elite agents in the other MLS (to capture their listings) or to go after the non-producing agents who may be far more sensitive to cost?

The third possibility is to regard MLS of Choice as a threat and seek to neutralize its impact. That essentially means doing the exact same analysis as the second option, but thinking of ways to defend against such moves by other traditional MLSs, by new third-party entrants, or any other issue raised above.

The fourth and final possibility is to regard MLS of Choice as an opportunity in some scenarios, and a threat in others and seek to accentuate the first and reduce the second. There is only one way to do that: become a non-REALTOR MLS.

A Note on REALTOR MLS Status

We have looked into the issue of what does and does not constitute a REALTOR MLS. Since we have found nothing in writing, we have reached out to NAR and received an answer via email from Rodney Gansho in December of 2017. I reproduce it here:

> When it comes to defining a "REALTOR MLS" for any purpose, insurance coverage or otherwise, the threshold requirement is that it be 100% owned by one or more associations of REALTOR®. There are independent MLSs partially owned by association(s) of REALTORS® that fall outside the purview of NAR's insurance policy.

Since the threshold requirement is 100% ownership, even a tiny minority ownership (even one share) by an entity or person other than associations of REALTORS means the MLS is not a REALTOR MLS, falls outside the purview of NAR's insurance policy, and is not required to follow NAR's rules.

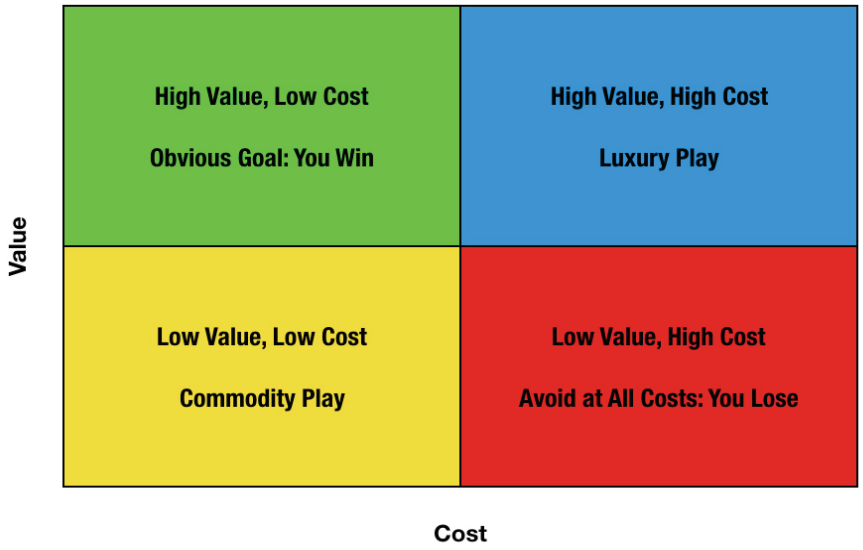
A Note on Offense vs. Defense

In truth, whether you decide to go on offense or stay on defense, you will end up needing to do very similar things. Because the way another MLS will attack you will require you to defend against it, which means understanding the mechanics of that attack. If you understand the mechanics of that attack, then you can use it on offense; you just choose not to.

For example, if another MLS competes on price, then you will need to adjust your pricing (or offer so much greater value) in order to remain competitive. If the competition is on the basis of technology, then you'll need to respond in kind.

The low hanging fruit, which means the early fights, will involve MLSs with such imbalance in the cost-value proposition that everyone involved should see the foregone conclusion. The basic

matrix is as follows:



Note that logically, you cannot normally jump diagonally across a 2x2. You do not go from low value, high cost to high value, low cost; you go from low value, high cost to one of the other two: high value, high cost, or low value, low cost, and then try to move into high value, low cost.

In your strategic planning, it is imperative that you be brutally honest with yourselves about where you fit in your competitive landscape. That may require some market research to confirm your hypotheses, but it is critical to be truthful within your boardrooms and executive suites.

"We're #1!" chants need to be reserved for sports fields.

Define Use

The number one task is to define what constitutes "use" or "access" to the MLS.

Ideally, NAR will take up this issue in future meetings of its various committees, but in the meantime, the local MLS has to determine for itself what constitutes "use" of its services.

As noted above, defining "use" and "access" is likely to have cascading consequences particularly for technology providers who have to figure out how to handle (a) restricting "use" to customers, based on waiver status, and/or (b) collecting that data for reporting and compliance purposes.

A couple of general thoughts then.

First, "access" will be easier to define than "use" since "access" contains connotations of entering an area or a system or a building. It is infinitely easier to track if anyone sends a TCP/IP request to a server that you own/lease than it is to track if anyone uses data that may have originated from your collection.

So working with your tech staff, consultants, and vendors—as well as with your legal counsel—it should not be impossible to come up with a definition of "access" and its reverse, trespass.

Second, however, the term "use" is far more difficult to define because it ends up being tied up with the data within the MLS, rather than the servers or systems of the MLS. Since that data is now widely shared, via IDX, syndication, and other feeds, it becomes far more difficult to draw a line between one "use" and another.

At one extreme, the MLS can adopt something like the "fruit of the poisonous tree" doctrine from criminal law.[22] Under that concept, using any data or product resulting from or created with the MLS's data would be considered "use" in violation of the waiver. But even criminal law has various exceptions, such as the attenuation doctrine, or independent discovery, or good faith exception.

Even though the specific definition is something you and your leadership will need to work through with legal counsel, your brokers, technology partners, and other stakeholders, my general recommendation is to ground "use" in the definition of the MLS itself. I would ask, is the action in question by the waivered agent tied to:

- orderly correlation and dissemination of listing information for serving clients, customers and the public?
- blanket unilateral offers of compensation?
- enhancing cooperation?
- accumulating or disseminating data to prepare appraisals, analyses, and valuations of real property?

[22] For those interested, you can get a good overview from Wikipedia: https://en.wikipedia.org/wiki/Fruit_of_the_poisonous_tree

- contributing appraisal data to common databases?

Since all five factors must be present in order for something to be an MLS in the first place, I would look to relate "use" to two or more factors above and draw the line ("attenuation") somewhere between two and four factors.

Under that kind of theory, a waivered agent using Zillow is not "using" the MLS since that affects at most one of the five factors: dissemination of listing data.

Using a brokerage intranet, however, to run comps using the MLS's data, on the other hand, implicates two factors: client service, and preparing an appraisal. That might be "use".

Using something like Project Upstream, which potentially implicates four of the five factors (all except for blanket offer of compensation) would certainly constitute "use" under this analytical framework.

I realize this is very rough and very general, but without specifics, it's the best I can do in terms of recommendations.

A Note on Copyright

Those readers who have read the May 2018 Red Dot on Photography and Copyrights already know some of the issues that will be raised here. I do recommend reading that report in full as the issue is important in its own rights.

But copyright issues will be implicated in any definition of "use"—which is but one reason why I highly recommend consulting your legal counsel.

Since mere facts cannot be copyrighted under *Feist v. Rural*, and since there have been some questions from the US Copyright Office on MLS compilation copyrights, there are some tricky legal questions as to whether the MLS can actually prohibit "use" of something it does not own: listing data.

Furthermore, since photos are one of the two things that can be copyrighted without question ("spark of creativity"), that raises the copyright issues around listing photographs from the May issue of Red Dot.

To use but one hypothetical, suppose that a private listing club decides to become an MLS. It goes on Redfin and copies all of the data—which is not copyrightable—to past sales from the MLS. It then contacts the photographers and purchases the photos to those

sold records. Depending on what rights your MLS was granted (by way of your brokers, which in turn implicates what the photographers granted them) and what rights the new upstart has purchased, not only is the Listing Club MLS fully within its rights, it can demand that *you* take down those sold photographs.

As you struggle with defining what constitutes "use" of the MLS, understand that you may need to struggle with copyright issues.

Consider Non-REALTOR MLS Status

put, if you can attack others while they cannot attack you in the same way, you have an advantage. The fact that your competitors have to grant a waiver to their subscribers, while you do not (as a non-REALTOR MLS, you don't care very much about 7.42 and 7.43 of NAR's MLS Policies) gives you a competitive advantage.

Since MLS of Choice is mandatory for REALTOR MLSs, you have to think long and hard about whether the benefits of being a REALTOR MLS outweigh the costs.

Recall that even one share of stock owned by an entity other than an association of REALTORs means losing your REALTOR MLS status. Practically speaking, your shareholder associations can remain in total control over the MLS and still get outside of NAR's rules. Our recommendation generally is to offer ownership in the MLS to your local brokerages, as that keeps ownership (and control) "within the family" as it were, and could also help improve relationships with your brokers.

But recognize that if you are willing to walk down that path, then shares in the MLS become a key tool for recruiting allies who may make a major difference in your fight against competing MLSs.

Just as an example, let's say you're looking to compete with a neighboring MLS. You don't have overwhelming superiority in the Value-Cost proposition. Suppose you were to offer the top brokerages in the competitor's MLS, who collectively make up 60% of the listings of that MLS, shares in your MLS. Would that help in competition? Of course it would.

Maximize Your Service Area (On Paper)

Going on offense in the MLS context means you are looking to expand. That necessarily means expanding your service area. On the other hand, going on defense means your competitors are looking to

expand. Given the ability of the MLS to require that its participants submit all listings in the MLS's service area, I do not know whether a purely defensive action can be successful.

Therefore, we recommend going beyond the exact boundaries you have in mind. For example, if your true goal is to take over seven counties, set your service area as those seven counties plus all adjoining counties. Or better yet, set the service area in your corporate documents as the United States, and then allow your CEO to determine what the true, effective market area will be.

The reason is flexibility. If you are on offense against a neighboring MLS, but your competition is limited to the boundary between you and them alone, it is far less effective than if you could open up another front behind them. If you're on defense, then fending off a neighboring MLS's encroachments without any ability to inflict costs on them may be ineffective.

There being no reason to tie your management team's hands in competition, we recommend maximizing your service area at least on paper.

Offer Low Cost Services

Think about the truth about MLS subscribers. Given that large percentages of your subscribers are not productive it makes sense to investigate low cost offerings. That is true even if you are in the enviable High Value, Low Cost sector.

The ultimate model is First MLS in Atlanta, GA, which charges a percentage of the sale at the closing. The advantages of this model are numerous: more money for the MLS, only the producing subscribers pay, they pay when they're flush, etc. But not everyone can adopt a whole new business model.

On a more traditional subscription model, it makes sense to investigate tiered subscription services. In effect, you want to try and combine the Low Value, Low Cost with High Value, High Cost, as it is easier to do that than to create High Value, Low Cost.

It might even make sense, depending on your local market and your cost structure, to consider some kind of a Freemium model.

There are dozens, if not hundreds, of tactics. But the point is that the MLS has to consider a low cost offering of some kind.

Offer Flexibility and Exclusivity to Elite Agents

On the other side of the spectrum, you should investigate some kind of structure that offers flexibility and exclusivity to elite top producers.

That means tackling the thorny issue of agent teams, as well as a clear-eyed look at private listing clubs.

The ironhanded approach that is not uncommon in MLS ranks today might work in the short-term, but given the changes coming, will prove to be a different obstacle to which people will find a workaround.

A smarter approach is to understand the motivations of the elite top producers and to look at ways to address them from within the MLS itself wherever possible.

For example, are elite agents joining private listing clubs because they want to double-end deals as much as possible, or because of the reality of (or perception of) incompetence amongst the non-producing, part-time agents who could endanger deals?

If the former, then there may be nothing you can do ethically or even legally. If the latter, perhaps there are things you can do as the MLS to give the elite agents the latitude they want, keeping in mind that after these changes, they may have the ability to waiver out.

As in all things, the benefits of compliance have to outweigh the costs of compliance. Otherwise, all you get is workarounds and noncompliance through loopholes.

Incentives and Disincentives

Which brings us to the issue of incentives and disincentives.

One of the more important psychological changes that need to occur within the MLS is the idea that brokers and agents must do what you tell them to do. The MLS is a *de facto* monopoly, dependent on network effects. The MLS of Choice changes undermines a great deal of that de facto monopoly power.

Going forward, then, it is important for MLS leadership to start thinking more *competitively* and far less *monopolistically*.

If complying with your rules creates too much of a burden, then people will naturally look for ways not to comply. Push them to the edge, and they could find ways to leave.

That could be with disruptive third-party MLSs, or it could be by joining a different traditional MLS. Either way, it isn't your Value-Cost that matters, but also the costs and benefits of compliance with your rules.

Be Careful of Not Competing

As pointed out above, there may be very valid reasons why an MLS may choose not to compete against certain other MLSs. It might make no sense to go head-to-head with a large, well-capitalized, professionally run MLS to the north when dozens of small, poor MLSs run by amateurs lie to the south.

But given the political and regulatory environment, the MLS has to be careful of even the *appearance* of collusion.

You will want documents showing your valid reasons for not competing in certain areas, against certain other MLSs. For example, a memorandum from staff or a consultant comparing unfavorably your strengths and weaknesses compared to another MLS's strengths and weaknesses is compelling evidence that any lack of competition is for valid reasons that have nothing to do with antitrust issues.

Reevaluate Data Sharing

One of the immediate consequences of MLS of Choice is that data sharing arrangements no longer make much sense, except in strictly limited circumstances.

The only circumstances in which data sharing makes sense going forward is between two or more MLSs who do not wish to compete against each other (for valid reasons, see above) but whose brokers and agents want the data across their collective markets. Furthermore, the MLSs involved in data sharing have to be more or less equal in the Value-Cost analysis.

Otherwise, the incentive to waiver out and use the data via data sharing is too great.

In almost all cases, if you are sharing data with neighboring MLSs, it may be time to discuss M&A instead or openly compete.

Enforcement

As described above, the entire MLS of Choice ruleset is silent on the question of enforcement. Again, this is properly the province of NAR, but in the meantime, you the local MLS will find yourself in enforcement-related disputes and issues.

In terms of enforcement of the waiver policy internally, the advice from the CMLS webinar from people like Matthew Consalvo of ARMLS who has had a waiver policy for years prior to these changes is that the heavy-duty certification of non-use plus individual audits, etc. is not necessarily cost effective. You'll want to balance how much staff time and resources you'll want to devote to tracking all of that information, then have written policies in place for penalties, how enforcement will happen, etc.

The major issue today is around enforcement of 7.42 and 7.43 *outside* of your own MLS. Suppose one of your agents requests a waiver from another MLS, and they flatly refuse. What then?

If you decide that you have to get involved in that dispute, you'll want to get a hold of NAR staff immediately and ask how they want you to submit complaints, supporting documentation/evidence, etc. It may be that a phone call from your CEO to the other MLS's CEO does the trick, but again, what if it doesn't? Someone has to adjudicate the dispute.

If you decide not to get involved, and put the burden of enforcement on your broker/agent, then you'll want a set of resources for them to use in trying to enforce the policy. Again, you might contact NAR staff to get some guidance on how your members and participants should file complaints and what the process will look like.

There is an unknown question today as to whether NAR will enforce the MLS of Choice policies on behalf of individuals and companies who are not REALTORS. That is, if you have a subscriber who is not a REALTOR, or if you yourself are not a REALTOR MLS, can you still use NAR to enforce its MLS of Choice policy against a REALTOR MLS?

Speak to Your Technology Partners

While you have numerous challenges and questions due to MLS of Choice, chances are that quite a lot of the enforcement efforts will necessarily involve various technology providers in and around the MLS itself. I advise you to immediately start conversations with

technology companies to figure out what local rules to implement, and how.

To use the example cited above, if you decide to ban the usage of AVM's based on your MLS data by agents who have waivered out, find out whether AVM vendors can do that kind of data segregation, how long it would take, and what they might need from you in order to do such a thing.

Keep in mind that technology vendors are providing products and services to your participant brokers and their subscribers. Make things too difficult for them, and you make things difficult for your subscribers, which is never a good thing.

In a real way, this recommendation is an extension of the "think more competitively, and less monopolistically" recommendation above. Becoming the hardass, iron-fisted MLS to tech vendors potentially puts you in a position of competitive disadvantage if vendors decide they'd rather not deal with you at all.

Conclusion

The changes to 7.42 and 7.43 resulting in the new "MLS of Choice" environment are fairly minor. The goals of those changes were limited and straightforward: stop the practice of MLSs to charge people who are not its customers.

Nonetheless, because of silences in the policy, and the interaction between 7.42, 7.43 and other parts of MLS policies as they exist today, as well as the prevailing realities of the real estate industry, there are now wide open gaps in the overall MLS policy.

Loopholes create whole industries, and there are reasons to believe that these loopholes could be extremely disruptive. It may be that none of those things come to pass, and that MLS of Choice remains a much ado about nothing, as many experienced executives and leaders believe. In fact, it is likely that nothing much changes in the short-term.

Nonetheless, we strongly believe that strategy should always include contingency planning, even for unlikely contingencies. In the case of MLS of Choice, many of the contingencies are not only not unlikely, but will *definitely* be an issue: questions of what constitutes "use" of the MLS and how the policy will be enforced are two that come to mind.

And more generally, at a higher level, if the MLS of Choice ushers in an era of greater inter-MLS competition—one of the stated goals of the policy—then the MLS, Association, franchises, brokerages, agents and technology companies in real estate should be thinking hard about how they will change to meet the challenges and take advantage of opportunities in the new environment.

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