

LEGAL BEST PRACTICES



CMLS BEST PRACTICES GUIDE FOR THE MLS

CMLS Best Practices bring together emerging and proven practices from across real estate to align and advance professional standards within the MLS industry.

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CMLS Best Practices

OVERVIEW

The legal aspects of the MLS business have increased exponentially over the last few years. What used to be routine business decisions now present potential legal challenges. An MLS typically manages hundreds of contracts for a variety of different services and purposes. The decisions made can have far-reaching effects, not only for the organization itself, but also for all of its stakeholders including brokerage firms, agents, stockholders, directors, consumers and employees. Indirectly, on the legal decisions of one MLS may affect other associations, MLSs, and the industry.

The content contained in this document is provided for general information purposes only and does not constitute legal advice. Any legal advice should be sought directly from an organization's attorney.

LEGAL MANAGEMENT

The most critical outcome of effective legal management is to balance the business requirements of the organization against the legal risks. Effective legal management of all the possible risks and deciding whether to create policies or take other actions to minimize those risks. Few decisions today are unilateral legal or business decisions. Favoring a strategy that either focuses too heavily on business needs or alternately too much on minimizing risk can have significant implications for future success. Therefore, finding the proper balance between the two is the best practice.

The best business decision for the organization is made only after evaluating any legal risk. An attorney is likely to recommend that the organization not move forward where the potential outcome could create legal difficulties later. However, such a recommendation may not account for the organization's willingness to accept the associated risk. For this reason, management and the board of directors, not attorneys, are the final decision makers.



Integrating Contracts into the Organization

Legal counsel must understand the business goals of the MLS both at a macro level (long term) and a micro level (for the specific contract). Efficient negotiation and implementation require effective collaboration among and between legal counsel and the CEO/executive team.

The business unit of the organization must take responsibility for the business decisions. This means that when negotiating a contract for the organization, the CEO (or other staff delegated by the CEO) must take responsibility for negotiating the business points of the agreement while the attorney provides guidance and direction, and all are working as an effective team.

It is important that those in operations know what the agreement contains so that they may hold the third party accountable to the terms of that contract. Therefore, once the contract is completed, the key provisions of the agreement should be summarized and distributed to the people inside the organization who will be working with the parties.

Contract Management and Compliance

If an organization has inside counsel, it has for managing the contracts. This includes maintaining a system where all contracts are logged with expiration. Contract management includes creating a matrix that is accessible to management. All existing contracts should show start and end dates, cancellation timeframes, timeframe to begin renewal process (if appropriate), contract type (segmented by contract types within the matrix), compliance rules, and staff responsibility to manage the business contract.

Higher-level contracts should clearly identify the timeframe for renewal. The most critical of these higher-level contracts is the primary MLS vendor system contract. It may take an organization several months to determine if it wants to change system vendors. The negotiations with the current vendor must begin significantly in advance of the contract renewal period to ensure that the organization retains its leverage. If the organization delays and has insufficient time to change vendors, it may lose its leverage, leaving the vendor with all the power in negotiating the extension terms.

Contract Management Best Practices

Monitoring compliance with the contract terms is essential to ensure that deliverables are made on schedule and all parties are adhering to the agreement. The CEO may delegate the primary responsibility to an individual within the legal department, if applicable, or to other management within the organization. However, the CEO is ultimately responsible for all contract compliance and must ensure that all contracts are tracked and maintained.

Key Contract Provisions for Third Party Agreements

Each agreement must clearly define the responsibilities and obligations of the participating parties, the products and services involved, the time for delivery, and the consequences of non-delivery. The business managers must ensure that the description of the products and services align with the organization's needs, and that the deadlines for delivery are incorporated into the contract. The attorney for the organization should work closely with management and staff to ensure the contract meets the business needs of the organization while also minimizing legal risks.

Indemnification

Black's Law Dictionary defines indemnity as "a duty to make good any loss, damage, or liability incurred by another." Indemnity has a general meaning of holding one harmless; that is to say, that one party holds the other blameless for some loss or damage.

The concept of indemnity usually arises in contracts where there is a possibility of loss or damage to one party during the term of the contract. In the business context, an indemnification provision protects one party against damages and expenses caused by the other party's failure and/or mistake. When an indemnification provision is triggered, one party pays the expenses, judgments, settlements, attorney fees, costs, and penalties of the other party.

One of the most important indemnification provisions today is the intellectual property indemnification, which requires the vendor to defend any intellectual property (e.g., patent, copyright) infringement claims.

Indemnification provisions can be a very powerful form of protection. When drafting or negotiating a contract, always consider the value of including an indemnification provision and always be wary of offering indemnity if the risk associated with doing so is not completely understood

Most-Favored Nations (MFN)

Most-favored-nation (MFN) clauses state that the vendor will offer the customer terms that are as favorable as, or more favorable than, those provided to any other customer. Depending on how the clause is written, it can cover pricing, products, services or other provisions. The larger MLSs may be able to obtain MFN pricing for similar-sized organizations contracting for the same products and services. Thus, MFN clauses are best considered in relation to the timeframe of any new upgrades, products or services as compared to when other organizations receive them.

Non-Compete Provisions

In some cases, the organization may be concerned that the provider of a product or service may intend to compete with the MLS. When this is the case, the organization should consider some type of non-compete clause. In this scenario, the clause would clarify that one party (usually the provider) agrees not to enter into or provide similar services in competition against the other party (usually the organization).

Exclusivity

The organization may be able to negotiate exclusive rights to a certain product or service for a specified period of time or in a specific geographic region. When appropriate, the organization should consider integrating this option into the agreement.

Intellectual Property Rights

It is important that a contract provide clear provisions defining intellectual property rights where appropriate. This should be spelled out in the definitions section of the agreement and then referred to throughout the agreement so that it is clear who owns what and when either side is relinquishing any rights.

Data licensing agreements should make it clear that the licensee shall not use the data for any purpose other than as specifically defined in the agreement. The licensee may not create any derivative works without express written consent. The MLS is the sole owner and possesses all rights, title, and interest in the data and that ownership remains with the MLS. When licensing data, the MLS may want to require the third party to display the copyright of the MLS.

Automatic Renewal Clauses

It is essential to have an automatic renewal provision in data licensing agreements with third-party vendors for IDX, VOW, and other related services in order to better manage the agreements. However, the agreement must also provide a cancellation period wherein the organization may cancel the agreement before the automatic renewal clause takes effect.

If the contract is substantive, such as an agreement for the primary MLS system, any auto renewal agreement should have guaranteed pricing. If pricing is subject to change, it may be best to come back to the table closer to the expiration date and work out a written extension. Small MLSs without the resources for internal contract management may find that omitting an auto-renewal clause is risky and costly, especially where there is not careful tracking of the start and end dates of each contract.

As mentioned, the contract should also include a cancellation clause that occurs prior to the auto-renewal taking effect. Timing is critical, because the selection of a vendor for the organization (e.g., the primary MLS system) coupled with a necessary implementation phase will always require sufficient lead time to ensure a punctual installation. Subscribers must never go without service.

Venue and Choice of Law

The organization should define the choice of venue and choice of law for any legal proceedings. This is generally in the state where the MLS is located. However, in practicality, most vendor agreements list where the vendor company is domiciled. If the listed state's laws are favorable to the MLS and the MLS attorney is comfortable with the selected state's business laws, this may be a good section to concede in order to attain some concession from the vendor.

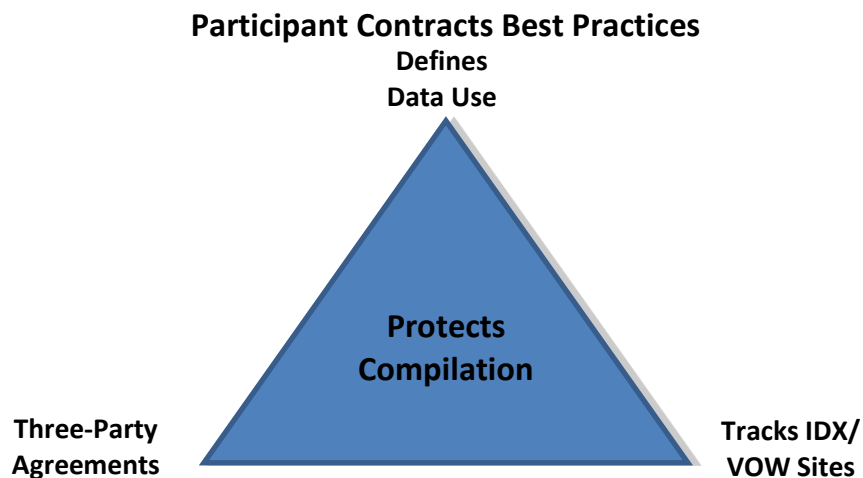
Key Contract Provisions Best Practices

- Indemnification
- Most-favored nations
- Non-compete provisions
- Intellectual property rights
- Automatic renewal provisions
- MLS choice of venue and choice of law

Contracts with Participants and Subscribers

The MLS must also manage contracts with participants (i.e., brokerage firm), and the companies those firms select as product and service providers, including IDX, contact management systems, internal systems, and a variety of other software. The contract should protect the data and also the MLS and the participant. It should clearly define the permitted uses of the data. A provision that allows the MLS to audit subscribers' and vendors' use of the data is critical.

There should be an agreement among all companies that have access to the data. This contract may be an agreement with just the MLS and the third party, or it may be a three-party agreement with the MLS, the company licensing the data, and the participant who will be using the company's software and/or hardware. The contract should specify that the third party receives access to the licensed content at the discretion of the MLS participant and that both the third party and the MLS participant are responsible for compliance with the contract.



Incorporating the use of an online system as well as an electronic signature service can make this fairly simple and easy to manage. It is not necessary to have separate signatures on paper for every subscriber IDX site, although having a digital request form with an electronic signature provides the best of both worlds. It is important that the MLS is aware of and tracks every site that displays IDX.

Contracts with Outside Vendors

To further its business objectives, an organization will enter into a number of different types of contracts. These include VOW provider agreements, IDX provider agreements, data licensing agreements, and agreements for vendor provided services and products.

For any data licensing agreements, VOW or IDX agreements, the organization should provide a standard agreement. This will allow for efficient administration, tracking, and enforcement. It will also ensure that the key provisions important to the organization will be incorporated in every agreement.

For third-party vendors that are providing products and services, it is typical for the organization to use the vendor's agreements and then make any required changes. However, in cases where it is the organization's service (e.g., MLS's data) being used, best practices dictate using the organization's own agreement.

Data Licensing Agreements

Data licensing agreements are complex and challenging because they are frequently with participants, third parties, or both. At minimum, they should clearly define the following:

1. Scope of and access to the licensed data
2. Use of the licensed data
3. Protection of the licensed data
4. Intellectual property rights and ownership rights
5. Fees
6. Compliance
7. Confidential information
8. Warranties and representations
9. Indemnification and limitation of liability
10. Term and termination
11. Audit rights

Appendix A contains a checklist of issues to address in MLS Data License Agreements (courtesy of NAR). Also see the Legal Management subsections Contracts with Outside Vendors and Contracts with Participants and Subscribers for guidelines for structuring those agreements. (See Data Distribution and Tracking Best Practices section for additional information.)

Data Usage Contracts

Misuse of the data, incorrect data or other rule violations are generally reported to the MLS by MLS subscribers or by others who notice the misuse or violation. It is difficult to police internally, but these issues are usually quickly reported, and followed up by an investigation. The MLS participant and/or subscriber agreement should clearly define the responsibilities of the MLS participant including responsibility of oversight for all subscribers accessing the MLS through that MLS participation and the consequences for violating those duties.

Data displays (both subscriber and public websites) require constant monitoring since they often change daily. Both automated and manual auditing can be used.

Data usage (i.e. analytics, AVMs, etc.) is difficult to monitor because the data is not seen. The best way to monitor this is to create a policy whereby the organization contacts any company, vendor or participant using the product once per year. Inquire as to whether each is using the data in the same manner as when the contract began. Gather an understanding of how the data is being used. It is difficult to fully safeguard the data or obtain true compliance with regard to these products, but continuing a dialogue is essential.

COPYRIGHT LAW

Copyright Protection

The MLS database and the information it contains are important assets to the MLS and participants, so it is important to protect those assets. U.S. copyright law provides protections for original works, such as the creative elements in listing content (i.e., photos, renderings, floor plans, drawings, virtual tours, descriptions, remarks) and the MLS compilation (the selection, coordination, and arrangement of data).

Note that facts themselves are not protected by copyright, so the fact that a house is three bedrooms with two bathrooms is generally not protected by copyright. However, “a stunning three-bedroom home, with a unique master bath and phenomenal ocean view,” can be protected by copyright due to the description added as an original work by the author.

The author owns the copyright unless the work was created by an employee at the request of the employer. In this case, the employer owns the copyright, or if the copyrights have been assigned, then the assignee owns the copyright. Generally, this means that the person who took the picture (e.g., professional photographer, homeowner, or subscriber) owns the copyright to that photograph, unless an exception applies. Ownership of the work matters because the copyright owner has the power to register the copyright and enforce the ownership rights.

Generally, the MLS will own the copyright in the MLS compilation as the MLS is responsible for the selection, coordination, and arrangement of the listing data. Because the MLS’s creation of the compilation is likely facilitated by the MLS system itself, the MLS will want to make sure that in the MLS system agreement it maintains its rights to the compilation. The MLS should file a quarterly registration with the U.S. Copyright Office for the compilation. Registration of the copyright is required before an enforcement lawsuit can be brought.

The MLS should consider having agreements with its firm participants and subscribers that give the firms the option of assigning their copyrights to the MLS. The MLS can then create a copyright portfolio and include the underlying listing data in its copyright filings. This assignment places the MLS in a stronger position to protect the copyrights in its database from scrapers and other unauthorized third parties.

MLS Copyright Protection Strategies

- **Ensure MLS maintains ownership of compilation in vendor contracts**
- **File timely copyright applications with U.S. Copyright Office**
- **Implement participant and subscriber agreements that assign copyrights to MLS**

Brokerage firms may obtain ownership of listing information created by their agents automatically if the agent is an employee of the firm. If the agent is not an employee, firms may obtain copyrights through an independent contract agreement or an assignment agreement with the agent. The firm can also use independent contract agreements or assignment agreements with other third-party contractors, such as photographers and videographers.

Once the firm has perfected its ownership in the listing information, the firm can file registration of its copyright with the U.S. Copyright Office. The firm can also assign its copyright to the MLS so the MLS can protect those copyrights. Absent an assignment of copyright from the firm, the MLS will be limited in the ways in which it can protect the firm’s listing content.

Firm Copyright Protection Strategies

- Perfect ownership of listing information copyrights between firm and subscribers
- Implement independent contractor or copyright assignment agreements with photographers, video tours companies and other contractors
- Assign copyrights to the MLS so the MLS can include listing content in its copyright applications

Copyright Infringement Risk Mitigation

The Digital Millennium Copyright Act (DMCA), provides a safe harbor from copyright infringement for organizations that display user-provided content on their websites. MLSs and participants may display user-provided content through a public facing MLS site or IDX website. The safe harbor provisions of the DMCA can provide for the limitation of liability for copyright infringement.

For the MLS or firm to avail itself of the DMCA safe harbor provisions, the organization must (1) register a designated agent with the U.S. Copyright Office, (2) display a DMCA policy on its website; and (3) comply with the procedures and timelines in the DMCA related to infringement take-down notices. For more information on the fees and required forms, visit <http://www.copyright.gov/onlinesp/>.

Some MLSs have registered the MLS as the designated agent for all of its participants, which can result in overall cost savings in the filing fees versus individual registration. Additionally, the MLS has the advantage of removing infringing content from the MLS database. If the MLS decides to register as the designated agent for its participants, the MLS should assess its rules and policies and participant and subscriber agreements to ensure consistent implementation. Even if the MLS does not register as the designated agent for all participants, the MLS should consider providing education and explanation of the DMCA and its safe harbor provisions to participant firms and subscribers.

Under the DMCA safe harbor provisions, if a copyright owner finds infringing material on a website, the copyright owner can contact the listed DMCA designated agent and request removal of the material. The DMCA designated agent for the website has the responsibility to respond to the copyright owner and remove the infringing material. Following the process and timelines provided in the DMCA is essential to taking advantage of the DMCA safe harbor provisions.

Another way that the MLS and firms may mitigate copyright infringement risk is to provide limited representations and warranties and indemnification for copyrighted content (see Legal Management Best Practices, page 2).

PATENT LAW

Patent enforcement, including enforcement from patent trolls, can create issues for organizations. “Patent troll” typically refers to a company that owns and enforces patents through litigation, but does not practice (i.e., use) the patent. A patent troll may obtain the patents by assignment from the original inventor seeking a one-time payout, by purchase at auctions where bankrupt companies are attempting to liquidate their assets, or by doing just enough research to suggest they had the idea first. Patent trolls can file lawsuits against infringing companies, or simply hold the patent without using the idea or invention in an attempt to keep other company’s productivity at a standstill. A company that has obtained a patent and uses the idea or invention in its regular business is not a patent troll.

The MLS industry has been plagued by patent trolls for over a decade. Even if the patent has no merit, the MLS can spend hundreds of thousands or even millions of dollars to defend a lawsuit. Because patent litigation is so prohibitively expensive, it may be tempting to just pay a patent troll demand and be done with it. But if the MLS just pays off the patent troll without examining the merits and conferring with legal counsel or the industry at large, the MLS funds the troll's future suits. Also, in such payoffs, the MLS may get a "license" to use the infringing patent, but if the license does not extend to the brokerage firms, shareholders, franchisors, agents, software partners and others, the MLS may still end up paying additional monies, even if indirectly.

On the Offense: The best protection is to take proper measures to minimize the potential of being sued for patent infringement. Negotiate an indemnification for intellectual property infringement from any vendor that is providing products and services. Ensure that the indemnification is clear about what is covered and that said clause covers the MLS employees, shareholders, participants and subscribers. Limit artificial caps on the amount a vendor will pay under the indemnification clause. Getting the indemnification may be difficult, if not impossible. Vendors will typically provide only limited coverage (if at all) and will likely specify that the coverage only applies in cases where the software or product is not altered in any way or combined with another software or product. Additionally, unless the vendor has sufficient resources to defend patent litigation, the indemnification clause has no value.

On the Defense: If an MLS receives a demand letter from a patent troll notifying it of a potential infringement, its first step includes contacting an attorney who is versed in patent law. It is also beneficial to contact the National Association of REALTORS® to inquire as to whether there are other MLSs, real estate associations, or brokerage firms receiving similar letters. Another early step is to contact any vendors that may be providing "infringing software."

If other MLSs, participants, subscribers, or industry vendors are named in a suit or included in a similar suit, there is an opportunity for the industry to form joint defense agreements. A joint defense agreement allows a group of defendants to hire one attorney or legal firm and share the costs of defense. It also has the advantage of facilitating the pooling of "prior art" that may be available. Once sued, an MLS should discuss with its legal counsel whether it is possible to attack the patent under the [Alice Corp vs. CLS Bank case](#). This Supreme Court decision may allow the MLS to bring litigation to a swift conclusion by showing that an issued patent should be invalidated on the grounds that covers subject matter not eligible for patent.

DATA DISTRIBUTION AND TRACKING

Each organization must make decisions about how and when it will license data to its own participants and third parties. Data management is an essential part of the MLS organization. Data management includes everything from who has access to the data, how they get access, how they can use the data, how the MLS tracks and polices usage, and the MLS's strategy regarding syndication. All of the implications and decisions of the organization need to be considered.

Each MLS should have a clear data use policy. Having a policy will make transactions smoother each time the MLS gets a request for a data license. An MLS data use policy should consider participant data uses, such as IDX, VOW, firm internal, and valuations uses; and third-party uses, such as facilitating participant data use, public display, and research. The policy can set forth what data is provided for each use, the basic terms of the use, and the applicable MLS agreement and MLS rules, if any.

The MLS should also consider if and how it will track use of content. The MLS can manually spot check data use, exercise audit rights, and require reporting from data recipients to police data use. Additionally, there are technological measures MLSs can take to track use of the listing data. Third-party vendors can help MLSs track use of content online by tagging listings, photos, data elements, and entire feeds.

Each MLS should consider how it will address suspected unpermitted uses of data. When an MLS finds a violator, a cease and desist option is often the first choice. The MLS should confirm the data use is made without the listing broker's

consent and is not permitted by any applicable agreement with the MLS. After confirming those points, the MLS should work with its attorney to craft a strong demand letter to the party making unpermitted use of listing content. The letter should clearly detail the unpermitted use, the legal remedies at the MLS's disposal, the MLS's requested action, and a timeline. In addition to a potential breach of contract, the MLS will potentially have strong claims for copyright infringement if it owns copyrights in the listing content.

The MLS can also consider turning off the data feed to the offender and verify whether the party making unpermitted use of the data is providing service to any of its participants. If the violator is receiving the data to provide services to participants such as IDX services, contacting the participants directly to explain that the data may be cut off can achieve what a cease and desist letter does not. However, should the participant or the offending party be uncooperative, the MLS may find itself in a dilemma: Should an MLS shut off a data feed if the vendor is in violation of the contract and if doing so would harm the participants' business?

MLSs must also sometimes address participant misuse of data. Most MLSs have rules that will enforce a fine for abuse of the data. Fining the participant or vendor (when possible) is often a better first option than simply turning off the feed. However, if the data abuse is widespread and can be seen as dangerous to the participants, MLSs should consider with legal counsel whether to close access to the data prior to resolution of the problem with the data recipient. The MLS should consult with its attorney before shutting off a data feed because doing so may open the MLS up to claims of breach of contract.

Syndication

Syndication continues to be an evolving subject for MLSs and their participants. It is frequently ill defined and misunderstood. Syndication is simply providing listing-related data to third parties for publishing on their websites. Re-syndication occurs when a third-party publisher transfers the listing compilation to another third-party publisher. Each MLS needs to take all possible steps to ensure the participants have complete and total control over where they choose their listings to appear.

Consumers demand (and will get) real estate-related information. They want to view properties on a wide range of sites, and firms will continue to market on the Internet. NAR has clarified, and most MLSs, that the brokerage firm owns the listing agreement and controls display of a listing outside of the defined purposes of MLS (NAR Policy Statement 7.85). With this in mind, the MLS must decide if its role is to be an educator, facilitator, protector, or all of the above.

MLS can be an efficient mechanism to distribute listings. It is more efficient than each individual attempting to enter into a contract with each third-party publisher, contracting with a technology company to send the data and then policing what that technology company is actually doing with the data. Most do not know what key elements should be considered in a contract with a third-party publisher and which publishers are available. There are many third-party publishers that do not charge and for special advertising, but display the listings with and contact information, resulting in free leads to. A listings management platform provides metrics, delivers broker management capabilities, provides the ability to compare data publishers and policies, and allows choice.

Syndication without the help of the MLS may have several drawbacks. Having syndicate independently penalizes small firms that do not have the facility to send feeds. Additionally, IDX vendors may become syndicators even though they do not have contracts with third-party publishers. The more companies distributing data, the less the data can be protected and controlled. This creates confusion because third parties will take listings from anywhere they can get them; this includes real estate firms, IDX providers, video tour companies, auction companies, foreclosure sources and others. This provides less control of the data. The vast majority of MLSs facilitate syndication on behalf of by providing tools for choice because it greater control greater protection, and decreases the chances of duplicate listings, while creating a standard for data distribution.

The MLS needs to consider if it can or should provide one management platform to transfer all data to third-party publishers. This participants a choice while providing a cost-effective way to manage their listings distribution, negotiate

with third-party publishers directly or contract with a syndicator to do so, define “preferred” publishers that meet a predetermined set of criteria, and track and compare leads from third- party publishers.

Appendix B contains a checklist of issues to address in a syndication agreement (courtesy of NAR). When entering into a third-party agreement with a publisher, these key components should be addressed. Whether:

- data may only be used for consumer display
- there are restrictions on use of listing data for any derivative works or other non-display uses
- data may not be used after the applicable listing is off-market
- content owner maintains all intellectual property rights
- may only display a set of fields as defined by the MLS
- must accept a -authorized, MLS-sourced listing, as the highest ranking listing feed, and cannot overwrite this data with listing data from a third party
- must display the source of the data with attribution to the listing firm and possibly the MLS
- may not re-syndicate or distribute listing data to any third party (publisher may have rights to “power” the search on a third-party site if authorized in the agreement
- must update site daily, at minimum
- must provide notice for any changes to its terms and conditions
- shall abide by any state laws regarding display of real estate content
- must provide metrics for all listings (e.g., page views)
- have the right to opt out at any time (no long-term commitment
- must use the currently supported version of the RETS syndication specification

MLS POLICIES, RULES AND REGULATIONS

MLS policies, rules, and regulations enable real estate competitors to cooperate efficiently toward a mutually satisfactory outcome.

When competitors have agreed to share information and cooperate with each other, it is important that the rules and regulations are fair to all, applied uniformly, and do not give an undue advantage to anyone. Therefore, when considering new rules and regulations, it is important for MLS staff and elected or appointed leaders to consider how the rule relates to the business of the MLS and the real estate participants it serves. MLSs are sometimes caught in the trap of creating rules that are overly restrictive or tend to constrain certain business practices. One need only review the case brought against NAR by the Department of Justice in 2005 (U.S. v. NAR, 2008) to understand the importance of this.

Like any other regulatory system, MLSs tend to add rules rather than remove them. In some cases, adding rules provides necessary clarification, which can be a good thing. Other times imposing new rules adds unnecessary complexity. In either case, the best practice is to implement a defined rules review process that the MLS consistently follows to ensure that the added or omitted rules make sense, are consistent with the MLS’s philosophy and are not contrary to any NAR model rules. In most cases, MLSs will have some form of committee to consider changes in rules and then present those changes to a board of directors for final approval.

When considering proposed changes to the MLS rules, keep these points in mind:

- Modifications to the MLS rules generally cannot be more restrictive than the REALTOR® Code of Ethics or the NAR model MLS rules.
- Sometimes local or state regulations conflict with NAR policy. In such cases, local or state regulations trump NAR policy.
- MLS staff should seek input from NAR member policy department staff and the MLS’s legal counsel before enacting rules that deviate from the NAR model rules to ensure MLS compliance.

Enforcement

Rules enforcement can take many forms, but generally fall into two major categories:

Fines or Rewards

1. Punishment is the best deterrent – crush the violators.
2. Forgiveness is the best incentive – kill them with kindness.

The alternative is balancing fining and forgiveness. For example, an MLS can adopt a policy the first This allows the participant or subscriber to learn the without feeling the MLS is punitive. After all, the MLS should not be looking at its fine structure as a revenue stream. However, there are bad actors who manipulate the rules and break them intentionally for personal gain. For those repeat offenders, monetary penalties are needed to prohibit this conduct. If the MLS can afford it, having a few people dedicated to data integrity is key. Being proactive; reaching out to ,participants and subscribers to educate them; having customer service available to answer their questions; and providing consistent education will reduce violations over time.

Violation from a data integrity software tool and/or the customer relationship management system as well as having a rules committee meet to go over “trends” that are happening so the MLS anticipates the types of rules that may be broken with greater frequency also helps the MLS plan ways to educate and train participants and subscribers so that violations do not occur. Offering a “traffic school” type of rules program for someone who has received one or two warnings can be a good education tactic. For example, an MLS can offer a participant or subscriber a fine reduction (or waiver of the fine) if they agree to take a data integrity class defining and explaining the MLS rules.

Still another approach to rules enforcement is a sort of “rewards program” whereby participants and subscribers who abide by the rules receive some sort of incentive, monetary or otherwise. This fresh approach proactively uses encouragement as opposed to retribution to convert those “bad actors” into “good doobies.”

No matter what method an MLS chooses for enforcement, it is imperative that it enforce its rules and regulations consistently and even-handedly to avoid the appearance of selective enforcement and/or favoring certain participants and subscribers .

NAR Rules Compliance

Most MLS rule changes are brought forth by the NAR. MLSs chartered under NAR policy must adopt the mandatory MLS rules following NAR’s changes and must submit its rules and regulations to NAR at least every two years for a compliance review. Usually, the large MLSs have a dialog with NAR (or join the dialog through organizations like CMLS and COVE), to understand, lobby, and gain a consensus of the proposed rule changes. Small MLSs can have their voices heard as well by submitting letters to NAR and by speaking up at forums at CMLS and biannual NAR meetings. Proper understanding of the implications (positive and negative) a rule change introduces effective communication, fosters efficient implementation for the MLS and encourages greater acceptance by participants and subscribers.

INSIDE COUNSEL VS. OUTSIDE COUNSEL

All litigation matters, intellectual property filings (for the most part), and complex corporate filings, etc. should be handled by outside counsel. If the in-house counsel has expertise in patents, copyright, or a certain type of litigation, it may be acceptable to handle the matters in house. However, it is often times better to pay the premium for outside counsel to handle these matters because if something goes awry, the law firm’s malpractice insurance can cover the MLS. If you do have in-house counsel, they should manage the activities and billing of outside counsel.

Most contracts and administrative hearings can be handled by in-house counsel. They should be able to manage compliance and licensing matters without the need for outside counsel. There are many contracts that in-house counsel can create and manage such as non-disclosure agreements, routine business contracts and amendments to master contracts. Finally, if an in-house counsel has employment law experience, most human resources-related documents, investigations, and compliance issues can be handled in house. Outside counsel should review major vendor contracts or agreements that are outside of the normal day-to-day business.

Making a decision to hire inside counsel depends on each organization's size, revenue, depth, and breadth of legal issues and contracts, as well as how much is being spent on outside counsel. Having experienced inside counsel is better than hiring an inexperienced lawyer at a discounted price. If the organization has mature internal processes or needs to improve internal processes and can spend the money, hiring inside counsel is advisable (allowing processes and compliance to mature further). Most inside counsel can handle multiple tasks for an MLS (HR, legal, compliance, contracts, operations, etc.), as well as some business matters. Most MLSs with 15,000 or more subscribers should have inside counsel based on their revenue and potential legal exposure. For most companies (with annual revenues in excess of \$5 million), having inside counsel is more cost effective than using only outside counsel.

ANTI-TRUST AND THE MLS INDUSTRY

The MLS industry is different than most other industries because competitors (participants) must cooperate with each other in order to serve their customer base. This cooperation can raise potential anti-trust issues. Indeed, both MLSs and their participants have been the subject of scrutiny by the Department of Justice and the Federal Trade Commission, as well as been subject to private lawsuits. Thus, MLSs must be mindful of anti-trust laws in their day-to-day operations.

Anti-trust Laws Generally

The antitrust laws seek to preserve free and open competition in all forms of trade. Therefore, the antitrust laws seek to: 1) prevent any agreements among competitors that restrain trade in a market, or 2) prevent one organization from exercising monopoly power over a market. Examples of anticompetitive conduct that restrain trade include: price-fixing, group boycotts or concerted refusals to deal, market allocations, and tying claims.

Meetings among Participants; MLSs

MLSs should exercise great care when holding meetings among its participants and subscribers. The MLS must not allow or condone any discussions that could be construed as. For example, during meetings of participants, the MLS and its participants and subscribers should avoid discussions regarding commission rates charged by participating firms. Similarly, an MLS must be careful not to have any discussions with other MLSs that could introduce even the appearance of supporting anticompetitive behavior, such as discussing vendor prices or those things that affect MLS pricing.

Issues Relating to Group Boycotts

A group boycott is deemed to exist when competitors agree and conspire to boycott a specific business. As a general practice, executives of one organization should refrain from discussing with an executive of a competitor (or an organization offering similar products and services) combining of efforts to rectify a business practice of another company.

- MLSs have faced scrutiny in connection with group boycott claims when the MLS enacted rules that other firms claim prevent them from competing on the same terms as already established participating firms. For example, rules discouraging brokerage firms based on certain business models, or creating "minimum service requirements" have come under increasing scrutiny from regulators in recent years. Additionally, rules

discouraging Internet-based or other alternative business models have also been the subject of litigation involving MLSs.

- The DOJ/NAR settlement arose from the DOJ's claim that Virtual Office Websites (VOWs) were essentially being denied access to the MLS because of rules that disadvantaged the VOWs.
- Similarly, MLSs have also faced scrutiny from the establishment of rules or guidelines that discourage cooperation between participating firms and firms that are not part of the MLS or part of an affiliated board. MLSs should avoid enacting rules that create such policies.

Issues Relating to Commission Rates

MLSs shall not engage in any conduct that involves the establishment, fixing, recommending, or even suggesting of the commission rates to be charged by participating MLS firms, whether it relates to the entire commission or the commission rate offered to cooperating firms.

The time to learn of parties engaged in anticompetitive conduct is not when the lawsuit is served, or upon receipt of a subpoena from a government regulator. MLSs should avoid enacting policies or rules that would implicate the issues discussed above. It is important to adopt business practices that also prevent the initiation of discussions that could lead to a finding of a group boycott.

from using trade association forums to discuss specific business issues with a specific firm. Use the trade association forums to discuss matters that universally affect joint businesses, but do not affect the overall competitive market.

Potential Repercussions of Anti-trust Violations

It is important to understand the potential repercussions of entering into a group boycott. Both the MLS and its executives can be subject to civil judgments, and potential criminal prosecution. These potential repercussions make it imperative that you always consult with MLS counsel prior to taking any action or enacting any MLS rules that could potentially cause the MLS to be exposed to,

The time to learn of parties engaged in anticompetitive conduct is not when the lawsuit is served, or upon receipt of a subpoena from a government regulator. MLSs should avoid enacting policies or rules that would implicate the issues discussed above. It is important to adopt business practices that also prevent the initiation of discussions that could lead to a finding of a group boycott.

Subscribers should also refrain from using trade association forums to discuss specific business issues with a specific firm. Use the trade association forums to discuss matters that universally affect joint businesses, but do not affect the overall competitive market.

LAWSUITS AND SUBPOENAS

Inevitably, the MLS will experience one of the following scenarios: (1) it will need to make the decision to file a lawsuit, (2) it will be sued and need to defend itself, or (3) it will be brought into a lawsuit as a witness or repository of information.

The most difficult legal challenge confronting an MLS is the process of evaluating the necessity to file a lawsuit. B, there are several factors that should be evaluated during the decision-making process

1. What is the amount in controversy? If the issue is a practice the MLS desires to enjoin, the cost to the MLS of the continuing practice must be quantified. In order to evaluate the business necessity of commencing litigation it is essential to have this factor in order to use the following items and obtain a proper evaluation.

2. How much will it cost? Counsel should be compelled to provide a conservative estimate providing leadership with the worst-case scenario. Clients need to know how much money will be spent on legal costs to evaluate whether there is a cost benefit to commencing litigation. Though competent counsel will have significant experience and understand there are many factors affecting the cost of legal counsel, experienced counsel will rely upon their experience when making realistic estimates.
3. How much staff time will be devoted to the litigation effort? All litigation consumes staff time. This is a real cost to the MLS and must be considered in evaluating the benefits and detriments of litigation. The MLS must weigh the need to litigate with the time lost from current and future projects because the staff is addressing litigation issues.
4. What is the loss of interest factor? It is endemic in the processing of any dispute that the participants will lose interest as new and competing interests arise. At some point in time, it is common for leadership to ask, “Why are we doing this?” This factor should be evaluated early in the dispute process.

When sued, the MLS should immediately contact litigation counsel. Special care should be taken not to destroy corporate records without first consulting with counsel. In consultation and cooperation with counsel, staff should be briefed on what has occurred and what to do when questioned about the litigation. The board of directors should be fully informed by counsel. The evaluation of how to address the litigation should be made in consultation with counsel and leadership, and should consider the factors set forth above.

Every effort should be made to resolve any differences before commencing a lawsuit. It is better to position the organization to take all necessary steps to avoid managed.

MLSs should adopt a risk management program designed to avoid litigation. This includes assuring copyrights, trademarks and other registrations are timely and properly accomplished. All agreements should be carefully crafted and use the skills of legal counsel. Understandings should be confirmed in writing through email or correspondence. Contracts should include “meet and confer” provisions compelling the senior management of the parties to meet before initiating litigation.

The MLS should adopt a policy always a subpoena when a government entity or anyone involved in an investigation, agency action or litigation requests information or testimony from the organization or its personnel. This includes real estate commissions; other trade associations, attorneys; and local, state or federal agencies. Immediately send the subpoena to outside counsel for review. Do not assume that you must comply with a request for information until advised by counsel. Outside counsel advise the organization on what must be provided and on a reasonable timeframe. Counsel may work with the requesting party to narrow the scope of the request so that it is not onerous on the organization and does not require unrelated information. In some cases, the subpoenas are written to obtain information that is beyond the scope of the investigation or lawsuit. Any testimony or information provided should be documented and provided as though the information or testimony may later be used against the MLS.

Every MLS should have a designated staff person to receive any and all legal inquiries. This can be the attorney on staff, the CEO or other designee. There must be a provision in place for what happens when that individual is absent. It is good business practice to only have a discussion with an outside attorney, law enforcement or others with your attorney present or on the phone. To the greatest extent possible, all communications should include counsel to preserve the attorney-client privilege.

INSURANCE

It is essential that every MLS obtain appropriate insurance coverage. A majority of MLSs are affiliated with NAR and are eligible to participate in its insurance program. The NAR program provides professional liability coverage for MLSs that are wholly owned by a REALTOR® association(s) and are in full compliance with NAR policies, including REALTOR® MLSs, regional REALTOR® MLSs, and data warehouses used to aggregate MLS listings from two or more REALTOR® MLSs and can extend to merged or consolidated REALTOR® entities.

The stated purpose of this policy is, "...to provide coverage against losses and/or claims expenses arising out of claims challenging the procedures or operations of the National Association of REALTORS® and associations of REALTORS® when functioning as real estate trade associations, including the provision of multiple listing services." The NAR coverage includes wrongful acts, personal injury or publisher liability (which includes trademark infringement), employment practices and for "all claims resulting from providing membership services and the carrying on of other activities usual to the real estate trade association. The NAR policy provides coverage for defense costs only (attorneys' fees and costs, not liability) for some areas of risk related to MLS services, including claims arising from lock box claims, anti-trust and restraint of trade, trademark and copyright infringement, arbitration services, and breach of contract

With regard to patent coverage, the NAR policy has a \$100,000 deductible for patent claims and only provides coverage for claims stemming from disputes involving products or processes purchased or licensed from a third party that has provided the MLS a hold harmless and indemnity agreement. Thus, it is imperative to negotiate hold-harmless and indemnity provisions in contracts with third-party vendors. Whether provided by NAR or purchased separately, patent insurance premiums and deductibles are expensive and do not provide the depth of coverage that would be ideal. An MLS is better served to take the monies it would spend on this insurance and invest it for the day it is hit with a patent insurance claim. MLSs may find it beneficial to contract for additional insurance over and above what NAR provides.

Anti-trust coverage is a necessary part of the insurance policies of MLSs. The nature of real estate, and the MLS business, requires competitors to work cooperatively together on a regular basis. This type of competitor cooperation can lead to questions of anti-trust violations. Federal and state penalties for anti-trust violations can be very steep, but the cost of defending a suit can be just as expensive.

APPENDICES

Appendix A: Checklist of Issues to Address in MLS Data License Agreements (courtesy of NAR)

This checklist includes a variety of topics and issues that an MLS and its participants may want to address in a licensing agreement with a third-party software vendor. This checklist is not exhaustive, but should provide the MLS and its participants with a good foundation for understanding the terms of such an agreement.

For the purposes of this checklist, the MLS is referred to as “MLS,” the MLS participant is referred to as “participant,” the third-party software vendor as “vendor,” and the data feed provided by MLS as the “licensed data”.

- I. Scope of and Access to Licensed Data
 - a. What is the specific data being licensed by MLS to participant and vendor? Is it clearly and narrowly defined?
 - b. Can MLS change the definition of licensed data, e.g., limit the number of fields or number of listings being provided, during the term of the agreement? If so, must MLS provide notice prior to doing so?
 - c. Does the agreement identify the format and manner in which MLS will provide the licensed data?
 - d. Does MLS reserve the right to change the format and method of delivery of the licensed data?
 - e. What happens if the licensed data is unavailable due to interruptions to or the unavailability of MLS’s servers?
 - f. Under what conditions may MLS suspend or discontinue delivery of the licensed data?

- II. Use of Licensed Data
 - a. Does the grant of license properly describe the manner in which participant and vendor may use the licensed data?
 - b. Is a sample product attached as an exhibit to the agreement, for example, a sample AVM?
 - c. Do the usage terms expressly prohibit use of the licensed data for any purpose other than the permitted use?
 - d. Which website, if any, will feature licensed data or the product, for example, an AVM?
 - e. Is vendor prohibited from using the licensed data to contact property owners?

Pay attention to all key words included in the license and understand their implications. For example: sublicensable versus non-sublicensable; perpetual versus limited; irrevocable versus revocable; exclusive versus non-exclusive; fully paid or royalty-free.

- III. Protection of Licensed Data
 - a. Which individuals will have access to the licensed data? Is vendor permitted to use subcontractors?
 - b. What mechanisms do participant and vendor have in place to prevent unauthorized access of the licensed data?
 - c. How will participant and vendor monitor the security of their systems and the licensed data?
 - d. What steps must participant and/or vendor take in the event of misuse or unauthorized access to licensed data?
 - e. Is participant responsible and liable for any unauthorized access or misuse of the licensed data caused by vendor?
 - f. Which party is responsible for complying with all federal and state privacy and information security laws, including breach notification?
 - g. In what circumstances can participant suspend vendor’s receipt of the licensed data?
 - h. Does the agreement require participant and vendor to acknowledge the MLS rules and agree to be bound by and comply with the rules?
 - i. Does MLS reserve the right to modify the MLS rules at any time? If so, are participant and vendor required to comply with the modified MLS rules within a certain amount of time?

- IV. Intellectual Property and Ownership Rights
 - a. How does the agreement describe the intellectual property and ownership rights of the licensed data?
 - b. Does the agreement prohibit the parties from challenging or taking any action inconsistent with the intellectual property or ownership rights expressed?
 - c. Is participant required to display a copyright notice with the licensed data? If so, does the agreement set forth the appropriate language for the notice?
 - d. Does the agreement require participant to identify MLS as the source of the licensed data? If so, does MLS grant participant permission to use MLS's name or trademark(s)?
- V. Fees
 - a. Is there a fee associated with the license? If so, which party is responsible for paying it?
 - b. Does the agreement require payment in a certain number of days?
 - c. What happens if the fee is not paid?
- VI. Audits and Compliance
 - a. How will MLS and participant ensure compliance with the terms of the agreement?
 - b. Does MLS have the right to audit participant's and vendor's systems to ensure compliance with the license restrictions and security measures? If so, under what terms and with what notice?
 - c. Is participant liable for vendor's breach of the agreement?
 - d. Does MLS have the authority to force participant and/or vendor to investigate and respond to alleged violations?
 - e. What remedies are available in the event the licensed data is used or accessed in an unauthorized manner? May a party seek injunctive relief?
- VII. Confidential Information
 - a. Is confidential information defined within the agreement?
 - b. Does the agreement require appropriate safeguards for confidential information?
 - c. What are participant's obligations in relation to confidential information when the agreement is terminated?
- VIII. Warranties and Representations
 - a. Do the parties warrant and represent that they will comply with all federal and state laws?
 - b. Do participant and vendor warrant and represent that their use of the licensed data does not infringe an intellectual property right of any third party?
 - c. Does MLS provide any warranties or representations regarding the licensed data?
- IX. Indemnification and Limitation of Liability
 - a. Does the agreement require any party to indemnify another party from any claims related to delivery, display, or use of the licensed data?
 - b. Does Vendor agree to indemnify participant from any claims that vendor infringes the intellectual property right of any third party, including patent infringement?
 - c. Does the agreement include a cap on liability?
- X. Term and Termination
 - a. What is the term of the agreement? Does it automatically renew?
 - b. How can the agreement be terminated?
 - i. May MLS or participant terminate the agreement at any time for any reason?
 - ii. May MLS cease providing feeds to participant or vendor at any time for any reason?
 - c. What happens to the licensed data after termination? Is it destroyed?
 - d. What is the time period for compliance with post-termination requirements?

Appendix B: Checklist of Issues to Address in a Syndication Agreement (courtesy of NAR)

Whether a syndication agreement is provided to the MLS, /participant, or /subscriber in the form of a contract or a terms of use page on the syndicator's website, it is imperative for data providers to read the fine print and ask questions. This checklist includes a variety of topics and issues a data provider may want to address with the syndicator. This checklist is not exhaustive, but should provide the MLS, /participant, or /subscriber with a good foundation for understanding the terms of any syndication agreement.

For the purposes of this checklist, the MLS, /participant, or /subscriber providing the data is referred to as "provider," the third party receiving the data is referred to as "syndicator," the content being licensed to the syndicator from the provider is referred to as "licensed content," and the third party that the syndicator re-syndicates or sub-licenses the licensed content to is referred to as "publisher."

I. Licensed Content

- a. What specific data is being licensed by provider to syndicator? Is it clearly and narrowly defined?
Active listings? Sold data?
 - i. Is any of the licensed content confidential?
If so, why is the provider sending confidential information?
 - ii. What are the syndicator's responsibilities with regard to protecting the confidential information?
- b. Can provider change the definition of licensed content, i.e., limit the number of fields or number of listings being provided, during the term of the agreement?

II. Use of Licensed Content

- a. What are the terms of the license restricting syndicator's use of the licensed content?
- b. Do the usage terms narrowly address the specific and limited purpose for which provider is licensing the data? For example, to:
 - i. Access
 - ii. Display
 - iii. Copy or reproduce
 - iv. Transmit or distribute
 - v. Transfer to third parties
 - vi. Create derivative works, products, or services
 - vii. Sell
 - viii. Sub-license
 - ix. Re-syndicate
- c. Pay attention to all key words included in the license and understand their implications. For example:
 - i. Perpetual versus limited
 - ii. Irrevocable versus revocable
 - iii. Exclusive versus non-exclusive
 - iv. Fully paid or royalty-free
- d. Does the agreement prohibit syndicator from using licensed content to contact provider, or provider's participants for marketing purposes?
- e. Will syndicator provide regular reports related to the licensed content on syndicator's website and/or publishers' websites? Such reports may include information about:
 - i. Which listings have been received by syndicator
 - ii. Which ones were rejected or accepted
 - iii. How duplicate listings were handled
 - iv. Traffic to the licensed content

III. Re-syndication or Sub-licensing Licensed Content

- a. Does the agreement prohibit syndicator from re-syndicating or sub-licensing the licensed content to any third party?
- b. Must syndicator get provider's written permission prior to re-syndicating or sub-licensing to any third party?
- c. If re-syndication or sub-licensing is permitted, are the terms and conditions of such activity clearly and narrowly set forth in this agreement?
- d. Who will receive and/or be able to display the licensed content in addition to the syndicator?
 - i. Does provider have the ability to control which parties receive or do not receive the licensed content?
 - ii. Can provider have access to the agreements between syndicator and publishers?
- e. Are the terms of re-syndication or sub-licensing consistent with the terms of the syndication agreement? (e.g., the publisher receiving the licensed content from syndicator does not have any rights to use the licensed content in any manner different from the terms set forth in the syndication agreement between provider and syndicator.)
- f. Do the publishers have any right to use licensed content to create derivative works? For example, can publishers create automated valuation models, research studies, or lead generation products that can be sold?
 - i. If so, how is the licensed content being used, by whom, and under what conditions?
- g. Do the publishers have the right to re-syndicate or sub-license the licensed content?
- h. What mechanisms are in place to ensure that the publishers receiving the licensed content keep the content current? For example, are publishers required to refresh or update data every 24 hours?
 - i. What mechanisms does syndicator have in place to ensure compliance by each of the publishers?

IV. Retaining Rights to and Ownership in Intellectual Property

- a. Does the agreement grant syndicator or publishers any intellectual property rights or interests in the licensed content?
- b. Does syndicator acknowledge provider's rights in and ownership of the licensed content?
 - i. Does the agreement clearly set forth that no intellectual property rights are granted thereunder; provider retains the rights in and ownership of all licensed content?
- c. If the agreement permits syndicator to create derivative works, who owns the rights to such derivative works?
- d. Are syndicator and publishers required to display a copyright notice with the licensed content?
- e. Does the agreement prohibit syndicator or publisher from challenging or taking any action inconsistent with provider's rights to the licensed content?

V. Security of Licensed Content

- a. How will the licensed content be delivered to syndicator? To publisher?
- b. Who has access to the licensed content?
 - i. Employees?
 - ii. Subcontractors?
 - iii. Publishers?
- c. What are the mechanisms that syndicator has in place for protecting the licensed content from unauthorized access? For preventing screen scraping? For detecting data hackers?
- d. What mechanisms does syndicator have in place to ensure compliance by each of the publishers?
 - i. How is the licensed content marked, if at all, for tracking? Tagging? Watermarks?
- e. Are syndicator and publishers responsible for complying with all federal and state privacy and information security laws, including breach notification?
- f. Is syndicator responsible and liable for unauthorized access or misuse of the licensed content by any third party, including publishers?
- g. How does syndicator monitor the security of its systems and the licensed content?

- h. If licensed content is scraped or misused, how will the syndicator respond? What steps will be taken to address and resolve the problem?
- i. Does provider have the authority to force syndicator to investigate and respond to alleged violations?
- j. What is the syndicator's privacy policy?
- k. What is the syndicator's disaster recovery policy?

VI. Display of Licensed Content on Syndicator or Publisher Websites

- a. Are syndicator and publishers required to display the source of the licensed content in proximity to each listing?
- b. How will the syndicator and publisher ensure that the licensed content is kept current?
 - i. When is the data updated or refreshed?
 - ii. Will the date that the listing was last confirmed and updated be displayed with the listing?
 - iii. What happens if a publisher fails to keep the licensed content current? Will the publisher's feed be terminated by syndicator?
- c. What is the process for removing expired or sold listings?
 - i. How does a syndicator enforce compliance of that process against publishers?
 - ii. How can provider request that information be removed from syndicator or publisher websites?
- d. If syndicator receives multiple entries for the same property, which entry takes priority? How is that determined?
- e. Will advertisements for competitors (or non-listing agents) be displayed near provider's licensed content?
 - i. Will provider's contact information be displayed prominently near the listing? Will it be displayed more prominently than competitors'?
 - ii. Does the syndicator's website provide a link to provider's website along with the display of the licensed content?
 - iii. Are the competitors (or non-listing agents) the default (or preselected) choice for consumer contact?
- f. Does the agreement prohibit certain types of content from being displayed near the licensed content? (e.g., offensive, discriminatory, or harassing content.)
- g. Under what conditions may provider suspend or discontinue delivery of the licensed content?

VII. Audits and Compliance

- a. How will syndicator ensure compliance with the terms of the agreement? How will syndicator ensure compliance by publishers?
- b. Are syndicators and publishers required to provide periodic (e.g., every six months) written certification that the licensed content is being used as authorized under the terms of the agreement?
- c. Does provider have the right to audit syndicator's systems to ensure compliance with the license restrictions and security measures? If so, under what terms?
- d. What are the liquidated damages that syndicator must pay provider for unauthorized use or access to the licensed content or for any violation of the agreement by syndicator or publishers?

VIII. Warranties and Representations

- a. Does syndicator warrant and represent that it will comply with all federal and state laws, including state regulations pertaining to real estate professionals?
- b. Does syndicator warrant and represent that its use of the licensed content and that its website and any feature or functionality related to syndicator's website does not infringe an intellectual property right of any third party?

- IX. Indemnification
- a. Does syndicator agree to indemnify provider from any claims related to syndicator's or publishers' display or use of the licensed content?
 - b. Does syndicator agree to indemnify provider from any claims that syndicator or publisher infringes the intellectual property right of any third party -- including patent infringement?
 - c. Does syndicator's obligation to indemnify extend past termination of the agreement?
- X. Amendments
- a. How can the agreement be amended?
 - i. Is syndicator required to provide notice to provider if the terms or conditions of the agreement are changed?
 - ii. Is provider's written consent required for any modification of the syndication agreement?
- XI. Term and Termination
- a. What is the term of the syndication agreement? Does it auto renew?
 - b. How can the agreement be terminated?
 - i. May provider terminate at any time for any reason?
 - ii. May provider terminate feeds to publishers at any time for any reason?
 - c. What happens to the licensed content after termination? Is it destroyed?
 - d. How will syndicator ensure that publishers will be unable to access, use, or retain any licensed content upon termination of the syndication agreement?

Appendix C: Sample Best Practices Checklist for Legal Management

LEGAL MANAGEMENT	YES	NO	COMMENTS
Balance business requirements and legal risks			
Contracts with outside vendors			
Clearly defined products/services			
Timeframes for delivery/consequences			
Indemnification			
Most-favored-nations			
Non-compete			
Exclusivity			
Intellectual property rights			
Automatic renewal			
MLS designated venue			
Standard MLS data licensing agreement			
Protects compilation			
All parties sign			
Clearly defined use			
Tracks IDX sites			
Contracts integrated			
Business units accept responsibility			
Key provisions summarized			
Contract Management			
Start and end dates			
Cancellation timeframes			
Timeframe to begin renewal process (if appropriate)			
Contract type (segment by contract types within the matrix)			
Compliance rules			
Staff responsibility to manage the business contract			

COPYRIGHT PROTECTION	YES	NO	COMMENTS
Formal filing with U.S. Copyright Office			
Listing agreement has seller assign rights			
Firms have agreement with subscribers			
Firms have agreement with third parties			
Firms assign rights to MLS			
Participant's education plan			
DCMA for the MLS			
DCMA:			
– Provided for firms			
– Or firm's education			
DATA DISTRIBUTION AND TRACKING			
Data licensing agreements include			
1. Scope of and access to the licensed data			
2. Use of the licensed data			
3. Protection of the licensed data			
4. Intellectual property rights and ownership rights			
5. Fees			
6. Compliance			
7. Confidential information			
8. Warranties and representations			
9. Indemnification and limitation of liability			
10. Term and termination			
11. Audit rights			
Policy in place for violators			
– Cease and desist letters			
– Clear on when to shut off data			
Tracking capabilities			
Syndication			
Role defined			
– Educator			
– Facilitator			
– Protector			
Key components negotiated			

MLS POLICIES, RULES AND REGULATIONS	YES	NO	COMMENTS
Up to date			
Defined punishment or forgiveness			
ANTI-TRUST			
Policies in place			
Leadership and all employees educated			
LAWSUITS			
Policy in place for providing information			
Subpoena policy			
Attorney consulted			
INSURANCE			
Liability			
Anti-trust			
Umbrella			
E&O			
D&O			
Employment liability			
Cyber liability			
Crime			

Appendix D: Reference List and Contributing Organizations

Reference List

Black's Law Dictionary

<http://immixlaw.com/what-is-indemnification/>
ListHub

Contributing Organizations

California Regional Multiple Listing Service (CRMLS)

CarolinaMLS

National Association of REALTORS® (NAR)

Northwest Multiple Listing Service (NWMLS)

Thomas N. Jacobson, Attorney at Law