

C. MULTIPLE LISTING SERVICES

1. Introduction

Multiple Listing Services are organizations created by, and composed of, real estate brokers who do business in local geographic areas. These organizations function to make information concerning the contracts to sell property ("listings") of each participating MLS broker known to all other MLS brokers.^{229/} Multiples are structured as formal organizations with requirements for membership and participation.

The basic function of the real estate brokerage industry is to match buyers and sellers. In relatively small residential real estate markets, the matching process can be accomplished by an individual broker. In such markets, the number of brokers and the number of houses for sale are sufficiently limited that brokers are able to obtain fairly complete information without the aid of a formal, centralized, market information-sharing mechanism. In larger markets, however, it becomes more difficult for individual brokers to gather complete information about the housing market. MLSs accomplish this necessary market information exchange. With 92 percent of surveyed sellers who used brokers indicating that their properties were listed on the MLS, the importance of these facilities as the primary marketing mechanism in residential real estate is apparent.^{230/}

As facilities which link brokers in a common undertaking, the MLSs significantly affect the performance of the residential brokerage industry. In order to analyze the purposes and effects of these facilities and their various rules and regulations, we first examine the history of the MLSs. We then examine the structure and operation of MLSs; their membership and listing requirements; requirements relating to commission rates, split schedules, and the dissemination of competitive information; and requirements governing the selling of MLS listings.

2. History of the MLSs

a. Introduction

In 1924, the Chairman of the MLS Committee for the California Real Estate

^{229/} NAR, Handbook, supra, note 184, at 7.

^{230/} FTC Consumer Survey Exhibit, Screener Question 13. See Ch. II for an explanation of the relationship between the seller maximizing his price and the buyer maximizing his satisfaction, and the full knowledge of the parties relating to potential buyers and sellers. See also Austin, 70 Colum. L. Rev. 1325, 1329. A.D. Little, in a report commissioned by the NAR, also noted: "In the stated perception of many NAR members, whom we have interviewed, access to the local MLS is the most obvious reason for belonging to NAR, at least in major market areas." A.D. Little, supra, note 80, at 73.

Association characterized the MLS as follows:

The multiple listing service, the new system of conducting the real estate business, is a radical departure from the old system, or no system, as has been and still is practiced by those who have not adopted it. In order to understand this system, we must examine some of the things that called it forth. Some of the things that were making a joke out of the business, instead of raising it to the high plane where it rightfully belongs. Competition was increasing to the extent that it was very difficult to get a real listing on any property. An exclusive listing was almost a thing of the past, and a signed listing was getting to be a scarcity.^{231/}

While brokers had been cooperating on an informal basis for some time,^{232/} the MLS had a number of advantages, including efficiency and the elimination of much competition. Where successfully organized, it proved to be "exceptionally profitable to both the member and the [local Board of Realtors]."^{233/}

b. Chronology

The exchange by brokers of housing information has taken place for many years. Early real estate "exchanges," later to become known as "Boards," accomplished this function by providing a place where the local brokers could meet, usually once a week, and announce to other brokers what listings they were offering for sale.^{234/}

Shortly after the turn of the century this exchange function was reduced to a system of distributing the written listing information from a central office. The term "Multiple Listing" was first used to describe this new, more formal system in 1907.^{235/}

MLSs developed very rapidly in the 1920's. However, while many multiples were formed during this time, they were not all successful. The most successful multiples were associated with the well-organized Boards.^{236/}

^{231/} H. Nightingale, California Real Estate (April 1924), at 12.

^{232/} Before MLSs, interchange of information was often limited to friends because of problems associated with open listings. See section l.c., below. See also California Real Estate (November 1925), at 23.

^{233/} H. Nightingale, "Multiple Listing Conference Report," California Real Estate (November 1925), at 23.

^{234/} See Ch. IV, Part A. See also NAR Handbook, supra, note 184, at 7.

^{235/} NAR Handbook, supra, note 184, at 7.

^{236/} H. Nightingale, California Real Estate (October 1926),
(Continued)

After a lull of activity during the 1930's, MLSs again began to increase in importance during the post-World War period. As late as 1950, however, MLSs represented significant sales sources only in some large urban areas.^{237/} In 1950, a National Association survey indicated that roughly 50 percent of brokerage offices still accepted both exclusives and open listings. Open listings, generally not accepted by MLSs, were, therefore, still quite common.^{238/}

In comparing the real estate office of 1953 with that of 1977, Professor Fred Case of UCLA concludes that perhaps the most important change relates to MLS membership. By 1977 an average of 93 percent of firms were members.^{239/}

A 1973 study of Dr. R. Erler found that virtually all Boards of Realtors and all Board members in urban areas had access to MLSs. Furthermore, the firms that did not participate in the MLSs were usually not the large firms, but were smaller, single-office firms. While the study did not focus on why these firms did not belong, some appeared to be concentrating on other than residential sales. Non-member firms were unable to demonstrate that they were more successful or profitable because of their non-member status. Those large non-MLS brokers examined had noticeably fewer sales per salesperson than did the large MLS-member brokers.^{240/}

By the late 1960's and early 1970's, MLSs had been named in a number of private antitrust actions and Justice Department investigations. Justice Department investigations culminated in 15 consent orders banning price fixing and other alleged anti-competitive activities. In response to these legal problems, the National Association of Realtors developed and enforced a list of policy points. The NAR's November 15, 1971 statement, setting out and mandating these policies on the Realtor MLSs, is referred to in the industry as the "Fourteen Points." In explaining to the Association members why the Fourteen Points had become necessary, the Chairman of the National Association's MLS Policy Committee summarized the importance and growth of MLSs as follows: "Marketing experts tell us that the greatest problem in our economic system is the complication in the buyer search. MLS has served this problem well. . . ." While sharing of listings had been around since the 1880's or 1890's in some form, "the impact has been dramatically felt in the residential field for the last 25 years. MLS has in most areas of the country become a way of life both for the home owner and the broker."^{241/}

at 26.

^{237/} Case Report, supra, note 57, Part 3, at 13.

^{238/} M. Lee, Director, Visalia Multiple Listing Service, Chairman, Farms Land Division, California Real Estate Association, California Real Estate (September 1952), at 22.

^{239/} Case Report, supra, note 57, Part 3, at 15; source: NAR survey of firms.

^{240/} R. Erler, Assistant Professor of Finance, University of California, "The Role of MLS in Real Estate," California Real Estate (February 1973), at 34.

^{241/} C.L. Hoag, "Multiple Listing Service Developments," California Real Estate (April 1972), at 4.

c. The Original Reasons for and Effects of Multiple Listing

(1) Open Listing Competition

(a) In General

The concept of multiple listing was based upon the need to devise an efficient method for marketing exclusive listings. With an exclusive listing only one broker had direct rights and incentives to sell the house. By the 1920's, however, sellers had become aware of the advantages of obtaining exposure through many brokers. For this reason exclusive listings had become nearly impossible for brokers to obtain. The open listing was the general rule.

From the broker's point of view, open listings were associated with a number of problems. These problems related to competition among listing brokers, competition with sellers, and duplication of effort by brokers.

(b) Listing Broker Competition

Competition among brokers due to the open listings was associated with two somewhat distinct phenomena.

First, commission cutting by brokers had become a common method of inducing sellers to list with and sell through such brokers. Multiple listing and the exclusive listing contract "solved" this problem wherever they were "applied as remedy and faithfully practiced."^{242/} This is discussed in section (4), below.

Second, competition among brokers was associated with the inability to cooperate in marketing listings. Brokers with open listings were reportedly afraid to tell other brokers about properties for fear that these other brokers would go straight to the sellers.^{243/} Furthermore, even if brokers did want to cooperate, there allegedly were frequent disagreements over how a broker originally received information relating to a house for sale and over how any resulting commission should be divided — broker A might allege that broker B got the information from him or her, while broker B might insist that the information came straight from the seller. Finally, with open listings as opposed to exclusives, no particular broker was absolutely assured of a commission upon sale. Any one of several competing brokers might spend time, effort, or funds to advertise and promote sale of a property, claim to be the sole procuring cause of a sale, and try to claim the entire commission. But the seller might claim that he or she had found the buyer on their own. The general use of open listings was, therefore, believed to make both cooperation and predictable success in obtaining a commission very difficult.^{244/}

The MLSs and exclusive listing agreements, when used together, reduced the problems presented by unfettered competition. With an exclusive listing, only one broker could claim the commission. Other brokers could not work directly

^{242/} H. Nightingale, California Real Estate (April 1924), at 12.

^{243/} H. Nightingale, California Real Estate (May 1923), at 29.

^{244/} H. Alleman, CREA Honorary Director, "Exclusive Listings," California Real Estate (September 1952), at 23.

with the seller. Cooperation of other brokers with the exclusive listing broker (someone with whom they could anticipate dealing cooperatively on many different future sales and therefore with whom they could establish an ongoing professional relationship) was the basis of the new marketing system.^{245/} "They have replaced the old spirit of competition for one of cooperation, and it has brought peace where there was strife, and harmony where discord reigned."^{246/}

(c) Seller Competition

Open listings were also associated with competition with the seller. Substantial numbers of sellers at that time were making direct sales to buyers even after listing their homes with a broker who spent time and effort to sell it.^{247/} The MLSs and the exclusive-right listing agreement helped to stop this. The MLSs would accept only exclusive-right listings, and the exclusive-right listings most brokers came to insist upon in most transactions guaranteed the broker a commission even if the seller procured the buyer.^{248/}

(d) Duplication of Effort

Open listings sometimes might be given to as many as 20 brokers. Many of these brokers might spend time trying to sell the property only to find that they could not deliver the property to a prospective buyer. Either the property had been sold, withdrawn from the market, or the price had gone up. Listings were considered the broker's inventory, the stock on his shelves. Open listings, however, were analogized to perishable goods. A broker had no certainty that they would remain viable, saleable listings.^{249/}

This waste of time and the inability to deliver properties even if purchasers were found are problems which brokers still associate with open listings.^{250/} The exclusive contracts required by most MLSs eliminated these

^{245/} H. Nightingale, California Real Estate (March 1923), at 37.

^{246/} H. Nightingale, California Real Estate (April 1924), at 12.

^{247/} H. Nightingale, California Real Estate (March 1923), at 37.

^{248/} See Section 5.c., below, relating to MLS listing requirements.

^{249/} See, e.g., H. Nightingale, California Real Estate (November 1924), at 34.

^{250/} J. Westrom, Chairman, Southwest Branch, Los Angeles Realty Board, California Real Estate (April 1928), at 38. In both this country in the past, and in Great Britain today, where exclusive listings and open listings compete in the absence of MLSs, the exclusives are associated with lower commission rates due to the lack of wasted work. On the other hand, in Britain consumers still prefer opens to exclusives. See Ch. IV.G. and Appendix E.

perceived problems by binding the seller to a specific listing period and a specific price.^{251/} Further, with an exclusive, the listing broker receives so protection from other brokers and from the seller. Even if another, cooperating broker or the owner sells the listing, the initial, listing broker will receive substantial portion of the commission.^{252/}

(2) Making a Market

While the individual brokers may have been primarily concerned with the competitive problems associated with open listings, sellers appear to have preferred open listings. Sellers at the time appeared to be well aware of the advantages of maximum exposure of their properties. With no MLS, open listings allowed sellers to substantially increase exposure on their properties. However the market was so fragmented that, even with open listings, both sellers and buyers faced the inconvenience of trying to deal with many brokers and the uncertainty of not knowing whether they were reaching the entire market. One of the primary selling points of the MLS system for buyers and sellers was the convenience of being able to reach the "entire" market by dealing with only one broker.^{253/}

The market-making function was especially important for the smaller broker. In fact, some commentators at the time felt that it was a saving factor for such a broker. Some felt the small broker could not continue to survive without the MLS.^{254/} In a fragmented market, large brokerage offices are presumed to have an advantage because of their size. With each firm being, in effect, an independent market, those with the largest inventory have the best chance of having an appropriate property for a particular buyer.^{255/}

If the smaller, or less efficient broker was at a disadvantage relative to the large broker under the open listing system, the lack of a system for sharing listings also made it difficult to persuade the public to grant exclusive contracts. Sellers would never give exclusives to a firm without some assurance of adequate exposure. The small broker, with a small sales force, would have little hope of persuading sellers that properties would get adequate exposure without the MLS, and very few individual firms in very few markets were likely to be large enough to overcome the perceived advantage of giving an open listing to

^{251/} NAREB, Annals of Real Estate Practice, Volume II (1926), at 347.

^{252/} Note, cooperating brokers still face a situation similar to that presented by open listings. A cooperative broker may spend substantial time and effort on a property only to find that some other cooperating broker has just sold the listing.

^{253/} NAREB, Annals of Real Estate Practice, Volume II, (1925), at 350.

^{254/} J. Westrom, California Real Estate (April 1928), at 38.

^{255/} O.C. Gould, Secretary, Oakland Realty Sales Association, Inc., "The Benefits of Multiple Listing to the Individual Board Member," California Real Estate (May 1925), at 44.

each of many firms. With the MLS, however, not only could the small broker assure the seller of adequate exposure, but the small broker could claim that he was able to give the same exposure as the larger offices. The small broker could assure the seller that, in theory at least, the entire system was working for the seller,^{256/} and the scale efficiencies of larger firms could, at the same time, largely be "merged" out of existence. Where the MLSs were successful, not only did they make possible the obtaining of exclusive listings by small firms, but obtaining them became relatively easy.^{257/}

The market-making effect of the MLSs probably exceeded even the founders' expectations. Real estate listed on MLSs became much easier to sell.^{258/} Brokers using the MLS found that fewer property owners tried to sell on their own and brokers, therefore, were listing many more properties.^{259/} When the public learned of the advantages of the MLS, they allegedly often insisted upon it.^{260/} One investigation of the MLS system of selling concluded that use of the MLS doubled the probability of a property selling, and the perceived value of the MLSs often was reflected in a practice of charging a 1 percent higher commission rate when the MLS was used.^{261/}

(3) Information on Housing Prices

The MLS, by accumulating in one place information relating to all of the houses for sale in an area, created an excellent centralized source of information regarding housing values.^{262/} Many brokers have expressed the opinion that MLSs might be worthwhile for this information alone.^{263/}

The superiority of the housing information provided by the MLSs gave brokers

^{256/} J. Westrom, California Real Estate (April 1928), at 38.

^{257/} A. Kern, Vice President, California Real Estate Association, "Multiple Listing and Exclusive Agency in California," California Real Estate (January 1923), at 49; H. Nightingale, California Real Estate (October 1926), at 26.

^{258/} A. Kern, California Real Estate (January 1923), at 31. See also Florida Association of Realtors, Real Estate Research Project No. 5, Multiple Listing, 1964 through 1965, NAR Library (hereinafter cited as "Florida Survey"), at 47.

^{259/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 349-353.

^{260/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 351.

^{261/} K.L. Dowling, A Study of Multiple Listing, Real Estate and Stock Institute of Australia, NAR Library, at 46.

^{262/} H. Nightingale, California Real Estate (October 1926), at 26; NAREB, Annals of Real Estate Practice, Volume II (1926), at 353.

^{263/} Florida Survey, supra, note 258, at 50.

another tool by which they could persuade sellers not to try selling on the but instead to list their properties with brokers. As one broker wrote in 1925, "if we are to meet direct dealing successfully, it is desirable to pool all of our knowledge so that every Realtor may know infinitely more about value and trends than the readers of the daily papers."^{264/}

(4) Commission Rates

An explicit purpose of the MLSs in the 1920's was to ease the price competition among brokers that was associated with open listings. As we have noted, the MLS is a means of lessening the competitive advantages of larger firms. The MLS also appeared to be a most successful tool for stabilizing commission rates.^{265/} The Chairman of the California Association's Multiple Listing Committee, in reviewing the progress of multiples in California in 1924 for example, discovered that the San Francisco Board, which felt that multiple listing was a panacea, nonetheless was not taking full advantage of its MLS:

I was . . . surprised to find that they were working on an inadequate commission for services rendered. The commission for sales on all multiple listing contracts should be 5%, no more and no less. . . . The service rendered through the multiple listing is well worth that fee. It should be one of the main objects of the multiple listing service to establish this rate of commission every place where it is in operation, and it is the only agency that we have at present that will be able to do it.^{266/}

While the multiples may have had many advantages, no doubt the most important inducement for brokers to join the multiple was that they were "exceptionally profitable."^{267/}

^{264/} O.C. Gould, California Real Estate (May 1925), at 44.

^{265/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 352; H. Nightingale, California Real Estate (November 1925), at 23, California Real Estate (October 1926), at 26, California Real Estate (April 1924), at 12; NAREB, Annals of Real Estate Practice, Volume II (1926), at 345.

^{266/} H. Nightingale, California Real Estate (March 1924), at 41.

^{267/} H. Nightingale, California Real Estate (November 1925), at 23; NAREB, Annals of Real Estate Practice, Volume II (1925), at 350.

(5) Advantages to the Board

Establishing MLSs provided a number of advantages to the Boards of Realtors. First, the MLS fees, especially in the large cities, generated revenues in excess of costs. This provided a new source of financing for the Boards.^{268/}

More importantly, the MLSs, as services provided by the Boards, made the Boards much more valuable to brokers. As one broker stated in 1926, the MLS "changes the Board from a social organization to a business organization as well, operating for the financial betterment of its members."^{269/} Before the MLSs, many Boards had problems recruiting members.^{270/} Some multiple listing officials and industry commentators have expressed the opinion that without the MLSs, the brokers' associations would not exist.^{271/} With control of the MLSs, the Boards gained more control over practices in the real estate business.^{272/}

(6) Cooperation and Ethics

Increased cooperation among Board members was widely considered to be one of the primary benefits of multiple listing.^{273/} The multiple listing system was felt to shift the basis of the business from competition to cooperation. The system created a "bond of mutual interest," which in turn facilitated cooperation.^{274/} The MLS was called "[t]he cement that has bound together the membership.... The cooperation that this system calls for has changed the spirit of the membership from one of 'Each for Himself,' to 'Each for the Other.'"^{275/}

^{268/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 350; NAREB, Annals of Real Estate Practice, Volume II (1926), at 352; California Real Estate (November 1925), at 23.

^{269/} H. Nightingale, California Real Estate (October 1926), at 26.

^{270/} H. Nightingale, "Multiple Listing Makes More Sales for Members So Organized," California Real Estate (May 1923), at 29.

^{271/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 352.

^{272/} NAREB, Annals of Real Estate Practice, Volume II (1926), at 352.

^{273/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 353; NAREB Annals of Real Estate Practice, Volume II (1926), at 352.

^{274/} H. Nightingale, California Real Estate (March 1923), at 37.

^{275/} H. Nightingale, California Real Estate (May 1923), at 29.

Many brokers at the time felt that the MLS, with its binding together of the membership, did more than anything to improve ethics. In the case of Realtors, ethics are, in part, rules aimed at facilitating cooperation.^{276/}

d. Analysis of MLS History

The development and growth of the MLSs appear to have had a substantial effect on the residential real estate brokerage industry. While making the market for houses more efficient in terms of the availability of housing information, the MLSs also appear to be associated with substantially reduced competition in several respects. The reduction of the competition associated with open listings, including price competition, was one of the primary purposes and effects of the MLSs, according to their Realtor-founders.

The founders clearly understood that the MLS changed the basic character of the industry. The MLSs made each local brokerage industry a single, cooperative marketing system. Furthermore, control of the MLS system substantially increased the ability of the associations to regulate brokerage practices.

While the practices and restrictions imposed by the MLSs today may be different from those in the 1920's, the history of the MLSs, as stated by the Realtors who early founded them, gives valuable insight into the power and importance of the MLSs in today's residential brokerage industry. The Realtors' journals indicate that the early MLSs had the power to raise and maintain commission rates. Furthermore, the MLSs were considered by at least some of their founders to be the only tool available to brokers which could accomplish this.

3. MLS Structure and Operations

a. FTC Survey

In December of 1979, the staff of the FTC's Los Angeles Regional Office mailed a survey questionnaire, prepared in cooperation with the National Association of Realtors, to all readily identified MLSs in the United States. These included 931 Realtor-affiliated MLSs, identified by the NAR in its Who's Who - 1979, and 55 independent MLSs.^{277/} The FTC received over a 30% response from these MLSs.^{278/} The tabulated results of this survey, in addition to

^{276/} NAREB, Annals of Real Estate Practice, Volume II (1925), at 353.

^{277/} Most independent MLSs (45) were identified by counsel for the Northwest Council of Multiple Listing Services, an association of independent MLSs. Additionally, numerous calls were made to brokers and other industry sources in cities where brokers, industry literature, cases, Realtor contacts, or other leads indicated an independent MLS might exist. We found a total of 55 independent, non-Realtor MLSs.

^{278/} By the end of July 1980 a total of 328 returns had been
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information from the NAR and from in-depth interviews conducted by the staff, provide a relatively comprehensive profile of MLS operations.^{279/} Because of the central role played by the MLS, the results of the survey also provide a relatively complete profile of residential real estate brokerage in the country.^{280/}

b. MLS Ownership

MLSs generally have been formed under two types of ownership structures. Ninety-four percent of the MLSs located for the Los Angeles Regional Office survey were affiliated with a Board. These "independent" MLSs were, however, still owned and controlled by local real estate brokers.^{281/} Furthermore, most of these brokers were also Realtors. Thirty-five percent of the independent MLSs required Realtor membership in order to participate in the MLS.^{282/} For the multiples which did not require Realtor membership in order to participate, whether or not they were affiliated with a Board, 89 percent of participating brokers were nevertheless Realtors.^{283/} Most of the independent MLSs also conformed their by-laws, rules, regulations, and policies to NAR guidelines.^{284/}

The percentage of MLSs that are independent as opposed to Realtor-affiliated may be decreasing. An A.D. Little study commissioned by the NAR noted an

received. This is a 33% response for the total survey. These include 300 Realtor MLSs (32% response) and 28 independent MLSs (51% response). Because of late returns, some tabulations were based on a smaller number of returns. However, in no case are statistics based on a sample smaller than 270 (29% response).

^{279/} Staff report, Multiple Listing Survey, contains further details relating to the FTC MLS Survey.

^{280/} The FTC Consumer Survey found that 92% of sellers who utilized brokers had their property listed on an MLS. Screener Question 13.

^{281/} Seventy-nine percent of independent MLSs surveyed indicated that they were member-owned. MLS Survey Question A.6.a. See also City Summaries of Seattle and Los Angeles.

^{282/} MLS Survey Cross Tab A.3., I.6.

^{283/} For MLSs accepting non-Realtors as participating brokers, the mean number of non-Realtor participating brokers was 13. MLS Survey Question I.7. For the entire sample, the mean number of total participating brokers was 122. MLS Survey Question I.3. Assuming that MLSs which allow non-Realtors are, on average, the same size as those which do not allow non-Realtors, the mean percentage of non-Realtor participating brokers in MLSs allowing such would be 11%.

^{284/} Thirteen of the 15 independent MLSs responding to MLS Question A.7. indicated that they so conform. MLS Cross Tab A.3., A.7.

increase in the number of Board-affiliated MLSs at the expense of the independent MLSs, and projected that the trend of independents converting to Board-affiliated would continue.^{285/}

The NAR strongly recommends that Board-affiliated MLSs be operated as committees of the Board. However, if a Board believes that its MLS, a service designed to help individual members as opposed to improving business conditions generally, may be its "primary" activity as opposed to simply an "incidental" activity, then it is preferable to operate the MLS as a wholly-owned subsidiary in order to preserve the Board's tax-exempt status.^{286/} Twenty-seven percent of the surveyed MLSs were operated as wholly-owned subsidiaries of the affiliated Board of Realtors. Seventy-three percent were operated as committees within the Board structure.^{287/}

MLSs generally are financed by means of fees paid by member brokers. These usually include initiation fees, periodic membership fees, and use fees charged on a per-listing basis.^{288/}

c. Service Area

Realtor MLSs collect, correlate, and disseminate information relating to areas which are, at a minimum, equal to the geographic boundaries of the affiliated Boards. In addition to property located within the Board territory, 98 percent of MLSs surveyed accepted listings of property outside of their areas.^{289/}

MLSs rarely compete with each other. Realtor MLSs, following the jurisdictions of their affiliated Boards, do not have overlapping territories, and Realtors historically have tried to have one Board per city. Today, however, some large, multi-city metropolitan areas are served by numerous, but territorially distinct Boards and MLSs.^{290/} Because the Realtors require reciprocity only between contiguous MLSs,^{291/} broker access to an MLS in a

^{285/} A.D. Little, supra note 80, at 53.

^{286/} See NAR Handbook, supra note 184, at 25-27; Evanston-North Shore Board of Realtors v. U.S., 320 F.2d 375 cert. denied, 376 U.S. 931 (1963).

^{287/} MLS Survey Question A.3., A.4.b.(2); 247 MLSs indicated Board affiliation, and 66 (26.7%) indicated that they were wholly-owned subsidiaries. A 1973 NAR survey of Boards also found 27% to be wholly-owned subsidiaries. All Realtor-affiliated MLSs are operated either as committees or as subsidiary corporations. Report of Interview with William North (September 24, 1979).

^{288/} See section 4.e., below, for further discussion relating to MLS fees.

^{289/} MLS Survey Question H.6.

^{290/} See, e.g., Los Angeles City Summary.

^{291/} Report of Interview with William North (September 24, 1979).

jurisdiction in which his firm has no office may be difficult.^{292/} Occasionally, independent MLSs will overlap the territories of Realtor MLSs, but studies of areas where there is overlap among MLSs have found this had little or no effect on the brokerage practices within those areas.^{293/}

d. 1978 Sales and Membership Statistics

Our MLS survey asked a number of questions relating to 1978 sales and membership figures. The highlights of these statistics will be reviewed in this section.

The MLSs surveyed showed a tremendous range in size. The number of listings disseminated by surveyed MLSs in 1978 ranged from 13 to 64,500. The mean was 5,871 and the median was 2,869 listings disseminated.^{294/}

Of MLSs surveyed, the mean number of disseminated listings that were sold in 1978 was 2,919. The median was 1,450.^{295/} The mean dollar amount of home sales for MLSs surveyed was \$155 million.^{296/}

Most sales on the MLSs were cooperative sales, involving two or more participating MLS firms. The mean percentage of sales involving two different firms was 52%.^{297/}

The MLSs also reported their average selling time. The time period measured was the time that it took between a home being listed and being reported as sold. The mean selling time for those surveyed was 65 days.^{298/}

The selling price of homes listed on the MLSs was generally 94 percent of the last listed price.^{299/}

^{292/} See MLS Survey Question J.1.c.

^{293/} See e.g., Los Angeles City Summary. West Los Angeles is served by both Realtor MLSs and by the independent United Multiple Listing Service.

^{294/} MLS Survey Question B.1. The numbers of listings indicated above somewhat exaggerate the actual numbers of houses for sale. Often a home will be relisted two or more times. The MLSs do not distinguish a relisting from a new listing. Report of Interview with William North, NAR Counsel (September 24, 1979).

^{295/} MLS Survey Question B.3.

^{296/} MLS Survey Question B.5.

^{297/} MLS Survey Question B.6. Because many large firms have in-house cooperative sales which would not be measured as co-op sales by the MLS, overall co-op sales involving two different brokers, as opposed to firms, are substantially higher.

^{298/} MLS Survey Question B.7.

^{299/} MLS Survey Question B.8. Homes may be listed more than once. Often, they are relisted to lower their price because
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The MLSs were also asked to provide membership statistics. They reported a mean number of participating firms of 115. The median was 74.^{300/}

The number of offices participating in the MLS, because of multi-office firms, was slightly more than the number of firms. The mean number for reporting MLSs was 125 offices. The median was 78.^{301/} The mean number of sales associates affiliated with those offices was 573. The median was 300.^{302/}

The MLSs were also asked to indicate trends for the years 1976 through 1977 relating to various membership and sales statistics. Over 60 percent of responding MLSs reported moderately increasing memberships and numbers of listings disseminated.^{303/} Forty-seven percent of responding MLSs indicated that the percentage of disseminated listings that were sold was moderately increasing. Thirty-seven percent felt that it was about the same as before.^{304/} The percentage of sales which were cooperative sales was reported 35 percent of the MLSs to be moderately increasing, and was reported by 53 percent of the MLSs to be about the same as before.^{305/}

e. Format of Information Collection and Dissemination

MLSs generally collect listing information from members by having those members submit copies of the listing contracts or property data forms which are completed by the member broker. Sometimes both the contract and the form will be submitted, and sometimes the form is part of a standard listing contract submitted by the MLS. Among MLSs surveyed, 77 percent required participants to submit their listing contracts for those listings to be disseminated by the MLS, and 9 percent required submission of property data forms.^{306/}

Of MLSs surveyed, 78 percent distributed information relating to listings in the form of a book. These books were generally distributed to the membership on a weekly basis.^{307/} Many MLSs also used loose-leaf notebook systems where only

they did not initially sell. The 94% figure does not include these initial, higher listing prices.

^{300/} MLS Survey Question I.1. The mean number of "participating" brokers was 122. The median was 76. MLS Survey Question I.3. MLSs generally require one "participating" broker per firm regardless of the size of the firm. However, a firm organized as a partnership will often list each partner as a participating broker.

^{301/} MLS Survey Question I.2.

^{302/} MLS Survey Question I.4.

^{303/} MLS Survey Questions C.1 and B.2.

^{304/} MLS Survey Question C.3.

^{305/} MLS Survey Question C.4.

^{306/} MLS Survey Question H.7., H.10.

^{307/} MLS Survey Question G.1.a., G.2.

the new listing sheets were distributed to members. It was also common to have supplemental sheets for new listings.

Twenty-seven percent of the surveyed MLSs indicated that computer terminals were available to the members. These terminals allow a member to access information immediately from the member's office.^{308/}

Ninety-one percent of the MLSs directly or indirectly distributed to their members information relating to sales prices.^{309/} These "sales summaries" or "comparable sales" were often distributed on a quarterly basis.^{310/}

For Realtor MLSs, the compilation of the sales information and the distribution of the comparable books is usually done by the affiliated Board. The statistics, however, come from the MLS.^{311/}

f. Analysis of MLS Structure and Operations

The statistics relating to the structure and operations of the MLSs are somewhat self-explanatory. While these statistics raise few issues directly, some general comments relating to the extent of Realtor control of MLSs are in order.

It is apparent from the high percentage of Realtor-affiliated MLSs that the Realtors' associations control, to a significant degree, the practices of the MLSs. The MLSs and the Realtors are, to a large extent, the same organizations. At the same time, both of these organizations are simply joint ventures of the local brokers, and the local brokers can, if they so choose, establish independent MLSs to avoid having to conform to any unpopular Realtor standards.

4. Membership Requirements of MLSs

a. In General

All MLSs have membership requirements — usually contained in by-laws, rules, or regulations — which can have the purpose or effect of eliminating dishonest brokers, setting minimum professional standards, or standardizing contract terms and other broker behavior.

In this section we will discuss those requirements that are not apparently necessary to the operation of the MLS and that have either an apparent anticompetitive effect, or have been alleged by alternative brokers or others to have been used from time to time in an anticompetitive manner.

^{308/} MLS Survey Question G.1.e.

^{309/} MLS Survey Question G.5.a.

^{310/} Thirty-four percent of MLSs reported a quarterly distribution; 20% reported a weekly distribution. These were the most frequent periods reported. MLS Survey Question G.6.

^{311/} Report of Interview with William North, NAR Counsel (September 24, 1979).

b. Board of Realtors Membership

(1) Description of Condition

For Board-affiliated MLSs, Board membership is generally a requirement for participation in the MLS. For most MLSs the membership requirements for the ML are the same as the membership requirements for the Board of Realtors.

The NAR has an eight-point set of membership criteria that establishes the most rigorous qualifications a Board of Realtors may require of an applicant for active Realtor membership. These membership criteria, adopted in 1974, were developed in an effort to establish "reasonable and non-discriminatory written requirements for membership."^{312/} The basic requirements are as follows:

- (1) "A valid real estate license (and actively engaged in the real estate business and its recognized branches). . .
- (2) "A place of business within Board jurisdiction. . .
- (3) "A place of business in compliance with local zoning regulations. . .
- (4) "A favorable business reputation in the community. . .
- (5) "A sound credit rating. . .
- (6) "Completed the Board indoctrination course. . .
- (7) "Signified his intention to abide by the National Association of Realtors' Code of Ethics. . .
- (8) "Signified his intention to abide by the Constitution, Bylaws, Policy, and Rules and Regulations of the local Board, the state association, and the National Association of Realtors."^{313/}

The NAR Membership Policy and Procedures Manual provides definitions of the terms "actively engaged," "favorable business reputation," and "sound credit rating." It also recommends that each Board seek a court declaratory judgment affirming its decision whenever the Board declines to accept an applicant on the basis of these qualifications.^{314/}

Often the Board membership requirements which may restrict use of the MLSs are imposed also by non-Realtor MLSs. They are discussed as separate MLS requirements below. Certain of the Code of Ethics provisions and Rules and Regulations of the Realtors that affect MLSs are also discussed separately in the next sections as listing and selling requirements of the MLSs.

^{312/} NAR, Membership Policy and Procedures Manual (1973), at 44.

^{313/} Id. at 44-45.

^{314/} Id. at 45.

While Realtor MLSs generally require Board membership, there are exceptions. In California, the courts have opened Realtor MLSs to non-Realtor licensees.^{315/} In addition to the California MLSs, approximately ten percent of the Realtor MLSs outside of California that responded to our MLS survey indicated that they allowed non-Realtors to be participating brokers.^{316/} California, however, is the only jurisdiction in which participation by non-Realtors in Realtor multiples is widespread.^{317/}

(2) Analysis of Condition

Whether Realtor membership is a reasonable condition to MLS access has received considerable attention in the courts and in the legal literature. It is clear that whether or not Realtor membership per se is a reasonable requirement does not answer the question of what specific requirements aid -- as opposed to suppress -- competition. As pointed out earlier, Realtor membership itself consists of many requirements, some of which are also common to non-Realtor MLSs.^{318/} These are analyzed separately below.

In addition to MLS-related membership conditions,^{319/} there are elements of Board membership which have no apparent relation to the MLS. For example, there are Board dues which are allocated to functions other than the operation of the MLS. Other requirements, such as a sound credit rating and reputation, and a required indoctrination course, appear not to relate directly to the efficient operation of a MLS, but to set quality and ethical standards in addition to those already established by the state real estate licensing laws.

If interdependence among competitors accounts for any performance problems that may be observed, then membership requirements which increase that interdependence may deserve scrutiny. The requirements imposed by the Realtors which are in need of close scrutiny are those which may lessen head-to-head competition and create a mechanism for possible coercion against deviations in competitive behavior by specific brokers. A requirement of arbitration before a panel of competitors arguably might fit this description. That requirement is discussed in greater detail in section d. below.

^{315/} Marin County Board of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (1976); Glendale Board of Realtors v. Hounsell, 139 Cal. Rptr. 830, 72 Cal. 3d 2n (1977).

^{316/} MLS Survey Question I.6.

^{317/} Report of Interview with William North, NAR Counsel (September 29, 1979).

^{318/} Some non-Realtor MLSs, in fact, still have restrictions which have been prohibited by NAR policy for Realtor MLSs. See City Summaries of Seattle and Los Angeles. See also subsection 6. below.

^{319/} See Ch. II.

c. Real Estate License

(1) Description of Condition

Both the Realtors in their eight-point criteria and all non-Realtor MLSs require a valid real estate license in order to be a participating broker in the MLS. This excludes direct access to the multiple by buyers and sellers. While some multiples responding to our survey indicated that a license was not a criterion, or that buyers or sellers could obtain access,^{320/} a check of other responses by the same multiples revealed either that they were Realtor multiple requiring Board membership and hence licensure, or that they provide access only through brokers who are members of the MLS. In other words, we found no MLS which is open to buyers and sellers directly.

(2) Analysis of Condition

Some industry critics believe that consumer access to a MLS is a key to a price-competitive brokerage industry. That is, if a real estate license were not required for access to the MLS, consumers could directly list their properties and directly search for homes. Industry spokespersons, however, claim this would "destroy" a MLS.^{321/} With no MLSs which do allow consumer access, it is difficult to assess the validity of either side of this issue.^{322/} Restrictions on direct consumer access do, however, appear to have at least some justification.

Being licensed as a real estate agent may help in the proper use of the MLS. In the training needed to obtain a license brokers no doubt learn the industry terminology and other information which perhaps relates to MLS use. However, the difficulty and expense of requiring the proper filling out of an MLS property data form to list a home on the MLS would appear to be nominal.

From the MLSs' and cooperating brokers' points of view, there are more serious problems, such as whether and under what circumstances a cooperating broker could be sure that he or she had an enforceable contract to sell a house at a specific price; who would have authority to enforce any contract offer made by a seller — the MLS or a broker; whether a private seller could be required to agree to some form of binding arbitration in the event of disputes prior to using the MLS; how fines and penalties for misuse of the MLS would be set and enforced; how fees for MLS service would be determined; and so forth.

Such issues as these are, in a sense, mechanical ones. A willing broker could, in theory offer to sell assistance to an inexperienced seller in meeting

^{320/} Ninety-eight percent of responding MLSs indicated that a real estate license was required. MLS Survey J.1.a. Ninety-five percent indicated buyers could not directly access the MLS, and 94% indicated that sellers could not directly access the MLS. MLS Survey Question G.4.b. and c.

^{321/} See, e.g., Consumer Reports (September 1980), at 572.

^{322/} In England the MLSs which allowed consumer access appeared to be less successful than the MLS which was open only to brokers. See Appendix E.

formal requirements, and the contractual and financial arrangements needed to protect the interests of other users of a MLS do not seem beyond the ordinary range of human ingenuity to devise. Addressing such issues, however, means being prepared to live with both complexity and the risk of new and more varied forms of competition.

If the real estate brokerage industry were commonly competitive, we would expect to discover that some listing brokers had already carved out a market niche for themselves by offering sellers a service limited to assistance in meeting formal MLS requirements for posting and servicing a listing. The absence of such specially tailored offerings from every local market simply lends additional credence to suspicions that normal competition of the sort observable in other markets (whether for goods or services) is not present in real estate brokerage.

d. Submission of Disputes to Arbitration

(1) Description of Condition

MLSs usually require, directly or through affiliated Board rules, that members submit disputes with each other to arbitration. These arbitration proceedings commonly are conducted by the MLS itself or by the affiliated Board. The hearings are generally before a panel composed of MLS and/or Board members.^{323/}

Some alternative brokers have mentioned abuses of the arbitration requirement as a barrier to their effective use of a MLS. These brokers did not express concern with arbitration in the abstract. Rather, they claimed, as they did in the case of proceedings for enforcement of code of ethics requirements by the Boards,^{324/} that arbitration that takes place before a panel composed of other and more traditional brokers in their community may result in biased proceedings.

Most of the MLSs follow the arbitration procedures established by the NAR. Article 14 of the NAR's Code of Ethics provides that the Realtor shall submit disputes with other Realtors to arbitration. The NAR has standardized the arbitration process for Realtor MLSs and Boards by providing local Boards with an arbitration manual. The manual instructs the Boards with respect to both arbitration and ethics grievance proceedings.^{325/}

While arbitration decisions usually are made by a panel of MLS members, some Boards and MLSs have used other methods. For example, Board-affiliated MLSs in California must permit non-Realtor brokers access to the MLS. Non-Realtors may not have agreed to abide by the NAR's Code of Ethics and may object to an arbitration proceeding where the decision is made by Realtors. One local Board,

^{323/} Of responding MLSs, 89% indicated that arbitration and grievance matters were handled by the affiliated Boards; 66% indicated that submission to arbitration was a direct condition of MLS access and that arbitration took place before a panel of MLS members. MLS Survey Questions J.2.b., J.1.k., and J.3.

^{324/} See Ch. IV.A. and E.

^{325/} NAR, Code of Ethics and Arbitration Manual (1976).

in coping with this problem, reports the following solution: "If a dispute is between a MLS participant who is not a member of the Board and a Board member it is referred to the American Arbitration Association."^{326/}

(2) Analysis of Condition

Required submission of disputes to arbitration before a panel of competitors may be one method which the local group can use to address (and sometimes to suppress) behavior considered injurious to the industry. Arbitration of disputes may save members substantial time and money. However, in an industry where competitor interdependence appears to be a primary characteristic, placing disputes in the hands of a firm's competitors may add significantly to the general pressures for uniformity.

e. Initiation Fees

(1) Description of Condition

Among MLSs surveyed, 90 percent charged some initial fee for joining the MLS.^{327/} These initial membership fees varied considerably. Some MLSs charged nothing at all to new members, while others charged over \$1,000 for membership. Among the multiples responding to our survey, the highest initial membership fee was \$4,000. This fee was an alternative to the purchase of an existing member's shareholdings in a MLS which was a member-owned, joint-stock corporation.^{328/}

The membership fees of Realtor MLSs are supposed to be cost-related. However, the local Board determines how the revenues needed to operate the MLS will be generated. Local Boards, therefore, are largely free to set the initial membership fees according to their discretion. The NAR recommends a \$250 maximum fee unless the Board takes a cost-justified position. These costs can include training and other expenses of establishing service for a new member.^{329/}

In addition to initiation fees, MLSs generally charge a fee for each listing submitted and/or a periodic membership fee. Fees for listings are generally between \$5 and \$15 per listing. Periodic fees for most MLSs surveyed were modest. However, some charged substantial annual fees, up to \$750.^{330/}

^{326/} MLS Survey Return from Hacienda Rowland Diamond Bar Board of Realtors, California.

^{327/} MLS Survey Question E.1.a.

^{328/} MLS Survey Return of Multiple Listing Service of South Bend, Indiana.

^{329/} Report of Interview with William North, NAR Counsel (September 24, 1979).

^{330/} MLS Survey Question E.1.b., E.2., E.4.a.

(2) Analysis of Condition

Initiation fees vary widely, with no apparent relationship to variations in the actual operating costs of MLSs. While we did not undertake a detailed study of MLS costs, we found there to be few major expenses associated with adding a new member. Substantial charges in excess of a nominal initiation fee are probably not based upon the cost of adding such new member, and if the fee is not based on cost, then it would seem to be a condition of membership more restrictive than needed to operate the facility.

While even a \$250 fee may not be substantial compared with other initial costs of establishing a business, the burden may be multiplied if a broker seeks to do business in a metropolitan area served by many MLSs. There may also be times when a Realtor wants to do occasional business in another Board's territory. Excessive initial fees may discourage that. When an MLS applicant already is trained in the use of the MLS, for example as would be a member of another local MLS, high initiation fees are very hard to justify. Either in purpose of effect, they may result in the protection of the local members from outside competition.

f. Other Membership Requirements

In the past, multiples in various parts of the country have employed a number of membership requirements to exclude certain classes of people. Such requirements commonly have included restrictions on part-timers and residency requirements.

In recent years, however, the Realtors have made an effort to eliminate unreasonable or discriminatory membership conditions. Requirements such as having a "favorable business reputation" have been interpreted by the NAR in a manner designed to avoid subjective, arbitrary application.^{331/} However, many MLSs still condition membership upon the approval of current members or the approval of the Board of Directors.^{332/} These requirements appear on their face to be primarily subjective.

^{331/} "By 'favorable reputation in the community' is meant that the applicant is not subject to any unresolved charges of civil rights violations, violations of consumer protection laws, violations of real estate license laws, or other violations of law. It is not intended that 'reputation' be evaluated on subjective impressions or hearsay." NAR, Membership Policy and Procedures Manual (1973), at 44.

^{332/} Forty percent of responding MLSs initially indicated that they conditioned membership upon approval of current members. However, most Realtor MLSs submitted letters subsequent to the initial return changing this response to a negative answer. Seventy-nine percent of surveyed MLSs did require the approval of the Board of Directors. MLS Survey Questions J.1.i. and J.1.j.

9. Conclusion

It is difficult to assess the actual impact of MLS membership requirements on the competitiveness of the industry.

The MLS clearly is essential to most brokers in order to market their properties efficiently. The vast majority of houses for sale are now listed on a MLS. Exposure of a property for sale and cooperation are so important in reducing selling time and finding buyers, that some industry commentators believe that a listing broker's refusal to offer cooperation to other brokers through the MLS in attempting to sell a listing may constitute a violation of his or her duty to the seller to sell the house for the highest price possible.^{333/}

The actual number of denials of MLS membership appears to be relatively small. Our MLS survey asked how many licensees had been denied membership in the Board or MLS for each year from 1976 to 1978, inclusive. In each year at least 98 percent reported no denials. For all MLSs and Boards responding, there were a total of 28 denials for all reasons during the three-year period in question.^{334/} A total of 15 of the 125 alternative brokers responding to our survey and answering the specific question indicated that they had been denied MLS membership.^{335/} Thus, the membership requirements do not appear to be a substantial bar to entry into the industry.

While MLS membership requirements may not involve barriers to entry, conditions such as required arbitration before a panel of competitors may add substantially to the pressures for uniformity. Because the state of competition in the industry in general appear to relate more to conditions and structures which have the effect of restricting the form and variety of competition, and less to restrictions that impede the flow of resources into the industry, membership requirements which add to interdependence or otherwise restrict vigorous competition are the most questionable.

Various other MLS rules and regulations that may restrict competition are discussed below. While many of these could also be considered "membership requirements," they have been categorized by how they functionally relate to the brokerage transaction.

5. Listing Requirements

a. In General

Every multiple has a number of requirements which must be met by

^{333/} See, e.g., W. Milligan, "The Legalities of Broker Cooperation," California Real Estate (August 1976), at 43; H. Miller and M. Starr, Current Law of California Real Estate (1975) (hereinafter cited as "Miller and Starr"), Section 2.14.

^{334/} MLS Survey Question J.4-J.6.

^{335/} From a total survey response of 149, 15 indicated that they had been denied membership, 110 indicated that they had not, and 24 did not answer the question. Alternative Broker Survey Question V, 16.

participating brokers in order to enter listings on the MLS. Some of these requirements, such as payment of a fee for each listing submitted, clearly are necessary to the operation of the multiple. Others, a matter of custom or convenience and not clearly related to the successful functioning of the MLS, may not be necessary. This section is concerned primarily with two such requirements widely imposed by MLSs throughout the country: mandatory submission of listings and restriction of MLS service to exclusive listing contracts.

b. Mandatory Submission of Listings

(1) Description of Requirement

The NAR describes multiple listing services as being of two basic types: "mandatory" and "voluntary." Mandatory MLSs are available to Board members on a voluntary basis, but once the member has decided to participate, he or she must submit to the MLS all listing contracts specified by the MLS. In a voluntary MLS, members have the option not to submit certain of their listings, regardless of the type of listing contract.^{336/}

Prior to 1971, the NAR allowed its affiliated MLSs to require that all designated types of listings (for example, exclusive-right-to-sell listings) be submitted to the MLS without exception. However, Policy Point 11 in the NAR's "Fourteen Points" requires that an MLS not prohibit or discourage a member from accepting a listing from a seller preferring to give an "office exclusive."^{337/} "Office exclusives" are those exclusive-right listings where the seller has specified that the listing not be submitted to the MLS. The NAR's concern that this decision be made by the seller and not the participating broker is indicated by the NAR's Suggested Rules, Section 1.3. This Rule requires that office exclusives be filed with the MLS and that they be accompanied by a certification signed by the seller that he or she does not desire the listing to be placed on the MLS.^{338/}

Among MLSs responding to our survey, 81 percent indicated that they required some designated types of listings to be submitted to the MLS.^{339/} That is, 81 percent of the MLSs were mandatory MLSs. Of these, 99 percent required that exclusive-right listings be submitted.^{340/} Twenty percent required that exclusive agency listings be submitted.^{341/} And 5 percent required that open listings be submitted.^{342/}

An essential part of a mandatory multiple is that brokers submit listings soon after obtaining them from the sellers. If a time limit were not set, the

^{336/} NAR Handbook, supra note 184, at 8.

^{337/} Id. at 12, 18-19.

^{338/} Id. at 30.

^{339/} MLS Survey Question H.1.

^{340/} MLS Survey Question H.1.a.(1).

^{341/} MLS Survey Question H.2.a.(2).

^{342/} MLS Survey Question H.2.a.(3).

mandatory multiples would be, in effect, no different from the voluntary multiples. The most common time requirement, imposed by 52 percent of MLSs surveyed, was submission to the MLS within 48 hours after obtaining the listing from the seller.^{343/}

The purpose of a mandatory listing requirement is, of course, to require brokers to submit all of their exclusive-right listings. From the seller's point of view, this ensures that the seller's listing receives the exposure that it should have to obtain the best price possible. From the MLS's point of view, this requirement ensures that the MLS will not simply be a repository for difficult-to-sell listings. If these purposes are served by the mandatory listing requirement, one would expect the mandatory MLSs to contain, on average, easier-to-sell listings than the voluntary MLSs. These relatively easier-to-sell listings should sell more quickly than others, on average. The MLS survey results are consistent with this hypothesis. Mandatory MLSs show a shorter average time-on-the-market for their listings than do voluntary MLSs. Mandatory MLSs with a submission time of 72 hours or longer show a longer average time-on-the-market for their listings than do the mandatory MLSs with shorter required submission times.^{344/}

(2) Analysis of Requirement

On its face, requiring that MLS members submit all of their listings of a designated type restricts the competitive freedom of the broker-members. Alternative methods of selling houses are effectively foreclosed. However, Realtor MLSs following the NAR's Policy Point 11 may have ameliorated any competitive injury which would otherwise have resulted from "mandatory" submissions of listings. Where "office exclusives" are allowed, that is, where the seller can specify that his or her listing not be placed on the MLS, the broker and seller appear to be free to contract as they see fit. In effect, therefore, the distinction between "voluntary" and "mandatory" MLSs simply becomes a distinction between whether the broker, without the seller's authorization, can decide to withhold a seller's listing from the MLS, or whether the broker must obtain the specific authorization of the seller in order to withhold such listing.

While there may be cases where a seller does not want his or her listing submitted to the MLS, the MLS remains the most efficient method of maximizing exposure of a property in large markets.

Historically, however, a common problem for sellers and for the MLSs has been "vest pocket" listings. An ability to easily withhold under-priced listings may increase the incentives of some brokers to undervalue listings initially. Thus, one rationale for mandatory listing requirements traditionally has been that it helps in suppressing a practice which can do substantial injury to

^{343/} MLS Survey Question H.3.

^{344/} Average listing time-on-the-market for the 257 mandatory MLSs responding to our survey was 65 days. The average time-on-the-market for the 70 non-mandatory MLSs was 71 days. Comparing submission time to average time-on-the-market, the following results were obtained: 24 hours - 61 days, 48 hours - 66 days, 72 hours - 63 days, more than 72 hours - 75 days. MLS Survey Question H.1, H.3.

consumers.^{345/}

c. Required Use of Exclusive Listing Agreements

(1) Description of Requirement

MLSs generally will not accept and distribute all types of listings. Typically, for example, Realtor MLSs will accept and distribute only exclusive right-to-sell listings for residential properties.

NAR representatives feel that open listings are inconsistent with their view of the MLS as a system of unilateral offers of subagency: open listings generally do not authorize the listing broker to appoint subagents.

Exclusive agency listing agreements also are not usually accepted by Realtor MLSs. With an exclusive agency listing, unlike an exclusive right-to-sell, the seller has the right to find and deal with a buyer directly and avoid paying a commission. NAR representatives feel that exclusive agency listings might lead to controversies, in that buyers may view the property with a broker and then attempt to deal with the seller directly. A controversy might thus arise over whether a broker was the "procuring cause" of the sale. Because the seller has not agreed to arbitration, as have participating MLS brokers, such a controversy ultimately could involve judicial proceedings.^{346/}

While most MLSs accept and disseminate only exclusive-right listings, there are exceptions. Among those MLSs responding to our survey, 96 percent accepted and disseminated exclusive-right listings; 18 percent also accepted and disseminated exclusive agency listings; and 11 percent also accepted and disseminated open listings.^{347/}

Some MLSs, rather than require a certain type of contract, require that a specific MLS listing contract form be used. Among MLSs surveyed, 84 percent provided forms to their members and 21 percent of these required that the form be used.^{348/} While most of the required forms were of the exclusive-right type, one

^{345/} See Ch. III.B and Ch. IV.F.

^{346/} Report of Interview with William North, NAR Counsel (September 24, 1979); See also NAR Handbook, supra, note 184 at 51. A report by the British Government on real estate in that country found that most of the wasted work associated with open listings was due to another agent, as opposed to a buyer, dealing with a seller. See Appendix E. See also NAR Handbook, supra, note 184, at 29-30. Many in the NAR believe that the exclusive right-to-sell listing agreement "is the very cornerstone of modern real estate brokerage" and is "indispensable to the members of an industry who get paid for results and not merely for effort." "The 14-Points -- In Search of a Rationale," Executive Officer (August 1976).

^{347/} MLS Survey Question H.5.a.(1), (2), (3).

^{348/} It is the policy of the NAR that an MLS may not require an exclusive-right form which is provided by the MLS. MLSs can, however, refuse to accept and disseminate exclusive agency and
(Continued)

responding MLS also required that its own exclusive agency form be used.^{349/}

Among MLSs that allowed both exclusive agency and exclusive-right listings, the range of exclusive agency listings actually submitted and sold was between 1 percent and 47 percent of total listings.^{350/}

Among the minority of MLSs which accepted and disseminated open listings, the highest average percentage of open listings disseminated was reported as a "majority." The same MLS reported that, on average, between 40 percent and 50 percent of listings sold cooperatively were also open listings.^{351/}

(2) Analysis of Requirement

Effectively restricting the type of listing that a broker can negotiate with a seller is, on its face, a restraint of trade.

Exclusive agency listings, which allow the seller to find a buyer, sell the property on his or her own, and avoid the commission, may cause some advertising and other expenses of the broker to be wasted. Overall, therefore, they may be less profitable to the broker than exclusive-right listings, all else being equal. However, brokers operating in their own self-interest theoretically should be free to negotiate such contracts. To the extent there may be possible controversies between brokers and sellers, brokers ought to be able to account for this in setting their fees.

Individual brokers might find that offering exclusive agency listings provided a significant competitive advantage. There appears to be some consumer demand for such contracts. The survey showed that, where allowed, a significant portion of MLS listings were exclusive agencies. This is probably because the use of exclusive agency listings could save some consumers substantial commission expenses. While use of a broker is the most common method by which buyers find homes, a significant percentage of buyers surveyed initially became aware of their homes through some other means.^{352/} Thus, for those sellers who feel

must exclude open listing contracts unless required to do so by law. NAR Handbook, supra, note 184, at 29, 40.

^{349/} Cedar Rapids Board of Realtors, Iowa, MLS Survey Return.

^{350/} MLS Survey Question B.9.b.(2).

^{351/} MLS Survey Return, Portsmouth, Ohio, Question B.9.c. and B.11.c.

^{352/} The FTC Consumer Survey of recent home buyers involved in a transaction in which a broker was also involved asked buyers the following question: "How did you first become aware of the home you bought?" (Buyer Question 28.) The responses fell into the following general categories:

- 54.2% - Agent found home for me
- 11.5% - Newspaper ad
- 5.2% - MLS
- 1.4% - Real estate magazine
- 15.2% - Saw "for sale" sign
- 6.3% - Friend/relative told me about it
- 5.7% - All others

(Continued)

competent to handle the sale of their own home, but also want MLS exposure, there appears to be the potential for substantial savings.

From the MLS's point of view, there appears to be only minimal risk in allowing exclusive agencies. A minority of MLSs already do, and they appear to operate successfully.

Open listings on the MLS may present a more difficult problem for MLSs than do exclusive agency listings. While authorization for the listing broker to appoint subagents may be a technical requirement, it is easily solved simply by requiring that open contracts contain such authorization before they are accepted for listing. A more serious problem might arise if two brokers who have open listings on the same home both filed those listings on the MLS. If a cooperating broker were to procure a buyer for the home, determining which listing broker would qualify for the commission could lead to disputes. If open listings are allowed on a MLS, it would seem reasonable for the MLS to have appropriate rules that dealt with this sort of problem in order to reduce the cost and burden of arbitration proceedings.

In spite of much mystification to the contrary, it should be noted that from cooperating brokers' point of view, all MLS listings are already effectively "open." The MLS allows all MLS brokers to compete against one another in an attempt to sell the listing. Even with exclusive-right listings, cooperating brokers regularly compete in an effort to be the first to procure a buyer. Often there is wasted time and effort, and two or more competing cooperating brokers may both claim to have been the procuring cause of a particular buyer. When such a dispute arises, the issue of "procuring cause," therefore, would seem to generally be the same no matter what kind of listing is involved. The difference among different types of listings in that context is only whether the disputed issue ultimately has to be resolved by arbitration or by a court proceeding, and that is a matter which can be covered by contract.

Decisions relating to the forms of listing contracts discussed above, like decisions as to commission rates and commission splits, are in fact competitive decisions that probably could be made by individual brokers without hampering the operation of the MLS facility.

6. Commission Rate and Split Schedules

a. Past Prevalence

In the past, many state Associations of Realtors as well as the National Association of Realtors recommended fee schedules. Many of the local Boards and MLSs enforced these or other commission rate schedules in addition to schedules concerning the split of the commission between the listing broker and the cooperating brokers.^{353/}

.6% - Don't know.

^{353/} See subsection 2.c.(4) above. See also Ch. IV.G. A broker's conference report motion urged meetings of brokers to standardize the split of their commissions. California Real Estate (November 1927), at 27. A guarantee of an adequate split was felt to be necessary to persuade reluctant brokers to join the MLSs. J. Westrom, California Real Estate (April 1928), at 38. Even where not fixed, however, splits tended to cluster around a specific amount. Usually the cooperat-

(Continued)

Today, such schedules are rarely found. The NAR banned mandatory commission rate schedules in 1961. In 1971 the NAR issued its "Fourteen Points" Multiple Listing Policy Statement. This banned both recommended commission rate schedule and commission split schedules.^{354/}

ing broker received most of the commission. NAREB, Annals of Real Estate Practice, Volume II (1926), at 348; J. Westrom, "Multiple Listing Pays the Realtors," California Real Estate (May 1928), at 30.

^{354/} The "Fourteen Points," the Multiple Listing Policy of the National Association of Realtors approved by the Board of Directors November 15, 1971, states, in relevant part, as follows:

A Multiple Listing Service shall not enact or enforce any rule which restricts, limits or interferes with the actions of its members in their relations with each other or in their Realtor/client relationship or in the conduct of their business, including, but not limited to the following:

1. MLS shall not: Fix, control, recommend, suggest or maintain commission rates or fees for services to be rendered by members (Interpretation No. 14).
2. MLS shall not: Fix, control, recommend, suggest or maintain any percentage division of commissions or fees between cooperating members and between members and non-members.
3. MLS shall not: Require financial support of Multiple Listing Service operations by any formula based on commission or sales price.
4. MLS shall not: Require or use any form which establishes or implies the existence of any contractual relationship between the Multiple Listing Service and the client (buyer or seller).
5. MLS shall not: Make any rule relating to the posting or use of signs (Interpretation No. 26).
6. MLS shall not: Make any rule prohibiting nor discouraging cooperation with non-members.
7. MLS shall not: Limit or interfere with the terms of the relationship between a member and his salesman (Interpretations No. 16 and No.17).
8. MLS shall not: Prohibit or discourage any members from political participation or activity (Interpretation No. 15).
9. MLS shall not: Make any rule granting blanket consent to a selling member to negotiate directly with the seller (owner) (Interpretation No. 10).
10. MLS shall not: Make any rule regulating the advertising or promotion of any listing (Interpretations No. 6 and No. 26).
11. MLS shall not: Prohibit or discourage a member from accepting a listing from a seller (owner) preferring to give 'office exclusive.'
12. MLS shall not: Adopt any rule denying a listing member

(Continued)

In order to gain a better understanding of how prevalent commission rate and split schedules had been in recent time, our MLS survey requested information regarding the use of such schedules since 1963. While records often were not available and officials now working for MLSs may not recall conditions dating as far as back 1963, nevertheless the results of the survey are useful as an estimate of the minimum prevalence of such schedules since 1963.

Among MLSs responding to the survey, 15 percent indicated that a commission rate schedule had been applicable to their membership at some time since 1963. These were often only recommended schedules. However, in 30 percent of the cases where there was a schedule they were required. The schedules often had been promulgated by the affiliated Board of Realtors.^{355/}

Of those MLSs which had had some form of schedule, 81 percent indicated that a commission rate of 6 percent was specified for residential resales.^{356/}

All responding MLSs indicated that no commission rate schedules were in effect at the time of the survey.^{357/} Most of the responding MLSs stated that the schedules were abolished in the early 1970's.^{358/}

Commission split schedules were somewhat more prevalent. Twenty percent said that a schedule had been applicable to their membership at some time since 1963.^{359/} Forty-one percent of these recommended a split of 50/50.^{360/} Only two surveyed MLSs indicated that a split schedule was still in effect.^{361/} Most MLSs said that their commission split schedules had been abandoned in the late 1960's and early 1970's.^{362/}

b. Relevance Today

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- from controlling the posting of 'sold signs.'
13. MLS shall not: Reject any exclusive listing submitted by a member on the basis of the quality or price of the listing.
 14. MLS shall not: Adopt rules authorizing the modification or change of any listing without the express written permission of the listing member. . . . NAR Handbook, supra, note 184, at 11-12.

^{355/} MLS Survey Questions D.1. and D.2. 74% (25) of MLSs which indicated that some schedule was applicable since 1963 also indicated that the schedule was promulgated by the affiliated Board of Realtors. MLS Survey Question D.3.b.

^{356/} MLS Survey Question D.4.b.

^{357/} MLS Survey Question D.5.

^{358/} MLS Survey Question D.6.

^{359/} MLS Survey Question D.7.

^{360/} MLS Survey Question D.10.b.

^{361/} Ponototoc County Multi-List, Ada, Oklahoma and Cheyenne Multi-List Exchange, Cheyenne, Wyoming. MLS Survey Question D.11.

^{362/} MLS Survey Question D.12.

Few MLSs today appear to have commission rate or split schedules. But past use of these schedules by the Associations and MLSs may still be relevant to understanding today's industry.

The schedules, especially those dealing with the full commission rates, explain, in part, how the rates reached their current levels. Historically, the rates were administered by the associations. There appear to be very strong cooperative pressures that keep rates uniform within local markets once they are set. Commission rates today commonly are found to be essentially at the levels they were when they last were fixed.^{363/}

7. Commission Split Uniformity

Within any MLS market area splits tend to be highly uniform. That is, in a very high percentage of residential sales, listing brokers will offer the same split to cooperating brokers, often 50/50 or 60/40.

In our City Summaries, we surveyed MLS listing sheets to determine what percentage of listings were at the prevalent rates. The results showed that from 68 percent to 100 percent of listings offered the local prevailing rate to the cooperating brokers. Most often, over 90 percent of listings were at the prevailing rate.^{364/} On a national basis, 50/50 was the most common split.^{365/}

^{363/} See Ch. III.A.; Ch. IV.G.; and subsection 7., below. With commission splits the decision as to the split appears to have been primarily local. Nevertheless, to the extent we have information, splits today seem to be much the same as those that were last fixed.

^{364/} The results of the split survey were as follows:

<u>Area:</u>	<u>For August 1978</u> Split Ratio - % of Listings (% of selling price)	<u>For March 1979</u> Split Ratio - % of Listings (% of selling price)
1. Boston:		
a. Greater Boston MLS	50/50 - 93%	50/50 - 78%
b. Quincy & South Shore Bds. MLS:	50/50 - 93%	50/50 - 90%
c. Central Middlesex MLS:	50/50 - 68% 33/66 - 29%	50/50 - 73%
2. Jacksonville (total commission rates not shown):		
a. Jacksonville MLS (10/78):	(3%) - 94%	(3%) - 93%
	(not reported) - 4.5%	(not reported) - 5%

(Continued)

Industry spokespersons explain this uniformity in terms of the unilateral incentives of brokers. Cooperating brokers may not show those properties which pay them less than the going rate as aggressively as those that pay the prevailing split. Further, while a larger than normal split to the cooperating broker might induce even more selling action, listing brokers are reluctant to give cooperating brokers more than the going rate because they generally do not need to do so in order to sell the property, and they may need the remainder of the commission to pay expenses, effectively compete for additional listings, and realize a reasonable profit. While brokers do not generally compete in price, non-price competition to obtain listings may, of course, be intense.

The very low percentage of cooperative sales reported by alternative, discount brokers particularly when they offer a lower than customary split generally may be explained in part by an apparent steering by other brokers away from such listings. In fact, this may be a primary cause of the alternatives' general lack of success.^{366/}

Even dominant firms appear unable to consistently, unilaterally alter splits in their own favor. The largest brokerage firm in Minneapolis, for example, reported that it tried to reduce the split it offered to cooperating brokers from 45 percent to 40 percent of the full commission. The result of the experiment was that the firm's inventory of unsold listings began to grow. The firm subsequently decided to return to the old 55/45 split.^{367/}

b. Jacksonville
Beaches MLS:

(2%)	-	1%		
(2.5%)	-	9%	(2.5%)	- 1.5%
(3%)	-	88%	(3%)	- 97%
(4%)	-	1%	(4%)	- 1.5%

3. Los Angeles:
San Fernando

Valley MLS:	50/50	-	100%	50/50	-	100%
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4. Minneapolis/St. Paul:

a. Minneapolis: (Generally no split is reported. The few listed ones and interview reports indicated virtually all splits are 55/45 or "reciprocal.")

b. St. Paul	(not reported)	-68%	(not reported)	- 76%
	60/40	-23%	60/40	- 20%

5. Seattle:

33/66	-100%	33/66	- 100%
(Splits were fixed by the MLSs at 33/66 until March 1979.)			

See also City Summaries and M. Carney Addendum.

^{365/} See Carney Addendum, Table II.B. Sixty-seven percent of splits taken from RESPA HUD-1 forms where the splits added up to the total commission were at 50/50.

^{366/} See Ch. IV.E.

8. Data Dissemination

a. In General

The purpose of the MLS is the orderly collection, correlation, and dissemination of listing information to MLS members.^{368/} The primary purpose of information dissemination is to facilitate cooperative sales among brokers. To do this, MLSs disseminate information relating not only to the property involved but also to the seller and the listing broker. A question sometimes raised is whether the dissemination of some information not relating directly to the property could be both unnecessary and injurious to the parties or to competition.

b. Property Information

MLSs typically disseminate information which describes the property for sale. This includes the seller's asking price, the address of the property, and various details relating to, for example, the size and type of house. Most MLSs also include a photograph of the property.^{369/} (While photographs of properties generally are included in the MLS books or loose-leaf sets, we found that as of 1980 no computerized MLS had video capabilities which extended to a terminal in the member's office. That is, while participating brokers were using computer terminals in their offices to search the MLS inventory, no computer terminal use at that time could display a picture of the property.)

c. Seller Information

MLSs often disseminate information not only identifying the seller involved but also providing certain information about the seller, such as his or her name and telephone number.^{370/}

^{367/} Report of Interview with Roger and Dave Rovick (June 12, 1979). Steering has also been reported to be a problem in new home markets where most sales are through brokers. Report of Interview with T. Martin (September 18, 1980).

^{368/} NAR Handbook, supra note 184, at 7.

^{369/} Fifty percent of responding MLSs indicated a photograph was always included. Forty percent indicated that a photograph was included at the discretion of the listing broker. MLS Survey Question F.11.

^{370/} Forty-four percent of MLSs indicated that the seller's name was always included. Forty-one percent indicated that dissemination of the seller's name was at the listing broker's discretion. Thirteen percent of MLSs indicated that the seller's phone number was always disseminated. Sixty-six percent indicated that such was the listing broker's discretion. MLS Survey Question F.6. and F.7.

The status of the seller's loan or mortgage also often is disseminated by MLSs. Twenty-seven percent of responding MLSs indicated that such information always was disseminated. Fifty-six percent of MLSs indicated that such information was disseminated at the listing broker's discretion.^{371/}

MLSs also often provide for the dissemination of information relating to the seller's reason for selling. Whether this information is disseminated is usually at the listing broker's discretion.^{372/}

d. Listing Broker Information

The listing broker's name and telephone number generally are disseminated by MLSs. Among MLSs surveyed, however, 12 percent chose to disseminate the listing broker's name in a coded form.^{373/}

At the time of the MLS survey, in early 1980, most MLSs required or provided for the dissemination of information relating the listing broker's full commission rate.^{374/} However, subsequent to the MLS survey, the NAR suggested new rules and regulations to the MLSs. These call for the dissemination only of the dollar amount or percentage of selling price to be offered to cooperating brokers. These new rules state the policy of the NAR as follows: "Board Multiple Listing Services shall not disclose in any way the total commission negotiated between the seller and the listing broker."^{375/}

The NAR's new policy still appears to anticipate that MLS participants will inform potential cooperating brokers of the split to be offered on the particular listing. "This is necessary because the cooperating broker has a right to know what his compensation should be prior to his endeavor to sell."^{376/} The NAR's new suggested rules and regulations state that the listing broker shall specify, on each listing submitted to the MLS, a split of commission which is applicable to such listing. While the MLSs do not control the amount of the split, the NAR Handbook recognizes that the amount of the split will affect the incentive of cooperating brokers to sell a particular listing. The Handbook notes that "the listing broker should specify a split which reasonably may be expected to encourage cooperation."^{377/}

^{371/} MLS Survey Question F.8.

^{372/} Among MLSs surveyed, 1.5% indicated the seller's reason for selling was always disseminated, 30% indicated it was never disseminated and 62% indicated that it was disseminated at the listing broker's discretion. MLS Survey Question F.3.

^{373/} MLS Survey Question F.4.

^{374/} Among MLSs surveyed, 16% indicated that the listing broker's compensation as a percentage of selling price was always disseminated, 14% indicated it was never disseminated, 64% indicated it was disseminated at the listing broker's discretion, and 20% indicated that it was disseminated in a coded form. MLS Survey Question F.1.

^{375/} NAR, Executive Officer (April 1980), at 4.

^{376/} NAR Handbook, supra, note 184, at 15.

e. Analysis of Data Dissemination

MLSs disseminate information which could be abused to cause injury both to seller and to competition. Information relating to the house is clearly needed by cooperating brokers. However, information relating to the seller's financial position and reasons for selling could, in a buyer's hands, substantially compromise the seller's position in negotiations. Seller information relating to his or her loan status also could compromise the seller's negotiating position. Under the traditional industry view that all brokers are agents of the seller, this is, in theory, not a problem. All brokers are supposed to be negotiating for the seller. However, this may not be entirely realistic since brokers do have an incentive to make a sale, and a cooperating broker may always be tempted to act as less than a fiduciary.^{378/}

While dissemination of full commission rate information may have facilitated policing by other MLS members against discounters, we doubt that under the new NAR rule there will be a major change in any plight perceived by discount brokers. Brokers in a community generally are well aware of the identity of the local discounters. Brokers who choose to compete by lowering their rates must advertise that fact to consumers. Other MLS brokers will also see these ads and if they choose, steer away from the listings of those brokers. Disseminating the name of the broker, therefore, may be as effective a policing device as disseminating the commission rate.^{379/}

The dissemination of the listing broker's identity and the amount of the split raise difficult questions. Disclosure of this competitive information may allow the MLS to be used as an anti-competitive, collusion-facilitating device. Yet, a MLS probably could not work well without such information.

When cooperating brokers are paid on the basis of a split from the seller as opposed to a contract with the buyer, and as long as cooperating brokers also act as listing brokers in other transactions, brokers will probably continue to be subject to incentives which militate against price competition and may individually use MLS information to reduce such competition.

9. Selling Requirements

a. In General

All MLSs have rules and regulations concerning appropriate selling procedures. These requirements often reiterate sections of the Realtor's Code of Ethics or deal with administrative functions. Many of these rules appear to be relatively non-controversial and will not be covered here.^{380/} The most

^{377/} Id. at 33.

^{378/} See Ch. IV.F.

^{379/} We do not know how widely followed this policy is. Generally, MLSs appear to carefully follow NAR requirements.

^{380/} The selling requirements often specify that negotiations shall be through the listing broker, the listing broker must present offers as soon as possible, sales shall be reported
(Continued)

commonly used rules and regulations, those suggested by the NAR, are contained in the NAR's Handbook on Multiple Listing Policy, pages 29-36.^{381/}

Two MLS selling requirements relating to cooperating brokers are relevant to this investigation. First, MLSs prohibit the solicitation of the seller by other MLS members. Second, cooperating brokers are usually considered subagents of the seller and listing brokers.

b. Anti-Solicitation Rules

(1) Description of Requirement

Section 4.3 of the NAR's suggested rules and regulations states as follows: "No solicitation of any kind shall be made for listing a property in Multiple Listing Service by other than the listing broker until the listing has expired."^{382/}

In explaining this rule the NAR Handbook notes as follows:

If a broker obtains a listing and places it with a Multiple, other brokers learn of the listing by virtue of their confidential relationship in the Multiple and ought not to use this confidentially gained information to the disadvantage of the listing broker. . . .^{383/}

This is, in effect, an elaboration upon the Realtor's Code of Ethics, Article 21. Article 21 specifies that a Realtor "shall not engage in any practice or take any action inconsistent with the agency of another Realtor."^{384/} Standard of Practice 21-3 interprets this article as including a ban on soliciting future business from sellers who have exclusive listings with other brokers during the term of that listing, if the nature and the term of the listing are fully disclosed.^{385/}

(2) Analysis of Requirement

Any ban on solicitation for business is, on its face, a restriction on

to the MLS immediately, and advertising of a listing is permissible only with the consent of the listing office. See NAR, Handbook supra, note 184, at 31, 32.

^{381/} See also Ch. IV.A. for more information on the Code of Ethics.

^{382/} NAR Handbook, supra, note 184, at 33.

^{383/} Id. at 33. See also Ch. IV.A.; and Ch. VI.C.

^{384/} NAR, Interpretations of the Code of Ethics (1976), at 157.

^{385/} Id.

competition. In the context of the MLS, an argument has been made that a very narrowly drawn and interpreted restriction may be reasonable, if reasonably enforced.

This argument is to the effect that a brokerage firm's list of properties for sale is, in effect, also its customer list. Customer lists are generally considered valuable assets by any business. If competing brokers are allowed to use these customer lists directly as lists of potential clients to be individually and personally solicited, this, in theory, might create a general incentive not to put listings on the MLS, even though the MLS is essential to the operation of an efficient real estate brokerage market.

The experience reported by alternative brokers may be relevant here. Among the major problems they have alleged have been lost or cancelled listings resulting from personal disparagement of their businesses and direct solicitation of their clients, urging those clients to break their contracts. These problems are claimed to be substantially more severe for those alternative brokers who list their properties on the MLS.^{386/}

Nonetheless, the breadth of the present prohibition is such that it may discourage many firms from legitimate direct advertising and targeted mass media campaigns that do not rely for their success upon any arguable abuse of "confidentially disclosed" information.

c. Subagency of Cooperating Brokers

The MLS is fundamentally a clearing house of listing information. There appears to be nothing in the structure of the MLS or in the state laws which requires cooperating brokers to be subagents of the sellers and the listing brokers. Furthermore, it is the policy of the NAR not to interfere in the relationships between brokers and their clients, including potential purchasers.^{387/}

On the other hand, the NAR does view the MLS as a system of unilateral offers of subagency from listing brokers to potential cooperating brokers. The Handbook on Multiple Listing Policy states as follows:

When a Realtor joins a MLS and agrees to submit his listings to the Service, he effectively appoints all other members of the MLS as his subagents on a blanket basis. The terms and conditions of such subagency are those established by the rules and regulations of the MLS consistent with the Multiple Listing Policy and Code of Ethics and of course subject to the commission split specified by the listing broker.^{388/}

Standard of Practice 22-1 also specifies as follows: "It is the obligation of the selling broker as subagent of the listing broker to disclose immediately all pertinent facts to the listing broker prior to as well as after the contract is executed."^{389/}

These apparently conflicting positions and their effects on brokers and consumers are discussed at length in Chapter IV.F.

^{386/} See Ch. IV.E.

^{387/} See Ch. IV.F. See also NAR Handbook, supra note 1, at 48-51.

^{388/} NAR Handbook, supra, note 184, at 51.

^{389/} NAR, Interpretations of the Code of Ethics, supra, note 51, at 171.