WOODS *of* CALIFORNIA INC.

RULES AND REGULATIONS MANUAL

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NAR Internet Advertising Policy

Model Internet Advertising Rule

Definitions

Advertising or marketing real property - An Internet site which consists of information regarding properties which have been listed with a real estate brokerage, the identity of that real estate brokerage or licensee for each property and information related to those properties.

Advertising or marketing of real estate brokerage services - An Internet site which includes an offer or solicitation to provide services related to marketing or identifying real property for sale or lease.

1. A licensed firm which has authorized advertising or marketing real property on a site on the Internet must include on the page on which the firm's advertisement or marketing appears the following data:

- the city in which the property being advertised or marketed is located;
- the firm's name as registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted; and
- if the firm does not hold a real estate brokerage license for the jurisdiction in which the property is located, the regulatory jurisdiction(s) in which the firm does hold a real estate brokerage license.

2. A licensed firm advertising or marketing real estate brokerage services on a site on the Internet must include on the firm's home page or on a clearly identified link appearing on that page, the following data:

- the firm's name as registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted;
- the city and state/province in which the firm's office is located; and
- the regulatory jurisdictions in which the firm holds a real estate brokerage license.

3. A licensee who has authorized advertising or marketing real property on a site on the Internet must include on the page of the site on which the licensee's advertisement or information appears the following data:

- the licensee's name;
- the city in which the property being advertised or marketed is located;
- the name of the firm with which the licensee is affiliated as that firm name is registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted; and
- if the licensee does not hold a real estate broker or salesperson license for the jurisdiction in which the property is located, the regulatory jurisdiction(s) in which the licensee does hold a real estate broker or salesperson license.

4. A licensee advertising or marketing real estate brokerage services on a site on the Internet must include on the firm's home page or on a clearly identified link appearing on that page, the following data:

- the licensee's name;
- the name of the firm with which the licensee is affiliated as that firm name is registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted;
- the city and state/province in which the licensee's office is located; and
- the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license.

5. A licensed firm using Internet electronic communications, such as e-mail, e-mail discussion groups, and bulletin boards, for advertising or marketing purposes, must include on the first or last page of all communications the following data:

- the firm's name as registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted;
- the city and state/province in which the firm's office is located; and
- the regulatory jurisdictions in which the firm holds a real estate brokerage license.

This rule shall not apply to communications between a licensed firm and a member of the public provided that: (i) the member of the public has sent a communication to the licensed firm; and (ii) that the licensed firm's initial communication contained the information required above.

6. A licensee using Internet electronic communications, such as e-mail, e-mail discussion groups, and bulletin boards, for advertising or marketing purposes, must include on the first or last page of all communications the following data:

- the licensee's name;
- the name of the firm with which the licensee is affiliated as that firm name is registered with (name of real estate regulatory body, commission, board etc.) or the d/b/a (doing business as) name it has registered with the appropriate state/province agency, commonly recognized abbreviations are permitted;
- the city and state/province in which the licensee's office is located; and
- the regulatory jurisdiction(s) in which the licensee holds a real estate broker or salesperson license.

This rule shall not apply to communications between a licensee and a member of the public provided that: (i) the member of the public has sent a communication to the licensee; and (ii) that the licensee's initial communication contained the information required above.

7. A licensed entity advertising or marketing real property on a site on the Internet that is either owned or controlled by the licensed entity shall periodically, but not less than every thirty-one (31) days, review the advertising and marketing information on the site concerning real property listed by the licensed entity to assure it is current and not misleading. Whenever information on properties listed by other licensed entities is displayed or distributed on a licensed entity’s site, the site shall disclose when the information was downloaded or that the information displayed or distributed is information currently available from another identified source.

8. Licensed entities may display and distribute, electronically or otherwise, information about properties listed by other licensed entities only with the authorization of the listing broker. This authorization may be express or, if both licensed entities participate in a cooperative service, may be set forth in the rules of that service. Licensed entities may not alter the online display or any information about the listing without the written permission of the listing broker.

NATIONAL ASSOCIATION of REALTORS®
REALTOR.org

The Real Estate Settlement Procedures Act

Dos and Don'ts For Real Estate Brokers and Agents

1. Entities Subject to RESPA

Services that occur at or prior to the purchase of a home are typically considered settlement services. These services include title insurance, mortgage loans, appraisals, abstracts, and home inspections. Services that occur after closing generally are not considered settlement services.

- **RESPA covers, among others:**
- Real Estate Brokers and Agents
- Mortgage Bankers and Mortgage Brokers
- Title Companies and Title Agents
- Home Warranty Companies
- Hazard Insurance Agents
- Appraisers
- Flood and Tax Service Providers
- Home and Pest Inspectors
- **RESPA, however, does not apply to:**
- Moving Companies
- Gardeners
- Painters
- Decorating Companies
- Home Improvement Contractors

2. RESPA Prohibitions

- RESPA prohibits a real estate broker or agent from receiving a "thing of value" for referring business to a settlement service provider, or SSP, such as a mortgage banker, mortgage broker, title company, or title agent.
- RESPA also prohibits SSPs from splitting fees received for settlement services, unless the fee is for a service actually performed.

3. Exceptions to RESPA's Prohibitions

Not all referral arrangements fall under RESPA's referral restriction. In fact, RESPA and its regulation feature a number of exceptions. Three examples are:

- **Promotional and Educational Activities**
- Settlement service providers, such as mortgage bankers, mortgage brokers, title insurance companies, and title agents, can provide normal promotional and educational activities under RESPA.
- These activities must not defray the expenses that the real estate broker/agent otherwise would have had to pay.
- The activity cannot be in exchange for or tied in any way to referrals.
- **Payments in Return for Goods Provided or Services Performed**
- A real estate broker or agent must provide goods, facilities, and services that are actual, necessary, and distinct from what they already provide.
- The amount paid to a real estate broker or agent must be commensurate with the value of those goods and services. If the payment exceeds market value, the excess will be considered a kickback and violates RESPA.
- The payments should not be "transactionally based." A payment for services rendered is transactionally based if the amount of the payment is determined by whether the real estate broker/agent's services resulted in a successful transaction. Payments may not be tied to the success of the real estate broker/agent's efforts, but must be a flat fee that represents fair market value.
- **Affiliated Business Arrangements**
- Real estate brokers and agents are permitted to own an interest in a settlement service company, such as a mortgage brokerage or title company, so long as the real estate broker/agent:
- Discloses its relationship with the joint venture company when it refers a customer to the mortgage broker or title company;
- Does not require the customer to use the joint venture mortgage broker or title company as a condition for the sale or purchase of a home; and
- Does not receive any payments from the joint venture company other than a return on its ownership interest in the company. These payments cannot vary based on the volume of referrals to the joint venture company.
- The joint venture mortgage broker or title company must be a bona fide, stand-alone business with sufficient capital, employees, and separate office space, and must perform core services associated with that industry.

4. Examples of Permissible Activities and Payments

- A title agent provides a food tray for an open house, posts a sign in a prominent location indicating that the event was sponsored by the title agent, and distributes brochures about its services.
- A mortgage lender sponsors an educational lunch for real estate agents where employees of the lender are invited to speak. If, however, the mortgage lender subsidizes the costs of continuing legal education credits, this activity may be seen as defraying costs the agent would otherwise incur, and may be characterized as an unallowable referral fee.

- A title company hosts an event that various individuals, including real estate agents, will attend and posts a sign identifying the title company's contribution to the event in a prominent location for all attending to see and distributes brochures regarding the title company's services.
- A hazard insurance company provides notepads, pens, or other office materials reflecting the hazard insurance company's name.
- A mortgage brokerage sponsors the hole-in-one contest at a golf tournament and prominently displays a sign reflecting the brokerage's name and involvement in the tournament.
- A real estate agent and mortgage broker jointly advertise their services in a real estate magazine, provided that each individual pays a share of the costs in proportion with his or her prominence in the advertisement.
- A lender pays a real estate agent fair market value to rent a desk, copy machine, and phone line in the real estate agent's office for a loan officer to prequalify applicants.
- A title agent pays for dinner for a real estate agent during which business is discussed, provided that such dinners are not a regular or expected occurrence.

5. Examples of Prohibited Activities and Payments

- A title company hosts a monthly dinner and reception for real estate agents.
- A mortgage broker pays for a lock-box without including any information identifying the mortgage broker on the lock-box.
- A mortgage lender provides lunch at an open house, but does not distribute brochures or display any marketing materials.
- A hazard insurance company hosts a "happy hour" and dinner outing for real estate agents.
- A home inspector pays for a real estate agent to go to dinner, but does not attend the dinner.
- A title company makes a lump-sum payment toward a function hosted by the real estate agent, but does not provide advertising materials or make a presentation at the function.
- A mortgage broker buys tickets to a sporting event for a real estate agent, or pays for the real estate agent to play a round of golf.
- A title company sponsors a "get away" in a tropical location, during which only an hour or two is dedicated to education and the remainder of the event is directed toward recreation.
- A mortgage lender only pays a real estate agent for taking the loan application and collecting credit documents if the activity results in a loan.

Before you undertake any activity with a SSP or accept any payments, goods, or services from a SSP, you should speak with an attorney familiar with RESPA and make sure the activity complies with state and local laws. Some of these laws prohibit activities that are otherwise permissible under RESPA.

Frequently Asked RESPA Questions

Answers Provided by NAR's Legal Counsel

1. Q. RESPA prohibits service providers from giving anything of value in exchange for referrals of business. Does that prohibition apply only to certain types of service providers (i.e. lenders, title companies) from providing food at open houses or does it apply to all service providers (i.e. home inspectors, pest control companies, advertising companies and others)?

A. RESPA applies to settlement service providers and does not distinguish among different types of settlement providers. A settlement service includes any service provided in connection with a real estate settlement including, but not limited to, title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate broker or agent, the origination of a federally related mortgage loan and the handling of the processing and closing or settlement. This list is broad but not all-inclusive. Anything listed on a HUD-1 form could be a settlement service and the company providing it a settlement service provider.

2. Q. Is a home warranty company a settlement service provider?

A. As noted above a settlement service provider is one who provides services in connection with the purchase/sale of a property that are paid for, directly or indirectly, out of the funds at settlement. Most home warranties are sold in connection with a property sale and therefore the company selling the warranty would be a settlement service provider.

3. Q. If a title/mortgage company sponsors a "get-away" at a resort property for brokers and agent and offers education, is it a violation of RESPA?

A. A title company or mortgage company paying for an educational event, so long as the costs associated with the event do not defray the expenses that the real estate agent would otherwise encounter, would be permissible. Note, however, that a rule of reason should be applied. An educational event hosted by a mortgage lender that was held at a local hotel and provided a lunch

would be quite different from an educational event held in Hawaii in which one hour was dedicated to education and the remainder of the event was directed toward recreation.

4. Q. When a title company hosts an agent luncheon at an open house, they are providing food in hopes of meeting agents - just as Realtors hold open houses. Doesn't this need to be looked at in a much more practical way and allowed under RESPA?

A. If a real estate agent requested that a title company pay for a lunch that the real estate agent was hosting, and the title company agreed, the payment would be a thing of value for, or in the hopes of, the referral of settlement service business. If, however, the title company paid for the lunch, but attended the open house and gave a brief presentation, or prominently displayed a sign indicating the title company's name and distributed brochures about the title company during the open house, there is a reasonable argument that this activity is a form of advertising and therefore acceptable under Section 8(c)(2). Again, real estate agents should apply a rule of reason. If these activities and materials are present, a casual lunch of sandwiches for $200 likely would be acceptable. A catered lunch by an expensive restaurant at a cost of $800, however, would more likely be viewed as a referral fee.

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1. The answers provided here are based on interpretations of RESPA. Real estate brokers and agents should also check any bulletins issued on these subjects by state regulators.

5. Q. Is it legal for a REALTOR® Association to solicit sponsorships from affiliate members who provide settlement services for Association functions that are not education-related such as awards and recognition ceremonies and association fundraisers?

A. While such events provide something of value to the association, the association is not in a position to refer business to the settlement service provider. Since real estate agents do not receive anything of value from the affiliate member by their attendance at these events, such sponsorships would not violate the law. In addition, it would be helpful if some sign or brochures are posted so that the affiliate member can claim this activity as an advertising cost.

6. Q. Does RESPA bar local boards or associations of REALTORS® or NAR affiliates of their local chapters from accepting from settlement service providers donations or sponsorships of meetings, awards and fundraisers?

A. Sponsorship of an association event is not prohibited by RESPA unless, as noted above, such sponsorship means that the association does not charge brokers and agents attending the fee that they

would normally be obligated to pay. The association is not in the real estate business and therefore not in a position to refer buyers or sellers to the party sponsoring the event.

7. Q. Is it legal for Affiliate Members who are settlement service providers to sponsor continuing education or new-member orientation classes?

A. It depends on whether some of the expenses an agent would otherwise bear are defrayed by the affiliate member. In the case of an orientation course there is probably no problem because new members pay an application fee which is the same whether an affiliate sponsors the course or not. If the affiliate is simply recognized as a sponsor it is similar to an affiliate running an ad in the association paper and would be considered normal marketing activity. Sponsorship of continuing education is more likely to be a violation because members normally have to pay a fee to attend such programs. If the cost of the course is underwritten by the affiliate so that the agents need not pay fees that they otherwise would have to pay, such sponsorship could be interpreted as a thing of value received by the agent for RESPA purposes.

8. Q. Is it legal for Affiliate Members to put on education courses about the services the affiliate member provides for REALTORS®?

A. Yes, Affiliate Members may put on classes about their business, since such informational programs are consistent with the marketing of an affiliate's business.

9. Q. Can an Affiliate Member donate items to the Association’s Political Action Committee auctions?

A. RESPA does not prohibit such donations, but the association should check with a campaign finance expert.

10. Q. May a mortgage company cater the food to be offered at a broker's open house tour?

A. Again, if the mortgage company came to the lunch and provided a short presentation regarding interest rates and loan programs, the payment would likely be permissible under Section 8(c)(2). Furthermore, if the mortgage company prominently displayed a sign indicating its sponsorship of the lunch and distributed brochures during the open house, the payment would likely be permissible. A rule of reason should be applied. If these activities or materials are present, a casual lunch of sandwiches for brokers could reasonably be a permissible marketing cost.

11. Q. Can brokers and agents accept from lenders and distribute to prospective buyers flyers containing financing information? For instance, at an open house, may a lender provide flyers that offer closing cost calculations for various down payment scenarios, to be distributed by brokers and agents?

A. Distribution of such flyers provided by lenders does not violate RESPA. The information gathered is consistent with the real estate agent's responsibilities to his or her client to facilitate the sale of the property and no separate benefit flows to the agent from the lender. The agent may not, however, accept from lenders flyers which also promote the listed property, since that would result in the lender bearing a portion of the agent's advertising expenses, which are the agent's responsibility.

Checklist for Creating a REALTOR® Association Record Retention Policy

There are a number of steps an association needs to undertake in creating a document retention policy. Each association should go through these steps on their own, as there is not a "one size fits all" model for record retention. The requirements will vary by association based on its size, state legal requirements, and also its business practices. The most important element for a good record retention policy is following the policy after it is created, as having a policy which is not followed is probably worse than not having a policy.

Below is a brief description of the process each association should undertake in creating a record retention policy. Following that is a list of different types of documents and some recommended time frames for how long the association should maintain these records. This is not intended to be comprehensive or even authoritative; rather, it is intended to serve as a guide for associations in creating these policies. Associations need consult with their attorney while creating these policies because state law will determine how long an association needs to maintain its records. A record retention policy adopted, and followed, by the association will reduce the costs and burdens of any future litigation. For more info, see attached **Update on Changes to Federal Discovery Rules.**

A. Process for Creating a Document Retention Policy

1. Identify sources and types of information.

The association should gather together the employees who are familiar with the association's documents and other information. Depending on the size of the association, the number of individuals could vary. A person familiar with how the association maintains electronic information should be at the meeting.

2. Identify and document current retention policies.

An association should determine what policies (if any) are currently governing its document retention policies and reduce those to writing, including its policies for retaining electronic information.

3. Evaluate existing policies.

The association should now decide whether its current policies are adequate. If not, the association should begin crafting a new policy.

4. Create policy.

Not only should the policy state how long certain documents should be retained, it should also state:

1. policy's effective date and date of last review

2. person responsible for the policy

3. purpose of the policy

4. definitions (if needed)

5. process for preserving records if litigation arises or is likely

5. Legal review of document retention policy.

Once the association has created a policy, it should seek review of its policy by its legal counsel. The association could choose to involve the attorney at the fourth stage during the crafting of the policy.

6. Distribute policy to employees and make sure that the policy is being followed.

This is the most important step, as having a policy that isn't followed will actually be worse if litigation arises than not having any policy.

7. Plan to periodically review policy to make sure it is still relevant.

Set a date in the future to assess the policy.

B. Issues to Consider When Creating a Document Retention Policy

A number of issues will arise during the creation of a document retention policy. A few are listed below:

Format One issue for associations is the format used to maintain documents. Generally, there are no requirements on the type of format an association needs to use to maintain its documents and other information. Reducing paper documents to an electronic format will save physical space, but could present authentication issues in court. Therefore, all electronic documents should be stored in a read-only format or other unalterable format in order to demonstrate that the documents are in their original state.

Privacy Considerations & Proper Document Destruction Certain types of records, such as employment records, are governed by privacy laws, either state or federal. Therefore, an association will need to be familiar with those laws and also any rules or other restrictions governing the destruction of these documents.

Other Legal Considerations The legal requirements for each company will vary based on a variety of factors. For example, certain employment statutes require minimum numbers of employees in the work place before they apply to a business owner. IRS audits are generally initiated within three years, but the IRS can audit a return seven years later if negligence was involved and indefinitely in cases of tax fraud. So, each company will need to be aware of the laws which apply to their situation.

C. Creating a Document Retention Policy

Below is list of general documents that associations may maintain in their files. Next to each entry are some suggested legal time requirements for which the association should maintain these documents. These time requirements are conservative estimates, and do not prevent any organization from extending these time periods beyond these minimums. These requirements vary by state, and so you will need to consult with your attorney when creating the policy, as stated above.

Accounting Records

Accounts payable (seven years)

Accounts receivable(seven years)

Annual financial statements (permanent)

Bank statements (seven years)

Bank reconciliations (seven years)

Canceled checks- routine matters (seven years)

Canceled checks- special (loan repayment, etc.) (permanent)

Correspondence: routine (four years)

Deeds and closing papers (permanent)

Deposit slips (four years)

Electronic payment records (seven years)

Employee expense reports (seven years)

Fixed-asset acquisition invoices (after disposal) (seven years)

Freight bills (seven years)

General ledgers (permanent)

Income tax returns (permanent)

Inventory count & costing sheets (seven years)

Insurance policies (after expiration) (four years)

Investments (after disposal) (seven years)

Mortgages, loans & leases (paid) (seven years)

Payroll journals & ledgers (permanent)

Purchase orders (except accounts payable copy) (one year)

Purchase invoices & orders (seven years)

Receiving sheets (two years)

Sales commission reports (five years)

Sales records (seven years)

Sales tax returns & exemption support (five years)

Subsidiary ledgers (seven years)

Tax returns (federal & state) (if applicable) (permanent)

Trial balances (permanent)

Association Corporate Records

Articles of Incorporation and amendments (permanent)

Bylaws and amendments (permanent)

Corporate filings (permanent)

Corporate Minute Book (permanent)

IRS Exemption Letter (permanent)

Electronically Stored Information

Specific documents in electronic formats will be treated according to the timeframes set forth elsewhere in the policy. The policy should state how long a association maintains information stored on its backup tapes and other backup systems. The policy should also state that the purpose of the backups is to restore the association's computer network in the event of a crash.

Employment Records

Documents relating to job recruitment: advertising, job orders submitted to employment agencies, interviewing, testing, hiring, training, demotions, promotions, layoffs, discharge, and other personnel decisions (one year)

Employee benefit plan documents (duration of plan)

FMLA leave records including: all FMLA information and notices distributed to these employees and records of any FMLA disputes.

Garnishments / wage assignments (three years)

Immigration I-9 forms (duration of employment plus one year, minimum of three years)

Medical records relating to the exposure of the employee to any toxic or hazardous substances. (duration of employment plus 30 years).

Payroll records showing name address, date of birth, occupation, rate of pay, and weekly compensation (three years)

Personnel Records (ten years after employment ends)

Record of all occupational injuries, including those under state workers compensation law and any ERISA awards (five years for ERISA; state law requirements will vary)

Legal Documents

Contracts (ten years after expiration)

License Applications (one year after expiration)

Licenses (one year after expiration)

Trademarks, Patents & Copyrights (permanent)

Warranties & Guaranties (two years beyond terms of the warranty)

Correspondence: legal (permanent)

MLS Documents

Rules and Regulations (permanent)

MLS Policies (permanent)

Listing agreements (until expiration of listing)

Sold property information (at least ten years)

Lockbox key agreements/Leases (one year after agreement terminates)

MLS Service Mark License Agreements (Permanent)

Contracts (ten years after expiration)

Subscription Agreements (ten years after expiration)

Participation Agreements (ten years after expiration)

Website Click-Through Confirmations (ten years)

NAR / Association Documents

NAR charter (permanent)

Territorial jurisdiction (permanent)

REALTOR® Agreement (until superceded)

Member file & membership applications (two years after membership terminates, with social security number and other financial information removed (if applicable)

Professional Standards Hearing Records: Ethics (result of hearing- permanent; rest of hearing file- minimum of 1 year after satisfaction of sanctions (if any) and there is no threat of litigation)

Arbitration / Mediation (minimum of 1 year after payment of award (if any) and there is no threat of litigation)

Property Records

Deeds of Title (permanent)

Leases (two years after expiration)

Depreciation schedules (permanent)

Property Damage (seven years)

Property Tax (permanent)

Appraisals (permanent)

Blueprints / Plans (permanent)

Warranties & Guaranties (two years beyond terms of the warranty)

Pension & Profit Sharing

ERISA disclosure documents (six years from date disclosure was due)

IRS Determination Letter(s) (permanent)

Forms 5500 & plan documents (permanent)

Update on Changes to Federal Discovery Rules

One of the more expensive parts of the litigation process can be the discovery process, and this process has likely become more expensive with the new federal rules governing electronic discovery. Because the increased costs will now arise at the beginning of litigation, the simplest and best way for companies to reduce these costs would be to adopt (and follow) a document retention policy. In order to assist REALTOR® associations with this process, NAR has created a checklist for creating a document retention policy.

I. Background

The Federal Rules of Civil Procedure ("FRCP") govern the process used for civil litigation in the federal judicial system. While all states have their own rules of civil procedure, states often look to the FRCP when making changes to their own laws and so the influence of the FRCP extends beyond federal civil litigation. The Supreme Court of the United States must approve any changes to the FRCP. After six years of study, the Supreme Court approved amendments to the FRCP relating to the discovery of electronic data. The amendments became effective on December 1, 2006.

"Discovery" is part of the civil litigation process where the parties exchange information through such things as documents and depositions in order to develop their allegations and/or defenses prior to trial. The recent amendments are designed to give some structure to the discovery of electronic data, since that is increasingly becoming the dominate way that parties communicate.

II. Changes to the FRCP

The first major changes to the FRCP are found in revised Rule 26. The rule now requires parties, among other required disclosures, to also now identify "a copy of, or a description by category and location of…electronically stored information …that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses". Formerly, the FRCP had used "data compilations" instead of "electronically stored information", but the drafters found this term no longer necessary since these would be covered within the broader "electronically stored information".

Rule 26 also provides that a party does not need to produce electronic discovery which is not reasonably accessible because of "undue burden or cost". When such information is identified and the other party seeks the information, the commentary suggests that the parties should try to come to an arrangement under what conditions the information will be produced and how the costs should be apportioned. If no arrangement can be brokered between the parties, then the requesting party may need to file a motion to compel to allow the judge to determine what sort of discovery is appropriate, if any.

The most important change for businesses is found in Rule 26(f). This section now requires parties have conference prior to any discovery occurring. The conference should involve discussions on a discovery plan and also provide for the preservation of all discoverable information, handling of claimed privileged information, and establish a discovery schedule. The rules state that the parties should agree on a process for exchanging electronic information, including the format(s) in which it should be produced and any other issues related to electronic discovery. At this conference, lawyers will need to be able to discuss how their clients maintain such information in order to identify any issues which may arise, and so the lawyers will need to be familiar with their clients' information systems and retention policies.

As set forth below, the best practice for a company is to have retention policies in place that the company follows which address these issues so that they can easily explain their policies. In particular, the issue of how the company preserves documents will become extremely important if electronic records have been destroyed. A business may be able to claim it was acting in good faith if the records were destroyed in the normal course of business pursuant to the company's retention policies. The commentary accompanying Rule 26(f) recognizes the business necessity for destroying outdated business records. The most important thing to take away from the new rules and commentary is that the business must apply its policy in a consistent manner and not change its behavior in the face of an investigation and/or litigation.

Rule 34 was amended to address the production form of electronically stored information. The rule allows a party seeking the electronically stored information to request that the information be produced in a particular format; the responding party can object to the request if it feels the request is burdensome. If no format is requested, then the responding party must produce this information in the format that it usually maintains the information or in a "form or forms that are reasonably usable".

Rule 37(f) addresses sanctions for failing to produce electronically stored information. The new section states that a court may not impose sanctions for a party's failure to produce "electronically stored information lost as a result of the routine, good-faith operation of an electronic information system". While this would seem to provide protection to a company which has retention policies and follows these policies which may result in the destruction of certain information, the commentary in the rules states that this only applies to "routine" operations, which may not apply if a party has intervened into the normal operation of its computer systems causing the deletion of documents.

III. What Changes Mean for a Business

Most of the changes relate to the conduct of litigation between parties, and so will not greatly impact a business's day-to-day activities. The two parts of the rules which will impact the day-to-day activities of a business are:

1. the business needs to be able to explain its system for maintaining and

destroying information, including electronic information; and

2. the business needs to be prepared to preserve all relevant documents and

other information within its control once the business learns about the

possibility of litigation or actual litigation.

A company can reduce its burdens for both of these requirements by addressing these issues in advance through a document retention policy. Below are some suggestions for companies on how to address these issues, and there are additional suggestions in the NAR checklist for creating a document retention policy.

<u>Document Retention Policy</u>

The creation of a workable document retention policy that the company follows will ease any burdens a company may face in complying with discovery requests, electronic or otherwise. Having such a policy will make it easy for a company to educate its attorneys on its methods for retaining and destroying information, and it can provide a business with a defense against any allegations that it destroyed documents. Since the requirements for what a business must retain vary state-by-state as well as by business model, each business will need to address its own needs as well as what is legally required. It is recommended that businesses work with their legal counsel in creating these policies.

Plan to Preserve Documents When Litigation Arises

The second requirement comes into play whenever a party has a reasonable belief that it may become involved in litigation or is involved in litigation. At that point, the business has a duty to maintain all relevant information within its control. "Relevance" is viewed very broadly during the discovery process

and so any documents or other information which are related to the claims or defenses raised in the lawsuit is potentially discoverable by the other side. As cases have found, “within its control” would mean any documents maintained for the business by a third party. So, once a company becomes aware of the possibility of litigation, it should advise all necessary individuals about the need to preserve any relevant documents.

By planning in advance for this situation, a company can reduce its discovery costs and also ease the burden of producing information in discovery. First, the company should identify where all relevant documents exist. So, for example, if the claim involves an employment matter, you would need to preserve the employee’s personnel file, emails/correspondence, and any other documents relevant to the claims or defenses. Second, creating “retain record” notices in advance will allow a company to react quickly to preserve documents and also protect itself from allegations that it did not act quickly to preserve documents. A company should work with its attorney in drafting such notices.

IV. Conclusion

Most of the changes to FRCP relate to the conduct of litigation between parties, and so will not greatly impact a business’s day-to-day activities. The two parts of the rules which will impact the day-to-day activities of a business are the requirement that a business be ready to explain its system for maintaining information, including electronic information, and also the preservation of all relevant documents and other information within its control once the business learns about the possibility of litigation. By planning ahead, a company can reduce its discovery costs and the burdens of complying with discovery requests.

MLS Data Security Issues

One of the issues raised by Internet Data Exchange (IDX) and Virtual Office Websites ("VOW") is how an MLS can continue to protect the security of MLS data in this new Internet environment. Below is a chronological summary of past cases where REALTOR® Associations and MLSs brought lawsuits against individuals and/or companies who were using the MLS data in an unauthorized way. Following the summaries are some tips that can be gleaned from these cases, which are intended to help MLSs and associations protect their data and databases.

Greater Lansing Board of REALTORS® v. Dobson Van Lines (MI)

In 1985, the Board suspected that a moving company had unauthorized access to MLS data because the moving company was contacting property owners before any "for sale" signs appeared in the yards of the property owners. The Board hired a private investigator to pose as a potential customer, and the detective was able to gather information which confirmed that the moving company had unauthorized access to the MLS information.

The Board filed a lawsuit against the moving company in federal court, alleging copyright infringement. The Board had properly registered the MLS database with the United States Copyright Office. During discovery, a sales agent for the moving company admitted to buying MLS sheets from a member of the Board. Eventually, the parties settled the dispute, with the moving company paying damages to the Board and also agreeing to the entry of a permanent injunction barring it from accessing the MLS in the future. Subsequently, the MLS took disciplinary action against the MLS participant who sold the listing sheets and the MLS's right to take such action was upheld by a court.

Southern California Van Lines v. San Fernando Valley Board of REALTORS® (CA)

The Board and the California Association of REALTORS® brought a lawsuit against approximately ten different moving companies and other individual defendants for copyright infringement based on the copying of MLS publications or providing the copied MLS publications to other defendants. The Board learned that the unauthorized users, primarily moving companies, were receiving access to the MLS data in a number of ways. Some MLS subscribers were selling MLS data or even their passwords to intermediaries, who then used that information to create mailing labels for properties listed in the MLS, which were then sold to moving companies. Some of the defendants were illegally obtaining the information by hacking into the MLS database or even by digging through the dumpsters of real estate offices for listing information.

After bringing the lawsuit, a number of the defendants settled with the Board, paying damages of approximately $80,000. Thereafter, the case proceeded to trial against the remaining defendants. The

court ruled in favor of the Board, determining that the MLS copyrights were valid and the defendants had infringed those copyrights. The court awarded approximately $120,000 in damages to the Board for infringements that occurred after the Board began registering its MLS publications with the United States Copyright Office.

Montgomery County Association of REALTORS® v. Realty Photo Master (MD)

In 1988, Realty Photo Master ("RPM") began offering to MLS participants a software system which digitized and downloaded to a real estate agent's personal computer photographs of homes that were offered for sale. In order to identify and photograph properties listed for sale in the system, RPM needed to gain access to the Association's MLS. RPM persuaded a MLS participant to provide such access. RPM then sold its database of computerized photos of homes to several MLS participants.

Upon discovering that RPM was accessing its MLS database, the Association sued RPM alleging that RPM's use of its database constituted copyright infringement and RPM countersued, alleging antitrust violations. The court determined that the computerized MLS database was copyrightable and that copyright registrations secured by the Association were valid. However, the court did not reach the question of whether RPM violated Association's copyright. Although RPM conceded that it downloaded the MLS database into its computer, it had gained access to the database through an agreement with an MLS participant and so an issue existed as to whether RPM's downloading was authorized. After the Association received judgment in its favor on the antitrust allegations and had entered into an agreement with another vendor to digitize the property photographs in its database, the Association dismissed the copyright infringement claims against RPM, since it no longer had any reason to pursue these claims.

REALTOR® Association of Greater Fort Lauderdale v. Property America Corp. (FL)

In 1998, the Association became aware that the defendants were “pirating” information from the MLS and posting it on their free Internet site. A broker participating in the MLS was giving the Defendants computer disks containing unauthorized copies of the MLS database. The Defendants claimed not to know where the information came from, although they admitted that they assumed it came from the Association’s database.

The Association filed a lawsuit against the Defendants seeking to stop the pirating of MLS data. The Association sought to immediately stop the Defendants’ from pirating and posting the MLS information on its website by obtaining a preliminary injunction. The court ruled that the MLS data was entitled to copyright protection, but the court declined to enter a preliminary injunction against the Defendants because the court found that money would compensate the Association for its damages and so a preliminary injunction was not necessary. The case eventually settled on terms that were favorable to the Association.

RMLS v. IMS, Inc. (OR)

The MLS discovered that IMS, Inc. had unauthorized access to its database. IMS was downloading the MLS data and repackaging it into statistical reports, selling these reports to members of the MLS. The MLS filed a lawsuit seeking a permanent injunction against IMS to stop the piracy of its data, pursuant to an Oregon law outlawing data piracy. Eventually, the parties reached a settlement, with IMS agreeing to the entry of a permanent injunction against its entry into the MLS database, unless it first received prior written permission from the MLS. The remaining terms of the settlement are confidential.

Arizona Regional MLS v. Doe (AZ)

The MLS became suspicious that moving companies were receiving unauthorized access to the MLS. The MLS "seeded" a listing, using their attorney's home (which was located in a gated community) as the bait and selecting "Internet "No"" when the listing was submitted to the MLS. When the moving companies solicited the attorney, the MLS filed a lawsuit against "John Does", and subpoenaed the moving companies for the source of their information. When the moving companies identified two MLS participants as the source of the information, the MLS named them in the lawsuit, alleging violations of the MLS rules and breach of their agreement to abide by the MLS rules. The two participants are claiming that they obtained this information over the Internet, not from the MLS. The lawsuit is pending.

Tips for Securing MLS Data

A number of lessons can be drawn from the above cases. First, it is important to copyright the MLS database. As illustrated by the cases above, an MLS database is entitled to copyright protection and infringement of the MLS's copyrights entitles the MLS to statutory damages. For more information about how to copyright your database see Copyright Registration Procedures for MLS Databases (page 46)

Second, you will need to be able to prove to a court that someone has received unauthorized access to the MLS database. As illustrated above, the MLSs, working with their attorneys, have come up with a variety of creative ways to confirm their suspicions of unauthorized MLS access by certain individuals and/or companies prior to filing a lawsuit. In some of the cases, the MLS used the discovery process to learn how the unauthorized users were able to obtain the MLS information and identify the MLS participants who were giving these users access to the MLS database.

Third, as demonstrated by the Oregon data piracy case, don't forget about your state's laws, as they may also be another useful tool in pursuing data pirates.

Finally, a participant's failure to abide by the MLS rules and regulations, gives rise to a breach of contract action against an MLS participant and/or disciplinary proceedings.

For a general article about protecting your MLS from data pirates, written by Ralph Holmen, NAR’s Associate General Counsel, see attached (pages 28-30).

Fall 2002

MLS Data Opportunities
Don't let fears of data piracy stop you from exploring new ways of displaying listings online

by Ralph Holmen, NAR Legal Affairs

Internet Data Exchange and Virtual Office Web sites have opened new opportunities for members to market their listings. But these opportunities also bring a potential downside: that such new uses for MLS data could make it more susceptible to improper and unauthorized use.

Fortunately, the same techniques that you use to safeguard your MLS database from misappropriation today will protect it from unauthorized use by those who access it in new ways.

Contract and copyright
Data compilations created by MLSs can be protected from unauthorized use by MLS participants and others who might have access to that information in two ways: by contract and by copyright. Prudent MLSs rely on both protections.

The MLS owns the compilation of listing dataÑthat is, the selection, arrangement, and coordination of those listings into a comprehensive database, including text and graphics, such as photographs taken by the MLS (or a photographer hired by the MLS). The MLS does not own the factual details of each listin--the price, the number of bedrooms, bathrooms, or square footage in the home, and so forth. Listing brokers own the rights to the comments that they include in their MLS listings, but they authorize the MLS to use that text by virtue of submitting the listings to the MLS.

Copyright law holds that "facts" cannot be owned. Only original, creatively devised collections of facts, such as those in an MLS database, may be owned and protected by copyright law.

An MLS data "pirate" is someone who takes the MLS database without authorization for a use not permitted by the MLS. Even a pirate who intends to use only select items in an MLS database would need to download or obtain the entire database to access the items of interest. For that reason, it is of little consequence that an MLS doesn't own individual items in its database, since as a practical matter the pirate can't obtain those individual items without violating the MLS's rights in the entire database compilation, which is protected from being used by unauthorized people under copyright and contract law.

Although an MLS can register each successive edition of the database with the U.S. Copyright Office, it's not necessary to do that to claim a valid copyright. It is prudent, however, to be sure that a proper copyright notice appears on any MLS compilation. That notice consists of the year of the publication, the name of the copyright owner (the MLS or the association), and the symbol "©" or the word "Copyright."

In addition to the protections afforded under copyright law, MLSs have and may assert contract rights to protect their databases. Such contract rights arise by virtue of MLS participants' agreement to abide by the rules and regulations of the MLS that carefully and narrowly prescribe how the listing data may--and may not--be used. A participant who violates that contract can be disciplined.

Besides allowing participants to use MLS compilations to identify properties for prospects, MLS rules usually also permit a participant to provide a few copies of property listings to prospects who indicate a genuine interest in those particular listings. However, the rules do not generally permit participants to provide uncontrolled, complete access to the MLS compilation, or an unlimited number of printed listings to prospects. The rules also generally prohibit MLS participants from using the database for any purpose unrelated to the sale of the properties contained in the MLS.

Non-MLS participants or subscribers may not use the MLS except when they are explicitly permitted to do so by the MLS. Although in the past it was rare for nonparticipants to request, let alone receive, authorization to use the MLS database, such third-party use of that data is more common now. An MLS that allows a non-participant to use the database should first enter into a license agreement with the user. The license agreement should carefully and narrowly specify how the licensee may and may not use the MLS database. An MLS can challenge and stop any unauthorized use based on the terms of its license agreement and copyright ownership.

Brother, can you spare a database?

Recently, some MLSs have found that some uses of the MLS database by non-participants are beneficial to the members and the MLS itself. For example, Internet property listing aggregators, such as REALTOR.com, typically obtain property listing data from MLSs. Some MLSs also receive requests for the right to access and use MLS data to create products or services that will be marketed to MLS participants and other real estate industry professionals.

For example, some software companies develop programs that analyze MLS comparable sales data to compute property market price evaluations or compile market share reports. Although an MLS is not obligated to make its data available to a third party, it makes sense when the result is a useful member service.

In addition, many MLS participants themselves have begun to use the MLS in new ways, such as in IDX, VOWs, or other forms of electronic MLS data display. Many details about how MLS participants can implement these other uses are still being worked out. In the meantime, MLSs should remind participants, and third parties involved in manipulating the MLS database, to comply with database restrictions.

Make sure to properly license your database

If an MLS participant uses a third-party vendor to create its IDX or VOW site, the participant is responsible for ensuring that the vendor plays by the MLS rules. That means that the vendor cannot use the database in any way other than developing the IDX or VOW. The agreement between the participant and the third-party vendor should include these restrictions.

Similarly, where an MLS provides the database directly to one or more participants' vendors to implement their IDX or VOW sites, the license agreement for this arrangement should restrict the vendor to using the database only for this purpose. Other prudent license agreement restrictions include:

* An acknowledgment by the licensee that the MLS owns all rights in the MLS database, including, but not limited to, copyrights

* A detailed description of how the licensee is permitted to use the database

* A specific prohibition on the use of the database for any other purpose and by any other person than is authorized in the license agreement

* An acknowledgment that any use by the licensee other than what is specifically permitted violates the MLS's copyright and the license agreement

* A right by the MLS to terminate the license agreement immediately if the database is being used differently from what is permitted in the agreement

Although in the past MLSs generally rejected out of hand most uses of MLS databases other than by participants in connection with the sale of listed properties, it is not necessary or even wise to do so today. Licensing alternative uses of MLS data should be explored to determine if they serve the interests of the MLS, its participants or the real estate community, and if they can be implemented by the MLS with an acceptable degree of administrative burden.

Associations should not restrict new and innovative uses of listing data just because they fear it will compromise their ownership of the MLS database. Although each case must be considered individually, the customary methods to protect the database--copyright and contract--are effective against the latest technologies and even those yet to come.

New Fax Law Confirms EBR Exception

The "Junk Fax Prevention Act of 2005" ("Act") has permanently inserted the "established business relationship" ("EBR") exception into the federal laws governing facsimile communications. The law became effective July 9, 2005, when President Bush signed the bill. Under the new law, a fax can be sent to anyone with whom the sender has an EBR, so long as the sender received the fax number voluntarily or had received the fax number prior to the enactment of the Act. To review new law, log onto http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s714es.txt.pdf.

NAR and other business groups supported this legislation, as this pro-business legislation avoids burdening businesses with the requirement of gathering consents for faxes sent to their clients or those who requested faxed information. In order to comply with the Act's requirements, members, brokerages and associations should immediately document all fax numbers in their possession for those individuals, clients, members, firms and/or MLS participants with whom they had an EBR at the time of the Act's effective date. The law also gives the FCC the authority to completely exempt nonprofit trade associations from the Act's requirements with respect to an association's communications with its members, but to exercise that authority, the FCC must adopt a rule specifically providing for that exception.

I. Background

The Federal Communications Commission ("FCC"), under the authority given it by Congress in the Telephone Consumer Protection Act of 1991 ("TCPA"), adopted rules governing fax transmissions in 1992. The TCPA contains a specific prohibition against sending unsolicited advertisements to a telephone facsimile machine. The TCPA allows the sending of faxes containing advertisements to individuals who have given their express consent to receive the fax.

The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." The penalties for violating the TCPA are $500/fax, with treble damages for willful violations. Consumers have a private right of action under the law, so the law can be enforced by consumers, state attorneys general, or the FCC. To learn more about how to report TCPA violations, log onto http://esupport.fcc.gov/complaints.htm.

In 1992, the FCC established rules pursuant to the TCPA. These rules require all messages sent via facsimile machines clearly contain the date and time that the message is sent as well as the identification of the business entity or individual sending the message and the telephone number of the machine sending the message or of the business entity or individual sending the message. This information must be contained in a margin either at the top or the bottom of each page transmitted or on the first page of the transmission. Click here to learn more about the rules, which are still in effect and unchanged by the Act except as noted in this article. Following the issuing of the rules, an FCC order clarified that the rules apply to the sending of faxes to personal computers equipped with, or attached to, modems and to computerized fax servers.

Based on the language in the TCPA, the FCC concluded in their 1992 rulemaking that an EBR provides evidence of the required express permission to send an unsolicited fax. The FCC also interpreted "express permission" to allow for oral consent from the fax recipient.

In 2003, the FCC reversed its prior policy position, and changed its rules to state that a facsimile advertisement is considered "unsolicited" unless the sender had obtained express written permission from the intended fax recipient which clearly indicates the recipient's permission to receive the fax and also contains the fax number where the faxes will be sent as well as the recipient's signature. The effective date of these new rules was postponed by the FCC on three occasions due to an outcry from the business community, and this new legislation means that the proposed rules will never take effect.

II. New Requirements for Sending Unsolicited Advertising Faxes

Under the revised law, there are three requirements that apply to sending unsolicited advertising faxes:

(1) The sender must have an "established business relationship" with the recipient;

(2) The sender must have obtained the customer's fax number through methods described in the legislation; and

(3) The sender must provide an opt-out mechanism that meets the Act's requirements (set forth below)

A. EBR Requirement

The Act expressly adopts the EBR definition used in the FCC's rules until 2003 but expands the definition to cover businesses in addition to the residential customers. Under the earlier rules, an EBR had the following definition: "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a… subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the… subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by

either party." Thus, a business has an EBR with anyone (i) with whom it has had a transaction, -or, (ii) with someone who made an inquiry to the business.

i. EBR for associations

For a REALTOR® association, the association has an EBR with current members of the association, since the act of paying dues qualifies as a transaction for purposes of this exception. Thus, the association can freely send faxes to its members. Additionally, the association has an EBR with anyone who has purchased association services. This could include, for example, nonmembers who took a class at the association or made some other purchase from the association or former members of the association. Faxes could also be sent to individuals who have made inquiries about membership or services provided by the association, such as through a fax-on-demand system.

ii. EBR for brokerages

For brokerages, an EBR exists with consumers in the same way it does under the "do not call rules", except there are currently no time restrictions for an EBR in the Act. In general, the brokerage could send a fax to any consumer who makes an inquiry to the brokerage. For a more detailed analysis of situations a brokerage may encounter, see attached "do not call" Q&A. The Act will permit brokerages to send faxes to consumers in the same way it can call consumers with whom it has such an EBR, notwithstanding that their phone numbers appear on the "do not call" registry.

Brokerages will also need an EBR to send other brokerages faxes about listings. A brokerage would have an EBR with any brokerage with whom it has participated in a cooperative transaction. Additionally, the brokerage would be allowed to fax listings to any broker who has made an "inquiry" to the brokerage, and the inquiry need not be related to the particular listing that the brokerage would like to fax to the other broker. The brokerage could receive the "inquiry" in any communication form, whether such as by phone call or email. Of course, an email is preferable, since it would provide the brokerage with a written record of the inquiry. For brokerages who regularly exchange listing information through faxes, the brokerages may want to exchange written consents to receive each other's faxes (written consent is effective until revoked).

B. Obtaining Recipient's Fax Number

Next, the Act requires that the senders have obtained the recipient’s fax number in one of two specific ways. First, if the sender had an EBR with the recipient and also possessed the recipient’s fax number prior to the Act's effective date (July 9, 2005), the sender may send faxes to that number. In this scenario, it does not matter how the sender obtained the recipient’s fax number. Any sender which qualifies for this category should retain and document the fact that it had the recipient’s fax number on the Act's effective date. This would include membership applications for REALTOR® associations. For brokerages, the best document source would be any communications it has had with other firms, agents/brokers, or consumers where the fax number is disclosed, such as in a listing agreement or purchase contract.

However, if the sender has not obtained the recipient's fax number prior to the Act's effective date or does not have an EBR with the recipient at the time of the Act's effective date, the sender will have to obtain the fax number from the recipient through (1) a "voluntary" communication of the fax number within the parties' EBR or (2) a number from a public source such as a directory, advertisement, or an Internet website.

The Act does not define a "voluntary" communication, but one of the following written communications provided to the entity sending the fax and containing a fax number would likely qualify as a voluntary communication: a business card; letterhead; invoices; and fax cover sheets. Of course, any communication where the receiving party voluntarily gives the sender their fax qualifies, whether it is given in an email or even in a conversation. However, it is advisable that the sender obtain a written record of the fax number, so as to protect itself from anyone who later claims to have not given the fax number to the sender. If the sender obtains the fax number from a public source, it should make a copy of the source if it is something like a directory or print out the page, if it is a website.

C. Opt-out Requirement

The Act requires that faxes containing unsolicited advertisements must contain an opt-out mechanism in order to allow the recipient the ability to opt-out of receiving future faxes from the business. The opt-out must also be included in faxes even where the sender has the recipient's written consent to send the fax. The opt-out must:

(1) be clear and conspicuous in its terms and on the first page of the fax (cover sheet if using one)

(2) state that the recipient has the right to opt out of future unsolicited advertisements, and that the sender's failure to comply within the shortest reasonable time (to be determined by the FCC, and until defined, brokerages and associations should quickly process opt-out requests to avoid lawsuits) is unlawful;

(3) include FCC language detailing an effective opt-out request (to be provided by the FCC); and

(4) provide a telephone and fax number where recipient can send opt request as well as a cost-free mechanism for opting out. The opt-out mechanism must be available 24 hours a day, 7 days a week.

The Act directs the FCC to create rules setting forth opt out request language and also to state what constitutes a "cost-free mechanism" for opting out. Right now, a cost-free mechanism that would comply is a toll free number. It is unclear whether an email address would qualify as a cost-free mechanism.

Possible opt-out language a business could use until the FCC provides its specific language:

"The recipient of this facsimile may request that the sender not send any future similar documents to a designated facsimile machine or machines. The sender's failure to comply, within the shortest reasonable time, with an appropriate request is unlawful. To opt out of further facsimile advertisements

from this sender, please [call or fax] [FILL-IN toll-free number] [email if desired] at any time on any day of the week."

III. FCC Rules & Possible Future Rulemaking

In order to clarify the Act, the Act directed the FCC to adopt rules within 270 days of the Act's effective date. Some of the required rulemakings are specified in the Act. First, the FCC will adopt rules specifying the form of the opt-out language. Second, the FCC must establish the time in which a business has to honor an opt-out request. Finally, the FCC will clarify what constitutes a cost-free opt out mechanism.

The Act also gives the FCC the discretion to conduct two other rulemakings. First, the FCC can create a nonprofit exception to the Act's requirements. This exception would allow "professional or trade associations that are tax-exempt nonprofit organizations" like REALTOR® associations to send faxes to its members in furtherance of the association's exempt purpose without having to include the opt-out notice. This exception can only be created after the FCC conducts a rulemaking on this issue and determines through the rulemaking that the opt-out mechanism is not necessary to protect association members from unsolicited advertising faxes from the association.

Second, the Act gives the FCC the ability to shorten the EBR time period. In order to take such an action, the FCC must make the following findings: first, that the EBR exception has generated consumer complaints; second, that the EBR time periods are inconsistent with customer expectations; third, the costs and benefits to recipients associated with a more limited EBR time period; and finally, the effect of costs associated with a more limited time period on small businesses. The Act states that the FCC must wait at least three months from the Act's effective date before it may undertake such a rulemaking.

IV. Conclusion

New legislation has enshrined the "established business relationship" exception in federal facsimile laws. The Act's EBR exception allows businesses to send commercial faxes to its customers and business partners without having to gather express written consents. Under the new law, a fax can be sent to anyone with whom the sender has an EBR, so long as the received the fax number voluntarily or had received the fax number prior to the enactment of the Act. The FCC will conduct further rulemakings to clarify certain aspects of the new law as well as possibly expand the law to completely exempt associations' communications with their members.

Frequently Asked Questions about Do-Not-Call Registry

As has been widely publicized, the Federal Communications Commission ("FCC") has changed its regulations ("Rules") enacted pursuant to the authority given it by Congress in the Telephone Consumer Protection Act of 1991. The Rules call for the creation of a national do-not-call registry for which consumers can register. The cold-calling activities of real estate professionals after October 1, 2003 will need to comply with the requirements of the new federal do-not-call registry. Click here to learn more about the do-not-call registry.

NAR has received numerous questions about the Rules, and below is a collection of these questions and answers. Note that these are not intended to be definitive interpretations of the Rules, but rather are based on our best understanding of the FCC's actions. If you are unsure of how the Rules will impact your telemarketing activities, it is recommended that you consult with your attorney before taking any action.

What is the Do-Not-Call Registry and how did it come about?

In December of 2002, the Federal Trade Commission ("FTC") finalized amendments to the Telemarketing Sales Rule ("TSR"). Key among the changes was the development of a national “Do-Not-Call” registry directed at stopping most unwanted interstate telemarketing calls to consumers. The new FTC rules provide consumers with the ability to place their telephone number on the registry. Telemarketers will be prohibited from calling anyone whose name is on the registry unless they meet certain criteria.

In a separate but similar effort, on June 26, 2003, the FCC announced final amendments to its telemarketing rules that would, among other things, prohibit intrastate calls to any person on the National Do-Not-Call registry, in addition to the prohibition against interstate calls established under the FTC rule. This is a significant change and as a result, all real estate professionals making interstate as well as intrastate calls must comply with the requirements of the National Do-Not-Call registry, regardless of state law exemptions.

What if my state has a "do not call" rule that provides an exemption for real estate licensees or other real estate activity exemption? Does the FCC rule still apply to intrastate calls that are permitted under my state's law?

Yes. The FCC action preempts state law that is less restrictive. A state do not call law that provided an exemption for real estate licensees would be considered less restrictive and therefore preempted, prohibiting real estate professionals in that state from making intrastate calls to persons on the Federal list, notwithstanding the state exemption. It is also important that other exemptions in the state law

such as those for existing business relationships and also calling time restrictions be considered when determining compliance requirements, as more restrictive state laws will remain in effect.

It is also important to note that some states continue to maintain their own “do-not-call” lists which are not integrated into the federal list. In those states, real estate professionals who would like to make telephone solicitations will need to consult both the state and federal lists. Click here for a list of states who maintain their own lists and who have not integrated their list with the federal Do Not Call registry.

How do I get the list and what does it cost?

Telemarketers will be able to access the registry on September 1, 2003. A telemarketer will receive access to the database by registering on the FTC's website. Following registration, the telemarketer will receive a unique account number that they may provide to any telemarketer or service provider that they employ on their behalf. In a real estate brokerage, real estate brokers can register and provide the account number to their agents. This will allow agents within the same brokerage the ability to access the registry under the same registration as the broker. The rules establish a bright line test under which corporate divisions, subsidiaries, and affiliates will be treated as separately for the purposes of gaining for access to the registry. Entities will be considered separate if: 1) they are separately incorporated or for a non-corporate entity such as a partnership, they are a distinct legal entity, and 2) they have different names or market their products under different names.

The list will be sorted by area code and telemarketers will be able to obtain the requested area codes from the FTC. Five area codes will be provided at no charge and additional ones will cost $54.00 per area code, up to a maximum annual fee of $14,850 for access to the Entire List. These charges will give the telemarketer access to the area codes they select for one year. Following the conclusion of the year, the telemarketer will need to renew its subscription for registry, including paying additional subscription fees if it has elected to receive access to more than five (5) area codes.

The FTC will also maintain an Internet page where telemarketers can look up a single number at a time free of charge. Telemarketers can look up to ten (10) numbers at a time.

How often does a business have to check the Registry?

Telemarketers are required to check the Registry at least every thirty one (31) days.

When will the “do-not-call” requirements go into effect?

Enforcement of the Do-Not-Call registry requirements will begin October 1, 2003.

Are there any exemptions to the rule?

Yes. There are few exemptions to the new rules. A telemarketer may call the following:

-Consumers with whom the seller has an existing business relationship. This applies to existing clients and customers and extends for up to 18 months after the end of a transaction. If a consumer makes an inquiry, the telemarketer can call the person for up to three months after the inquiry.

-Persons who have granted prior express permission to call. This permission must be in writing.

In addition, the rules do not apply to the following entities

-Charities and tax -exempt nonprofit organizations

-Political campaigns

-Callers taking surveys or polls.

Do the new rules apply to calls made to FSBO's?

There are two instances when a real estate professional would call a FSBO seller. The first would be a real estate professional seeking of a FSBO listing, and the second would be a buyer's representative who believes his/her client might be interested in a FSBO property. A buyer's representative can contact a FSBO owner whose number is listed in the Do-Not-Call registry about a client's potential interest in the property, as this call is not a telephone solicitation by the buyer's representative. Note that the buyer's representative can only discuss his/her client's interest in the property and not use a purported client's interest as a way to also discuss the possibility of the FSBO owner listing his/her property with the buyer's representative.

However, a real estate professional would be prohibited from initiating a telephone call to a FSBO seller whose number is listed in the Do-Not-Call registry in an attempt to obtain a listing. The rules prohibit anyone from making telephone solicitations to telephone numbers that are registered in the database, and a call initiated to obtain the listing falls within that definition.

Can I still call Expired Listings?

The established business relationship exemption permits the listing agent as well as other agents from the same company to contact the seller for up to 18 months after the expiration date. For all other agents, the Registry must be consulted prior to calling. If the seller has placed their number in the Registry, you should refrain from calling them.

Do the new rules apply to calls made to businesses?

No, the Do-Not-Call Registry is only for residential telephone numbers.

Have the Rules changed the requirements for autodialers and prerecorded message calls to wireless numbers?

The answer is no. Since 1992, it has been a violation of the Telephone Consumer Protection Act to use an autodialer or prerecorded message "to any telephone number assigned to a paging service, cellular telephone service . . . or any service for which the called party is charged." Due to the fact that land-based residential telephone numbers are now being converted to wireless numbers (or, "ported"), the FCC has recently created a safe harbor which gives telemarketers who use autodialers or prerecorded messages amnesty from liability under the TCPA where such calls are made to wireless numbers within

fifteen (15) days after the numbers are ported. Note the solicitation must otherwise comply with the established “Do-Not-Call” Rules, meaning that the newly ported number is not in the National Registry or on the company’s do-not-call list. The FCC has contracted with a private company to create a list of ported numbers. Any telemarketers using autodialers or prerecorded messages will therefore need to check this ported number list prior to making any such calls. Click here for more information.

How will these new rules be enforced?

The FTC and FCC are working to develop a Memorandum of Understanding to achieve an efficient enforcement strategy.

The FCC provides for a private right of action. Aggrieved consumers can sue if they receive two calls in violation of the regulations by the same company within a twelve month period and collect $500 for each violation.

My state association would like to download the area codes for my state and post those on its website for use by the members. Is this permissible?

No, the Rules make it clear that the only permissible use of the registry is for compliance purposes. It is not permissible to download and distribute the lists to third parties, even if the purpose of the distribution is to help members comply with the Rules.

A consumer calls my office to inquire about a listing. Can I call this consumer to talk about other listings over the next three months, or I am limited to only discussing the property which prompted the consumer's call?

The Rules permit a company to call consumer following an inquiry for three months after the inquiry or until the consumer requests to be placed on the company's do-not-call list. There is no limit on what the company can discuss with the consumer during those three months. Thus, other listings could be discussed with the consumer over the next three months.

A former client calls and tells me a friend of hers would like me to call her to discuss the possibility of her listing her home with me. Do I have to check the Do-Not-Call registry before making this call?

Yes, you would need to check the Do-Not-Call registry because it is not clear whether this sort of indirect inquiry would qualify as a "customer inquiry" within the Rules.

Can I call visitors to an open house who provide their phone numbers on a sign-in sheet?

It is not clear whether this would qualify as a customer inquiry is not clear in the Rules. Therefore, the safest course would be to provide some kind of notice on the sign-in sheet alerting visitors that they are consenting to receive a follow-up call, such as providing space on the sign-in sheet for visitors to include their name, telephone number, and a box next to each line allowing the visitors to check "yes" if they would like to receive a follow-up call.

My company publishes a telephone number with particular listings that interested consumers can call to receive additional information about the property. When the number is called, the system plays a recorded message about the home's features. During the call, the system also captures the telephone number of the caller. Will this type of call be considered an "inquiry" for purposes of the exemption?

The test under the Rules is whether the consumer has a reasonable expectation of receiving a return call. Therefore, in your recorded message to consumers, your company should create such an expectation by informing the consumer that they can expect a return phone call. Offering the consumer the ability to opt out of the return call would be the recommended solution.

What are the fines and are there any safe harbors?

The fine for calling someone whose name appears on the Do-Not-Call Registry is up to $11,000 per call by the federal government, $500 for a lawsuit by a state attorney general or a consumer.

There is a "safe harbor" for inadvertent mistakes. To meet the safe harbor, the entity making the call must demonstrate that:

-It has written procedures to comply with the do not call requirements

-It trains its personnel in those procedures

-It monitors and enforces compliance with these procedures

-It maintain a company specific list of telephone numbers that it may not call

-It accesses the national registry no more than 31 days prior to calling any consumer and maintains records documenting this process

-Any call made in violation of the do not call rules was the result of an error

Federal Laws Protecting Individuals Entering the Military

Two pieces of federal legislation affect employers and creditors of individuals who undertake military service, either through call-up or through volunteering. One sets forth how military service affects the employee/employer relationship, while the other legislation describes how the debtor/creditor relationship is affected. This article will address each separately below.

A. Employment Relationship

The civilian employment of individuals who join the United States military, either through call-up or by volunteering, is protected by the federal Uniform Services Employment and Reemployment Rights Act of 1994 ("Act"). The Act contains a number of important protections for members of the military, including protections from employment discrimination because of their military service and protection of their civilian job seniority while on military duty. The Act also requires that an employer offer an employee the same "leave of absence" benefits while engaged in military service that it offers to all other employees.

Below is an overview of how the protections offered by the Act affect employers. Note that although federal law pre-empts any state law when the military service is for the United States military, many states have similar laws that apply if an employee serves for the state's National Guard. In that situation, state law will need to be consulted.

1. Notification Provisions

The Act states that an employee must give an employer advance notice of any impending military service, unless for reasons of military necessity or impossibility notification is impractical.

2. Reemployment Rights

The Act protects a member of the military's civilian job while on active duty for up to five years, so long as the individual receives an honorable discharge from military service. The five years is cumulative for a single employer, but there are exceptions to the five year limit in times of national emergencies.

The Act contains an "escalator" provision for individuals returning from active duty. An employer is required to offer individuals returning from active service the position they would have obtained had they remained employed continuously. If the individual is not qualified to perform the duties in the higher-level position, then the individual must be offered their original position or, if it has been more than 90 days and the original position is not available, a position of similar status and pay as the individual's old position. There are also other provisions in the Act which mandate that an employer cannot deny the employee any "incident or advantage" of employment due to military service.

The Act's notification requirements vary for individuals returning from active military service, depending on the amount of time spent away from the employer. An individual whose military service lasts from one to 30 days must report back to work on the first work day falling within eight hours of the individual's return; 31 to 180 days of service, within 14 days after the completion of service; more than 180 days of service, within 90 days after the individual returns from service. Also, if an individual is injured or becomes ill while on duty, the application deadlines are extended for up to two years following the individual's return from service.

3. Compensation and Benefits

An employer is not required to pay compensation to an employee while the employee is employed in the active service of the military. Although an employee can use accrued vacation during the time of military service, an employer cannot require an employee to use accrued vacation time.

An employer is required to count service time towards an employee's pension plan, subject to ERISA's requirements. Similarly, upon reemployment, an employer is required to make-up contributions to an ERISA-defined contribution plan, like a 401(k), that were missed while the employee was engaged in military service. Matching contributions are not required, unless employee has made the necessary contribution. The IRS has rules pertaining to make-up contributions.

An employee who leaves for active military service can continue, or reinstate, employer-provided health coverage for up to 18 months or until the period allowed for the employee to apply for reemployment, whichever is less. The entire cost can be passed along to the employee, unless the employee's military service lasts for less than 31 days - in that case, the employee must only pay the normal share of the cost.

4. Other Provisions

The Act provides varying time periods during which a returning employee is protected from termination without cause following reemployment, except for an employee who served less than 31 days, for whom there is no protection. An employee who serves 30 to 181 days is protected for six months, and an employee who serves more than 180 days is protected for one year.

The Act also contains provisions protecting individuals from discrimination based on the individual's relationship with the military in the hiring, reemployment, retention, promotion or other benefits. These protections apply in all cases, whether it involves a veteran, a current member of the military, or someone seeking to join the military.

B. Debtor/Creditor Laws

The Soldiers' and Sailors' Civil Relief Act ("SSCRA") is federal legislation which was primarily created to give individuals who enter military service temporary relief from payment obligations for debts assumed prior to their entrance into the military, on the assumption that these individuals will experience a shortfall in their earnings upon entering military service. SSCRA accomplishes this by giving individuals in

the service tools to delay making or to modify payments on debts. Below is a brief summary of SSCRA's provisions.

A section of the SSCRA specifically relates to real estate leasing transactions. The SSCRA gives tenants who are called to military service the power to terminate pre-service leases. It does not matter if the lease was for residential or commercial use. The termination may occur at any time following the entry of military service and must be in writing. The following example demonstrates how this provision works: where rent is due monthly, the termination would become effective in the month following the termination (so, if rent is due on the first of the month and tenant sends the termination notice on July 10th, termination occurs on August 31st.) The rules vary for leases when other time periods for rental payments are involved.

The SSCRA gives the individual entering the military the power to suspend both civil as well as tax payment obligations that arose prior to, or during, the individual's military service. The individual obtains this relief by making a motion demonstrating to a judge that military service makes it impossible for the individual to make the required payments. If the judge decides to impose the stay, then enforcement of all payment obligations is suspended until the end of the individual's service, at which time another section of the SSCRA allows the individual to apply for further relief by postponing payments until the individual has recovered financially. The post-service extension can last for a time period equal to the individual's military service.

The SSCRA also gives an individual engaged in military service protections from a creditor enforcing obligations in secured transactions, such as for real estate or an installment contract. For this section to take effect, the contract must have been entered prior to military service and one payment or a down payment must have been made prior to the entry into military service. If these requirements are met, then the SSCRA requires a creditor enforcing the secured transaction to bring a judicial proceeding, instead of simply foreclosing or repossessing the property. During the judicial proceeding, the judge has the power to modify the agreement, such as altering the payment schedule or ordering the property sold and a division of the proceeds.

Other sections of the SSCRA allow a court to stay judicial proceedings that involve an individual who is serving in the military. There is no requirement that the lawsuit involve pre-service obligations. Another section allows a court to stay a judgment entered against an individual in the military. Another section gives an individuals the power to vacate any default judgment entered them by demonstrating to a court that they were prejudiced by military service from raising a valid defense to the action. Another section of the SSCRA limits the amount of interest payments an individual in the military is required to pay on a debt arising prior to military service to six percent. One of the more important sections of the SSCRA states that the period of military service does not count towards the running of any statute of limitations.

Copyright Registration Procedures for MLS Databases

This article presents a brief explanation on the importance of registering your MLS database with the United States Copyright Office, and also provides guidance on the registration process. By registering your database, your MLS will receive the maximum protections afforded by law.

I. Why Seek Copyright Registration for Your Electronic Database?

A copyright is a right granted by federal law which gives the creators of particular works the right to control the copying of their works for a specific time period. Copyright protection is available as soon as a work is created in a fixed form. In general, registration is not required to obtain copyright protection nor is the use of a copyright symbol (©) required. However, registration of your copyright and indicating to the public that you are the copyright holder (such as by using the © symbol) will make it much easier to protect your copyrighted works from infringement. Registration of a copyright establishes a public record of copyright ownership, and is a requirement before bringing an infringement lawsuit for works of U.S. origin. There are also other advantages to prompt registration of a copyright, including the right to receive attorney's fees in successful litigation.

Electronic databases, like a MLS database, are entitled to copyright protection. The United States Copyright Office defines an electronic, or "automated," database as a collection of facts, data, or other information which is one or more files organized into a format usable by a computer. These compilations of data are entitled to copyright protection because they are original works that organize existing information into a unique format or arrangement. A number of court cases have found MLS databases to be entitled to copyright protection- click here to view a list of these cases.

II. How Do You Register Your Electronic Database?

The United States Copyright Office is where you register your electronic database- click here to visit their website. The Copyright Office has created "Circular 65" (downloadable from the Copyright Office's website), which explains the registration process for "automated databases," like a MLS database. You can also download the necessary forms from the Copyright Office's website.

Registering your MLS database is a simple process. First, you will need to download or obtain Application Form TX from the Copyright Office (form is available on website). You will then need to complete the form and send it, a check for $45 (this fee may change annually, so check the Copyright Office site), and a deposit which is "representative of the updates/revisions being registered." In general, the deposit requires a submission of 50 records which are representative of the database. This will generally be the view which displays all the different categories of information collected for each property. Also a descriptive statement, which should include the database's title, contact information

for the copyright claimant, and information about the database which is being copyrighted, will need to be provided.

There are also special rules for completing Application Form TX for MLS databases that are set forth in Circular 65. In Space 1:Title, there is a special format which should be used. The information in this space must be presented in this style: “Group Registration for automated database titled [insert title]; published/unpublished (choose one) updates from [insert date] to [insert date].” The dates describing the period covered by the group registration must be three months or less apart, and all within the same calendar year. In the “Publication as a Contribution” part of this section, state how frequently the MLS database is updated. In Space 3: Creation and Publication, provide the date when the compilation format was first fixed in time. In Space 6: Derivative Work or Compilation, the application should state that the materials included in this compilation are preexisting materials and the information in this section should also make it clear that these materials were “selected” and “arranged,” in order to assure that the compilation receives copyright protection.

Conclusion

Registration of your MLS database assures that your MLS information will receive the maximum protection from infringement afforded by law. As this article explains, registration is easy, but you will need to follow the directions in the Circular carefully when completing the form. Visit the United States Copyright Office today to obtain the forms necessary to register your database.

See attached tips for completing copyright form (page 44)

See attached sample TXS form (pages 45-47)

Helpful Tips and Suggestions for Completing Copyright Form TX

- Read the special instruction circular first. In addition to the general information in the Circular you will want to refer to the section of the Circular on page 3 dealing with "Group Registration for Automated Database Updates/Revisions." Federal copyright registration forms are very simple, but what might appear to be an obvious piece of information may require a special format or even different information when registering a compilation and don't forget the supplemental page containing a descriptive statement for the compilation.

- "Publication" as used in the form refers to whether you make copies of your compilation available to others. If you don't, then your compilation is not published. If you do, then the date of publication is going to be the current year, not the year you started your multiple listing service, because the date is for the first publication of the current version of the compilation.

- MLS compilations are largely collections of factual information regarding the properties listed for sale by members. According to the Copyright Act, the copyrightable interest in factual compilation is in the author's original "selection, arrangement and coordination" of that information. These should be treated as special words to be used whenever describing the compilation and MLS's role in creating the compilation in any description of the compilation.

- MLS compilations always contain public domain information (facts) or materials that were previously published about the subject properties filed with the service. Keeping this in mind when reviewing the suggested language in the instructions for completing section 6(a) and (b) should make your choices obvious.

- The deposit requirement can be met by producing printouts for fifty different properties showing the fields of information collected with regard to properties. This shows your selection of which facts to collect and how those facts have been arranged and coordinated with each other, thus demonstrating the MLS's creativity in creating the MLS compilation.

Form TX
For a Nondramatic Literary Work
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

TX TXU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼

Group registration for the automated database titled Multiple Listing Service Compilation published dates 01/01/06 to 03/31/06.

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

Date represented by deposit materials is 03/31/06. The Compilation is continuously updated.

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2 a

NAME OF AUTHOR ▼

ABC Association of REALTORS®

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☑ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ U.S.
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

Compilation of database materials and text.

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

c

NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED
2006 ◀ Year
This information must be given in all cases.

b

DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published.
Month ▶ March Day ▶ 31 Year ▶ 2006
◀ Nation

4

See instructions before completing this space.

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

ABC Association of REALTORS®
123 Main Street
Anytown, Any State 12345

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8.

EXAMINED BY | FORM TX

CHECKED BY

☐ CORRESPONDENCE Yes

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? 5

☐ Yes ☑ No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: **Previous Registration Number** ▶ **Year of Registration** ▶

DERIVATIVE WORK OR COMPILATION 6

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼ a

The Compilation includes an appreciable amount of previously published or public domain materials.

See instructions before completing this space.

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼ b

Compilation of database materials and text consisting of characteristics of real property selected, coordinated and arranged by applicant and currently listed for sale by real estate broker members of applicant's multiple listing service. The Compilation is subject to continuous updating as changes occur to any of the selected characteristics.

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. 7

Name ▼ **Account Number** ▼ a

(insert name and account number if account is maintained --- if no account attach a check for $30.00)

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼ b

(insert address for correspondence)

Area code and daytime telephone number ▶ Fax number ▶

Email ▶

CERTIFICATION* I, the undersigned, hereby certify that I am the 8

Check only one ▶
- ☐ author
- ☐ other copyright claimant
- ☐ owner of exclusive right(s)
- ☑ authorized agent of ABC Association of REALTORS®

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Date ▶

Handwritten signature (X) ▼

X

Certificate will be mailed in window envelope to this address: 9

Name ▼
(insert address for correspondence)

Number/Street/Apt ▼

City/State/ZIP ▼

YOU MUST:
- Complete all necessary spaces
- Sign your application in space 8

SEND ALL 3 ELEMENTS IN THE SAME PACKAGE:
1. Application form
2. Nonrefundable filing fee in check or money order payable to *Register of Copyrights*
3. Deposit material

MAIL TO:
Library of Congress
Copyright Office - TX
101 Independence Avenue, S.E.
Washington, D.C. 20559-6222

Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

SUPPLEMENTAL INFORMATION TO APPLICATION TO REGISTER COPYRIGHT
GROUP REGISTRATION OF AUTOMATED DATABASE

Title of Database: Multiple Listing Service Compilation

Name and Address of
Copyright Claimant: ABC Association of REALTORS®
123 Main Street
Anytown, AnyState 12345

Database Description: The database consists of a single data file of residential real estate which is currently for sale and which is listed with a real estate broker who is a member of the multiple listing service. The data file contains approximately 30 types of data which have been selected by the copyright claimant with regard to each individual piece of real property in the database. The data with regard to each piece of real property is supplied by the real estate broker members of the multiple listing service. On average, at any one time, the database will contain information related to approximately 1000 pieces of real property.

Database Changes: The database operates with real time updating of its information so changes can be continuously made as properties are either listed for sale by a member of the multiple listing service and added to the database by the member or are sold and are removed from the database. Changes to the database may also occur as some change occurs in any of the data regarding a particular piece of real property.

Copyright Notice: Insert here statement where and when copyright notice appears and what the copyright notice states. Be sure any and all copyright notices in the database indicate that the Association is the copyright owner.

Does Your Association Have a Written Policy on Employee E-mail Use?

It's important for REALTOR® associations, as employers, to have clear written policies on how their employees may use the association's e-mail system and whether the association will monitor such use. This is important because unless your state law provides otherwise, courts generally look at the issue of e-mail monitoring by weighing the need for employers to maintain a safe and productive workplace against any reasonable expectation of privacy employees may have in those e-mail communications. Courts say that those "reasonable expectations" are based on what the employer communicates to its employees through policy statements and practices.

E-mail use and monitoring are particularly tricky because the existence of e-mail passwords may create the illusion of privacy. It's important that you dispel that illusion by spelling out the following:

- The e-mail system belongs to the association and the association has the right to determine how it is used. The association also has the right, for legitimate business purposes, to monitor e-mail use -- whether it be e-mails the employee sends or receives.
- Your association's policy can be whatever you feel is appropriate for your staff and organizational culture. Some organizations state that the e-mail system is to be used only for business use, never for personal use. Others state that only de minimus personal use is allowed, especially in states where an absolute "no personal use" policy may not be upheld unless it is strictly enforced. Yet other organizations simply advise their employees that they will only monitor e-mail when management has reason to suspect abuse.
- E-mails should be drafted thoughtfully and sent with the same sensitivity as one would draft and send paper memos. Because of the speed and informal nature of e-mails, many employees don't realize that e-mails are discoverable during litigation, can be sent to others (or everybody) by accident, and are not really ever deleted from the system. In fact, deleted e-mails are routinely archived and can be retrieved.
- Some communications are too sensitive for normal e-mail transmittals and either should be encrypted or not sent by e-mail at all. This is particularly important to remember with communications that relate to employee disciplinary actions, wage deductions, and other confidential information in which the employee rightfully has an expectation of privacy.

- Intimidating, hostile, offensive or harassing messages should not be allowed. Your association will be just as vulnerable to lawsuits when inappropriate or unlawful messages are sent by e-mail as you would be if similar communications were spoken or appeared in other media.

As with any employment policy, you must be consistent, not arbitrary or discriminatory, in enforcing your e-mail policy. It's also a good idea to get your employees to consent to or acknowledge receipt of your e-mail policy in writing. And, of course, you should articulate your policy frequently to make sure that new employees know and old employees don't forget that the e-mail system belongs to the association and they must use it according to association rules.

Volunteer/Staff Code of Conduct and Sexual Harassment Policy

The members and staff must work together effectively as a team to accomplish the Association's goals. Such joint efforts are enhanced by an environment of courtesy and mutual respect. Offensive behavior not only impedes the effectiveness of the joint efforts, but can also create exposure to legal liability.

The National Association fully supports the rights and opportunities of all its directors, committee members and employees to work in an environment free from discrimination and without subjugation to sexual harassment.

Sexual harassment does not include occasional compliments or voluntary relationships between members and staff.

Sexual harassment may be overt or subtle. It includes behavior that is not welcome, that is personally offensive, that fails to respect the rights of others, that lowers morale and that, therefore, interferes with the effectiveness of our work. Sexual harassment may take different forms. One specific form is a demand for sexual favors. Other forms of harassment include:

Verbal Sexual innuendoes, suggestive comments, jokes of a sexual nature, sexual propositions, threats.

Non-Verbal Sexually suggestive objects or pictures, graphic commentaries, suggestive or insulting sounds, leering, whistling, obscene gestures.

Physical Unwanted physical contact, including touching, pinching, brushing the body, coerced sexual intercourse, assault.

Whatever form it takes -- verbal, non-verbal or physical -- sexual harassment is insulting and demeaning to the recipient and cannot be tolerated. Sexual harassment of any member or staff by any member or staff will not be tolerated. All staff and members will be expected to behave accordingly and take appropriate measures to ensure that such conduct does not occur. Appropriate disciplinary action will be taken against any staff or member who engages in sexual harassment.

Any director who believes he or she has been the subject of sexual harassment should report the alleged act immediately to his or her Regional Vice President. If the complaint involves the Regional Vice President, the complaint should be brought to the attention of the First Vice President.

Any committee member who believes he or she has been the subject of sexual harassment should report the alleged act immediately to the chairman or vice chairman of the committee. If the complaint involves the chairman or vice chairman, the complaint should be brought to the attention of the committee liaison.

Copyright Information

From Steven King's latest bestseller to the launch codes for the U.S. nuclear arsenal, virtually all information is capable of being owned or controlled by someone. When developing Lotus Notes databases, in addition to what information to include, it is necessary to determine who owns or has the right to control the information to be included. In doing so, copyright and security and access issues must be considered.

Information will fall into two general categories:

1. **Information owned by others.**
2. **Information owned by NAR.**

Different copyright and security and access considerations will apply as follows:

Information Owned by Others

This information must be broken down between (1) information within the public domain, including virtually all works produced by government or whose copyright has expired (generally more than 75 years old); (2) information that is copyright protected; and (3) information in our possession but held pursuant to an agreement to keep it confidential.

Information that has not been copyrighted can be input into the database and made accessible to any user. This information is said to be in the public domain, since no one does or can own it. A business decision must then be made as to user accessibility and allowed use. For example, some information may only be of value to NAR staff so access would be internal only. Other information may have value to both NAR staff and Executive Officers so access would be both internal and external to the EO group. Then a decision must be made as to whether use is restricted or unrestricted (i.e., read only; read, download, print, etc.)

Information owned by others which is copyright protected can not be input into the database without first obtaining written permission to use and disseminate the information in a specific manner. In cases where inputting of such information is desired, you should request such permission from the copyright owner and, if it is granted, you should see Legal Affairs for assistance in obtaining a written release confirming the owner's permission to use the information. You should know that it is possible to

take public domain information (e.g., census data) and by rearranging, reformatting and/or re-ordering it create a copyrightable new compilation of facts. When considering whether to include something obtained from a third party, particularly if you had to pay for it, the safest assumption is that it is copyrighted, particularly, but not necessarily, if the source bears a copyright notice. Again, Legal Affairs can assist in determining the status of questionable items.

You will generally know when something is in NAR's possession under the terms of a confidentiality agreement or some other agreement limiting our use of the information. This type of information can only be used in the manner permitted in the agreement between the owner and NAR. Typically, you will have had to sign a document or the information is provided in a sealed package which must be broken to accept and use the information. Either one of these acts can bind NAR to the terms established by the information provider. Legal Affairs can assist you in understanding the limitations imposed or negotiating new terms if you talk to us prior to signing anything or breaking the seal on the information being provided.

Information Developed and Owned by NAR

This information must be broken down between (1) information that is not proprietary or confidential and contains no copyright; (2) information that is proprietary or confidential and not copyrighted; and (3) copyright protected information.

It is important to remember that information developed/owned by NAR is copyrightable and a business decision needs to be made whether or not to copyright it.

Information that is not proprietary or confidential and contains no copyright can be made accessible to any user. A business decision must then be made as to user accessibility (i.e., internal only, such as Human Resource's policies; internal and external, such as the Americans with Disabilities Act compliance kit, etc.). Then a decision must be made as restricted or unrestricted use (i.e., read only, read, download, print, etc.)

Information that is proprietary or confidential and not copyrighted probably warrants limited access if included in a Lotus Notes database. Additionally, its use would presumably be restricted (see MIS for assistance in establishing the appropriate accessibility groups and type of use).

Finally, careful consideration should be given to the accessibility of copyright protected information. If NAR has copyrighted a publication, product, etc., it is to protect NAR's ownership rights. A NAR copyrighted item included in a Lotus Notes database should include the appropriate copyright notice regardless of its distribution unless a business decision has been made to give up all rights to the materials and forego the protections provided by the copyright laws. Where copyright protected documents are to be accessible on the system, such documents should be clearly labeled in such a way as to inform users of the applicable limitations on their use.

Employer/Employee Guidelines

These Guidelines are not intended to and do not create a contract of employment.

Policies and guidelines may be revised at any time at the employer's sole discretion.

Following these guidelines is a requirement in order to invoke defense costs coverage (up to $1,000,000) under the NATIONAL ASSOCIATION OF REALTORS®' Professional Liability Policy for wrongful termination claims. Such coverage applies to suits arising from hiring, firing, compensation, employee privileges or other terms of employment.

I. PERFORMANCE REVIEW

Performance reviews are an excellent opportunity to provide feedback to your employees. In a performance review, you should discuss both the employee's outstanding accomplishments and those behaviors that need improvement. You and your employee should set goals to be met by the next performance review. Such goal setting is a good motivating technique that makes employees feel they have a say in their work. Frequent performance reviews can also help you catch misguided behaviors before they develop into major problems. Your positive attitude toward performance appraisals can make them rewarding experiences for both you and your employees.

Review all new, transferred, or promoted employees six (6) months after the starting date in the new position. You should schedule the employee's second performance review six (6) to twelve (12) months after the first, and the third and subsequent reviews on an annual basis thereafter. You may conduct additional performance reviews if the employee's performance or behavior warrants it.

All performance appraisals must be documented in writing and signed by the employee. Keep in mind that performance reviews do not necessarily require wage and salary adjustments.

II. DISCIPLINARY ACTION

You must discipline employees in a uniform and progressive manner. This means you should follow set steps when disciplining poor employee performance and violation of any standards of conduct which you have developed. The steps, arranged in order of their severity, are:

1. Verbal Warning

2. Written Warning

3. Probation

4. Suspension

5. Discharge

Your decision on which step to take depends on the nature of the violation or performance problem, its seriousness, frequency, and the employee's record.

Verbal Warning

For many minor infractions or performance problems, you only need to give the employee a verbal warning to correct the situation. You should meet with the employee as soon as possible after the problem, and in the conversation, clearly explain the violation or performance problem. Next, tell the employee why it is a violation or problem and discuss the future behavior you expect of the employee.

You should note in writing the date, time and content of your conversation for future reference. If the employee repeats the behavior, or if the situation doesn't improve within a reasonable period of time (this depends on the seriousness of the infraction), you may repeat the verbal warning or proceed to the next step in the process.

Procedure: Administering a Verbal Warning

1. Meet with the employee.

2. Explain the nature of the violation or the performance problem. Discuss the problem and its resolution with the employee.

3. Describe the future behavior you will expect of the employee.

4. Note the date, time, and content of your conversation in writing.

5. If the employee repeats the behavior, either give another verbal warning or administer the next disciplinary action, the written warning.

Written Warning

The next step in progressive discipline is to issue a written warning. Use written warnings if an employee:

continually repeats minor violations

has performance problems that have been unresolved by verbal warnings

violates more serious standards of conduct

has major performance problems

In this memorandum, you should describe in detail the facts involved in the infraction or performance problem. Also, outline the behaviors and objectives that you expect of the employee by a specified time in the future.

Have the employee sign the memorandum. This shows that the employee has received, acknowledged, and understood the memorandum. This does not mean, however, that the employee has necessarily agreed with its contents.

Allow the employee to make a written response.

Next, send a signed copy of the written warning (with the employee's response, if any) to the employee's personnel file. If the situation does not improve within the specified time period, you may need to repeat the written warning or take the steps required for probation, suspension, or discharge.

Procedure: Issuing a Written Warning to an Employee

1. Create a written memorandum in which you describe the facts involved in the problem.

2. Meet with the employee to discuss the memorandum.

3. Have the employee sign the memorandum acknowledging his receipt and understanding of it.

4. Allow the employee to offer a written response to the warning.

5. Put a signed copy of the memorandum (with the employee's response, if any) in the employee's personnel file.

Probation

In most instances, you should use this disciplinary action if the verbal and written warnings did not result in improved behavior and work performance. To place an employee on probation, you must again prepare a memorandum that explains the reasons he or she is being placed on probation. Also, specify the following:

the length of the probationary period

the behaviors or level of job performance expected during and by the end of the probationary period

the consequences of failing to meet the expectations by the specified time

The usual consequence of the employee failing to improve is to consider discharge or to actually discharge the employee.

Meet with the employee and discuss the contents of the memorandum. Have the employee sign the memorandum, acknowledging receipt and understanding of its content. The employee may provide a written response.

Put a signed copy of the memorandum along with a copy of the employee's written response, if any, in the employee's personnel file.

Procedure: Placing an Employee on Probation

1. Prepare a memorandum explaining why you are putting the employee on probation.

2. Meet with the employee and discuss the contents of the memorandum.

3. Have the employee sign the memorandum to acknowledge receipt and understanding.

4. Let the employee provide a written response.

5. Put the signed copy of the memorandum along with the employee's response, if any, in the employee's personnel file.

Suspension

Suspension can be used as a disciplinary action if your verbal and written warnings and probation failed to correct the problem. However, suspension is most often used when an incident warrants immediate action. In such a case, you can suspend the employee without pay for a specified time, pending investigation of the occurrence.

III. TERMINATION

State and Federal laws have a great impact on terminations, and they must be handled with expertise. If an incident occurs that you believe could be cause for immediate termination, contact your legal counsel. If the behavior is a repeated offense, the employee's file must be sufficiently documented to support the termination. Before you discharge an employee, review all documentation with your legal counsel.

IMPORTANT REMINDERS

All incidents of misbehavior, conversations with employees regarding those incidents, memoranda, employee responses, and other information pertinent to the misbehavior or performance problems must be documented in the personnel file.

When you document violations or performance problems, be objective and give only the facts. Do not include your personal feelings or opinions about the employee or the incident in either the memorandum or your verbal warnings.

Selecting Association Counsel Guidelines

Selecting a suitable firm or attorney as Association counsel is vitally important, given the significant role which counsel must often play in the Association effectively and efficiently accomplishing its objectives. The following considerations should be incorporated into the process of choosing an attorney or firm to represent the Association. Careful identification of counsel with the capabilities and willingness to serve the Association's unique needs is necessary to establishing a sound relationship between the Association and its counsel.

1. Appropriate Legal Expertise Coupled with a Practical Understanding of the Association's Needs:

The Association's counsel should possess a knowledge of the law as it applies to both the real estate industry and trade associations. Specifically, he should have experience in, or at least a working knowledge of, real estate transactions, agency law, corporate law, anti-trust, civil rights, and employment law. He should be familiar with state and federal tax law applicable to the Association. He should be capable of handling the myriad of developing legal trends relating to trade associations. Counsel, or his firm, should have the staff and facilities to represent the Association in litigation and to serve all other legal needs of the Association. The scope of these needs will depend upon the Association's size, current legal issues affecting the Association, the Association's goals, and other factors.

In addition to possessing the requisite legal expertise, the attorney must possess or develop a thorough understanding of the Association's structure and its operations. The attorney must possess a complete awareness and understanding of the various legal risks facing the Association in order to provide the legal services necessary to reduce or eliminate those risks. He must be capable of devising workable solutions to Association problems and issues, consistent both with the law and the Association's objectives.

2. Open Lines of Communication

It is imperative that a convenient and comfortable line of communication be established between the Association and its counsel. The Association must never be hesitant or reluctant to call on the attorney for advice when necessary, and the attorney must be easily accessible and willing and able to communicate his advice to the Association. Counsel must also be able to communicate in terms with which his audience is most comfortable.

3. Commitment to the Association

Although rather subjective and intangible, the attorney's commitment to working with and representing the Association are also of great importance in selecting counsel for the Association. Association counsel should demonstrate a clear commitment to providing the full array of legal services required by the Association, including reasonably prompt response to unforeseen questions and issues that arise, attendance at all meetings and proceedings of the Association where such attendance is necessary, and availability to provide or assist with education programs for the Association and its members. Because the attorney will be selected based to a significant extent on his personal attributes and capabilities, the attorney and the Association should discuss and agree on the circumstances in which other members of the attorney's firm may be involved in providing needed services to the Association in place of the principal Association attorney.

Of the highest importance is the trust placed in the Association attorney by the leadership and membership of the Association. This trust is crucial to open and frank discussions between the Association and its attorney. All parties must recognize that each is working toward the common goal of the Association providing the best possible service to the members. Inevitably, the attorney will feel compelled to advise against a proposed Association action which the membership or the leadership feels is highly desirable. This trust must exist so that the Association understands that the attorney's recommendation is based on his view of the best interests of the Association, considering the risks involved in such action balanced against the benefits which are envisioned.

4. Professionalism

Since the attorney will be the Association's representative in legal matters, his professionalism and demeanor must always reflect positively upon the Association. Counsel must possess and maintain a reputation for the highest standards of integrity in the legal, real estate and business communities. It is also advantageous for Association counsel to be a recognized figure in these communities, so that he has complete credibility among Association members as well as others who see him engaged in his role as legal spokesman for the Association.

5. Conflicts of Interest

The Association should be aware of possible conflicts of interest in its selection or employment of counsel. It is preferable that the Association counsel not be a REALTOR® or a member of the Association, since such status could impair the credibility, impartiality or effectiveness of counsel. Any close relationships between counsel and members of the Association should also be identified and explored, so that in any matters involving such members the potential conflict between the attorney's allegiance to the Association and to such member(s) can be addressed and resolved in advance.

6. Compensation

Fees are important because the Association must never feel restrained in calling on counsel because of the expense of doing so. The costs of not seeking professional legal advice when it is needed virtually always outweighs the financial costs of seeking such advice.

Fees, billing schedules and the extent of explanatory detail to be provided with each bill must be discussed, negotiated and agreed upon in advance. The Association should also never feel constrained from requesting additional information or explanation about a particular bill.

Sexual Harassment Policy Statement

Sexual harassment is illegal conduct and is contrary to the policy of the NATIONAL ASSOCIATION OF REALTORS®. Each and every employee is responsible for assuring that they do not engage in sexual harassment or any conduct which could be viewed as sexual harassment.

Sexual harassment includes:

1) Unwelcome sexual advances;

2) Unwelcome requests for sexual acts or favors;

3) Other verbal or physical conduct that has the purpose or

effect of unreasonably interfering with an individual's work

performance by creating an intimidating, hostile or offensive

working environment.

Complaint Procedure

Any employee who believes he/she has suffered sexual harassment by any other employee, including supervisors and coworkers, or by any member of the Association or by any guest or visitor of the Association must bring the problem to the attention of any of the following individuals:

1) His/her supervisor;

2) Any staff member in the Human Resources Division;

3) Any attorney in the Legal Affairs Division;

4) Executive Vice President.

The complaint does not have to be in writing. It is helpful if details of dates, times, places and witnesses, if any, to the harassment can be provided.

Complaint Investigation and Confidentiality

All complaints will be investigated promptly by a team comprised of a professional staff member from the Human Resources Division and an attorney from the Legal Affairs Division.

The identity of the employee making the complaint as well as the identity of the individual accused of sexual harassment will be kept strictly confidential. Information regarding the charge of sexual harassment and the investigation of that charge will not be made known to anyone who is not directly involved either as a party, a witness, a member of the investigatory team, or the Executive Vice President. Witnesses interviewed will be provided only such information as is necessary to elicit from them their observations and other relevant information.

During the investigation, both the complainant and the accused will be provided a full opportunity to tell their side of the story. Witnesses identified by the complainant or the accused will also be interviewed. Upon completion of the investigation, the investigatory team will prepare a written report of its findings and recommendations for the Executive Vice President. Authority for the final resolution of all charges and the determination of appropriate sanctions rests with the Executive Vice President.

Discipline

Sexual harassment is a serious offense and any employee found to have engaged in such conduct is subject to severe discipline, including termination.

It is contrary to Association policy for a supervisor to retaliate against any employee who files a charge of sexual harassment. All possible steps will be taken to eliminate the possibility of retaliation resulting from the filing of a complaint.

In the event a complaint of sexual harassment is found to be totally and completely without basis, appropriate disciplinary measures may be taken against the employee who brought the complaint. While this is in no way intended to discourage any employee who believes they have been the victim of sexual harassment from bringing a complaint, the Association recognizes that a charge of sexual harassment can cause serious damage to the accused's personal reputation and professional career.

Follow-up

In instances in which sexual harassment is found to have occurred, a member of the investigatory team will remain in communication with the victim to find out whether the harassment has ceased or if any retaliation has occurred.

Voluntary Office Romances

It is not contrary to the policy of the Association for employees to date except in circumstances where one of the employees reports, either directly or indirectly, to the other employee. No dating is permitted in such circumstances. The Association will, however, consider requests from affected employees to transfer them to other open positions within the Association for which they are qualified so that the employees are not in the same reporting lines.

Trademark Infringement and the Internet

Educating people on what new technology can do for them in their businesses may require a whole new set of skills for association staff, but understanding how that technology may be used in the marketplace may also require a new understanding of old rules and principles designed to protect consumers as they may apply to the technology filled workplace.

An example of the application of such a principle to the Internet is demonstrated by decisions such as one issued on April 26, 1996 by the U.S. District Court in California in Comp Examiner Agency, Inc. v. Juris, Inc., (1996 WL 376600 (C.D.Cal.)), involving the use of another company's trademark as a website and second level domain name. Comp Examiner Agency (CEA) was owned by a California attorney who specialized in workers compensation issues. This attorney had registered with Network Solutions, Inc. (NSI), the Internet name authority in the United States, the domain name "juris.com," and then transferred ownership of the domain name registration to CEA for its use. At the web site CEA sold software used in the legal, insurance and forensic professions, and in promotions for use of the web site claimed to have included links to many useful legal resources found on the Internet. The site was promoted to an audience which included attorneys and law firms.

Juris was a manufacturer of law office software and other goods and services mainly related to law office automation. In 1988 Juris had registered the trademark "Juris" for use in connection with these goods and services with the United State Patent and Trademark Office, and the mark had become incontestable under the federal trademark law (the Lanham Act). The principle market for Juris' products was made up of attorneys and law firms.

When Juris found out about CEA's website (while trying to obtain the same domain name from NSI, Juris wrote to CEA to ask it to give up the domain name on the basis of Juris' preexisting, valid trademark registration. TCE refused to cooperate and under NSI's Domain Name Dispute Policy once Juris had supplied NSI with a copy of its federal registration certificate which predated TCE's first use of the domain name, TCE should have had one of four options: (1) within thirty days submit to NSI a trademark registration certificate for the domain name; (2) relinquish the domain name to Juris; (3) accept assignment of a new domain name; of (4) refuse a new name and refuse to assign old name to Juris. Under options 3 and 4 NSI's policy would have required that a hold be put on the name and it becomes unavailable to any party until the dispute can be resolved. TCE failed to provide any response, and, according to Juris, NSI, contrary to its own policy, allowed TCE to continue to use juris.com and also allowed them to register jusiscom.com as a new domain name.

TCE sued Juris for declaratory judgment asking the federal district court to determine the respective parties rights to the domain name, and Juris counter claimed for trademark infringement. Juris then asked the court for a preliminary injunction to stop TCE's continuing use of the juris.com domain name during the pendency of the lawsuit. In ruling on Juris' motion for a preliminary injunction, the Court agreed with Juris' contention that the use of juris.com as a domain name was likely to cause confusion among potential purchasers of CEA's goods and services and lead them to possibly believe that the source of these goods and services was actually Juris. CEA was ordered to shut down all commercial activity at the juris.com site within seven days of the date of the Court's order pending a later full trial on the merits.

This was not the first time trademark owners had clashed with users of Internet domain names identical to their trademark. Other major companies have had to fight this battle including, McDonalds, Avon, the Better Business Bureau, Hasbro (separately for both their Candyland and Clue trademarks), and Apple Computer (for their Newton trademark), and this is far from a comprehensive list. This case may have been easier for the Court than some other examples because both the trademark owner and the Internet domain name owner were in the same line of business, selling products to the same group of consumers. However, this is one of the first cases which expressly recognized that an Internet domain name could parallel the function of a trademark in commerce, and, through the application of traditional principles of trademark law, to determine the use of someone else's trademark as a domain name could result in trademark infringement.

The role of trademarks and domain names is an important one and the case discussed here is only one of many which have arisen involving major corporations. The issue is also of importance in the REALTOR® community as the expansion of real estate business onto the Internet continues to accelerate. It will be important for Association's to monitor not only the use by members of the Association's membership marks on the Internet but also their own to assure all such uses comply with the rules governing the use of the membership marks. There are no special rules which must be learned for the Internet, but members as licensees authorized to use the membership marks must abide by the rules on the Internet the same way they do in any other media. The Trademark Protection Program treats the Internet as just another of the ways by which members may promote their services and the properties they are offering for sale. As such the rules governing the use of the membership marks on the Internet, including as domain names, are the same ones governing all uses of the membership marks by members. Members must observe these rules in the same way the must abide by the NSI domain name rules (those rules can be found at www.internic.net).

The term REALTOR®, whether used on the Internet, as part of a domain name or in some other fashion must refer to a member or a member's firm, may not used with descriptive words or phrases and should be separated from the member's name or firm name. Thus uses such as number1realtor.com, firstrealtor.org or realtorproperties.com are all incorrect. Uses such as johndoe-realtor.com or abcrealty-realtors.com on the other hand would be examples of what could be done as a part of domain names. The membership marks, and particularly the REALTOR® block R logo should not be used as hypertext links at a web site as such uses can suggest an endorsement or recommendation of the linked site by your Association.

The cost involved in correcting these types of misuses emphasizes the importance of communicating the rules and their application in cyberspace to members at the earliest possible time so that decisions related to domain names and designs for websites can include trademark considerations. As the rules themselves have not changed, members need only be reminded that the Web is not an unregulated wild west where anything goes, and the rules governing use of the membership marks do apply to uses on the Internet.

Tax: Unrelated Business Income Tax (UBIT)

Revisions in the 1997 Tax Act

A provision in the "Taxpayer Relief Act of 1997" recently enacted into law modifies a certain aspect of the "unrelated business income tax" (UBIT) provisions which apply to tax-exempt organizations. Although these modifications probably have little or no significance to most REALTOR® associations, they are described below so then can be properly taken into consideration by any associations to whom they might apply.

Under current law, UBIT does not apply to dividends, interest, annuities, royalties, and, subject to certain requirements and adjustments, rents. Despite those exclusions, interest, annuities, royalties and rents received by an exempt organization (such as an association) from a "controlled" exempt or non-exempt corporation are subject to UBIT. For that purpose, "control" means ownership of 80% or more of the voting stock and all other classes of the controlled corporation.

The new law changes this in three ways. First, the definition of "control" is reduced to ownership of 50% the stock or value of the controlled corporation. Second, the control test is made to apply to "second tier" subsidiaries as well. That is, the exempt organization is considered to control a corporation of which it owns 50% or more of the stock or value, and is also deemed to own a like proportion of the stock or value of another corporation owned by the subsidiary. If the constructive ownership of the latter is 50% or more of the total stock or value of that corporation, the exempt parent is deemed to control that corporation also. Finally, the manner in which the income subject to UBIT is computed is simplified.

For tax-exempt REALTOR® associations that own subsidiaries, these provisions apply to payments made by the subsidiary to the association. The most common type of such a subsidiary is probably a separately incorporated MLS. In most cases, however, the MLS is wholly owned by the association, and the MLS does not itself own a subsidiary. In such cases, the modification of the "control" test from 80% ownership to 50% ownership is irrelevant, and the application of these provisions to a subsidiary of the MLS is of no consequence where the MLS has no subsidiary. Interest, annuities, royalties and rents paid by MLS (or other) subsidiary corporations to the parent association remain, as under current law, taxable to the association.

For associations to whom these changes are relevant, they take effect for tax years beginning after the August 5, 1997 date of the Act, except that a generous two year phase in period is provided for payments made pursuant to written contracts in effect on June 8, 1997. Associations that receive payments from controlled organizations should be sure to make sure their tax advisers properly treat such payments as subject to UBIT.

TO COMPLY WITH CERTAIN U.S. TREASURY REGULATIONS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THE TEXT OF THIS COMMUNICATION, IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, BY ANY PERSON FOR THE PURPOSE OF AVOIDING ANY PENALTIES THAT MAY BE IMPOSED UNDER THE INTERNAL REVENUE CODE.

Checklist of Considerations for Internet Display of MLS Listings.

prepared by NAR Legal Affairs.

1. Does the MLS have authority from the listing broker to advertise his/her listings on the Internet?

2. Has the MLS copyrighted the database?

3. Does the MLS either own the copyrights in the photos or have a license from the owner to distribute the photos for display on an Internet site?

4. What is the scope of the license being given by the MLS to the Internet vendor?

- Does it allow the vendor to do more with the data than simply display it on the Internet?
- Does it license the vendor to use the data? If yes, for what uses?
- Are these uses in the best interest of the MLS and its Participants?

5. Does the agreement address ownership of the data?

- Does the vendor acknowledge the MLS's copyright in the database?

6. What data fields will be displayed on the Internet site?

- Will all confidential information be removed?
- Should the "Remarks" section be included?
- Should the street address of the properties be included?

7. Will the vendor agree to include a disclaimer on the site such as "Information deemed reliable but not guaranteed"?

8. Will the vendor's site include "for sale by owner" properties?

9. Are the payment terms clear?

10. What is the method by which the MLS will furnish the data to the vendor?

- Will this require any software modifications?
- Is there expense to the MLS?

11. How frequently will the MLS be expected to provide updated data to the vendor?

12. Is the contract assignable by the vendor?

- Does the MLS want the right to be able to terminate the agreement if it is assigned by the vendor?

13. Is the vendor requesting indemnification from the MLS?

- Is the vendor willing to indemnify the MLS in the event of litigation? Under what circumstances?

14. Does the vendor have a privacy policy for the Internet site that governs what the vendor will/will not do with information it gathers about consumers visiting the site?

- Will the vendor sell or refer those leads?
- If so, to whom?

15. What type of advertising is accepted on the site? Are there any restrictions governing banner ads that run over the real property ads? May a real estate franchise or broker purchase a banner ad that will run over the pages displaying any brokers' properties for sale? Do the MLS participants care?

16. What rights do the parties have to terminate the agreement? What happens to the data upon termination of the agreement?

NATIONAL ASSOCIATION of REALTORS®
REALTOR.org

Is **REALTOR®** the Right Word?

In this article the registration symbol has not been used because it has been prepared for distribution over the Internet. Some Internet browser software is not equipped to recognize or understand this symbol when it appears in a document.

Selecting the right word to convey an idea or image is an intricate part of preparing any article for publication. Not only must the nature and knowledge of the audience be taken into consideration, but often there are space or other restrictions which affect choices. However, these decisions are never more important than when dealing with articles to or about real estate professionals and when deciding whether the term **REALTOR®** should be used in a particular context.

REALTOR® is a collective membership mark owned by the National Association and licensed to each member of the Association to use when identifying themselves as members. When it is used in an article it should only be used to describe someone or some group as members of the Association. It should never be used to describe someone as a real estate agent or broker or in referring to people in the real estate business generally. Check this by looking at the context and asking whether you are talking about someone or some group as members of the Association, or simply as real estate practitioners.

Why it may be asked is it important that these distinctions be carefully observed? The answer to that is in two parts. First, the term **REALTOR®** is the one universal way members of the Association have to distinguish themselves from all others in the real estate profession. For example, if the Board were to accomplish something of significance to the community, the only way members may share in that goodwill is through their ability to use the term **REALTOR®** to identify themselves as members. Second, every time a member of the Association uses the term **REALTOR®** incorrectly and allows the public to think that the term describes anyone with a job in the real estate business, they are diminishing the ability of the term to distinguish members from non-members and demonstrating indifference to its value. On the other hand each time it is used correctly, the exact opposite is occurring and the value of the term **REALTOR®** is increased not only for that user, but also for every other member.

Once you have assured that **REALTOR®** is the correct word, the rules governing the proper form for the term apply to distinguish for the audience the significance of the term **REALTOR®** from the words surrounding it. The most common way to accomplish this is to use all upper case letters and the federal registration symbol, an R inside a circle. The rules indicate that members should use this form whenever possible, but also indicate that all upper case letters or upper and lower case letters with the registration symbol are also acceptable, although less preferred forms for the term **REALTOR®**. In this article the registration symbol has not been used because it has been prepared for distribution over the

Internet. Some Internet browser software is not equipped to recognize or understand this symbol when it appears in a document. All lower case letters should never be used to spell out the term **REALTOR®**, and upper and lower cases without the registration symbol should only be used in cases where style requirements prevent one of the acceptable uses. An example of this last situation would be in writing news releases for the media. Most newspapers operate with a style guide which does not permit the use of all upper case letters or the registration symbol in the body of stories. Therefore, to avoid excessive editing of Association news releases, the term REALTOR® may be used with upper and lower cases letters and no registration symbol.

More questions on the proper use of the **REALTOR®** marks? Check the Membership Marks Manual, Policy Reference File No. 109.

The REALTOR® Logo

In this article the registration symbol has not been used because it has been prepared for distribution over the Internet. Some Internet browser software is not equipped to recognize or understand this symbol when it appears in a document.

The familiar **REALTOR®** "**R**" logo is easily visualized. Its three elements, the rectangular block, the "R" inside the block, and the term **REALTOR®** below the block (called the identifier) form the logo. Like the terms **REALTOR®**, **REALTORS®** and **REALTOR-ASSOCIATE®**, the **REALTOR®** logo is registered with the United States Patent and Trademark Office as a membership mark for **REALTORS®** to use in connection with their name and the name of their real estate business.

But there is a difference between the **REALTOR®** logo and the other registered **REALTOR®** marks. The easy visual identification of the logo has been achieved because the rules adopted for use of the mark require that it always have the same overall appearance. The logo as a whole may be any size, but the elements of the logo must always have the same appearance and proportions to each other: The block will always be rectangular not square, the "**R**" will always be the same shape, and the identifier will always be the same typeface. This contrasts with the terms **REALTOR®**, **REALTORS®** and **REALTOR-ASSOCIATE®**, which are commonly seen in the many different typefaces used by members.

To further protect the image of the logo and its clarity in the minds of consumers and other real estate business people, the rules also require an "area of isolation" around the logo. This area of isolation is a space within which no competing image may enter. Thus, the logo may not be made a part of any larger design, except with the express advance approval of the National Association's Board of Directors, and nothing whatsoever should be placed within the space surrounding the logo which is one-half of the logo's width.

Also to assist in assuring a consistent visual image for the **REALTOR®** "**R**" logo, the use of colors is restricted. The block and the identifier for the logo may be shown in any contrasting color, but only where one color ink is used to produce the logo. In such instances the "**R**" is left without color so it appears the same as the paper upon which the logo is being printed. But where two color inks are used to print the logo, the block and identifier must be blue and the "**R**" must be gold.

Design marks such as the **REALTOR®** logo gain strength from their uniformity. As the public begins to recognize a design as identifying a particular group or company, the value of the mark as a consistent means of identification grows. Variations upon that uniformity correspondingly weaken the value of the logo. For that reason, it is very important that members periodically check their advertisements to make sure the **REALTOR®** "**R**" is properly displayed. If you are uncertain, obtain an official reproduction sheet for the printer or newspaper to use in producing your advertisements or other printing needs. Never try, or allow anyone to try, to "recreate" the logo for you.

Use of the REALTOR® Marks on the Internet - Rules

When surfing the Web for real estate homepages, it's quite common to come across sites belonging to **REALTORS®**. If you are looking to add your own electronic presence on the Internet, it is easy to get caught up in designing your own web page and choosing a domain name which will capture the attention of surfers and make you easily identifiable. **REALTORS®** often want to use the REALTOR® marks as part of their domain name or address to distinguish themselves, but they must keep in mind that there are rules governing proper use of the **REALTOR®** marks that must be adhered to at all times regardless of the media used. These rules are found in the National Association's ***Membership Marks Manual***, a reference manual explaining proper use of the **REALTOR®** marks including examples of correct and incorrect uses. Here is a brief list of the principle rules affecting use of the **REALTOR®** marks in domain names:

- The term **REALTOR®**, whether used as part of a domain name or in some other fashion must refer to a member or a member's firm.

- The term **REALTOR®** may not be used with descriptive words or phrases. For example, Number1realtor.com, numberone-realtor.com, chicagorealtors.org or realtorproperties.com are all incorrect.

- For use as a domain name or e-mail address on the Internet the term REALTOR does not need to be separated from the member's name or firm name with punctuation. For example, both johndoe-realtor.com and johndoerealtor.com would be correct uses of the term as a part of domain names and jdoe*realtors@webnetservices.com and jdoerealtors@webnetservices.com are both correct uses of the term as part of an e-mail address.

- The **REALTOR®** block R logo should not be used as hypertext links at a web site as such uses can suggest an endorsement or recommendation of the linked site by your Association. The only exception would be to establish a link to the National Association's web site, Realtor.com.

The public has adopted the use of all lower case letters when writing domain names, even those containing trademarks. Therefore, for purposes of domain names and internet addresses only, there is an exception to the rule on capitalization of the term **REALTOR** and it may appear in lower case letters.

Whether you use traditional print media or the Internet, it is essential to use the **REALTOR®** marks in accordance with the rules and guidelines of the National Association. The **REALTOR®** marks should only be used to denote membership in the **NATIONAL ASSOCIATION OF REALTORS®**.

STATE ASSOCIATION

LEGAL ACTION COMMITTEE

SUGGESTED

STATEMENT OF ORGANIZATION AND PROCEDURE

I. NAME

A program of the _____ (State) Association of Realtors known as the Legal Action Program is hereby established.

II. PURPOSE

The principal function of the Legal Action Program shall be to establish and administer the Legal Action Fund. The Legal Action Fund shall be administered so as to best achieve the purposes and goals of the Legal Action Program. These purposes and goals are:

A. To provide financial resources and other assistance to parties, including but not limited to Member Boards and members in the State of _____, engaged in litigation, actual or proposed, which may result in the determination of the relevant legal issues in a manner that may have important precedential significance to private property owners, real estate licensees, real estate associations, or the real estate industry generally in the State of _____. Assistance may be provided only to cases that meet the Criteria for Case Support set forth in Section VI.

B. Promote among Member Boards in the State of _____ an understanding of their rights and duties under federal, state and municipal law and to defray the expense of legal advice to that end.

III. FUNDING

A. The Legal Action Fund shall be financed by funds derived from the membership from any or all of the following sources, at the discretion of the Board of Directors:

(1) Direct appropriation from the budget or reserves of the (State) Association of Realtors, as authorized by its Board of Directors.

(2) Annual or special dues assessments or allocations to support the Legal Action Fund, as may be authorized by the Bylaws of the (State) Association of Realtors.

(3) Revenues derived from other sources or activities in a manner and at such times as deemed necessary and appropriate by the Board of Directors.

IV. ADMINISTRATION

A. The Legal Action Fund shall be administered by the Legal Action Committee. The Committee staff shall account for all Fund monies, and shall disburse such monies as recommended by the Legal Action Committee and approved by the Board of Directors.

B. The Legal Action Committee shall consist of ___ members appointed by the President for staggered terms of three years, except for appointments to fill vacancies in unexpired terms, which appointments shall be for the unexpired term of the vacancy. The immediate past Chair of the Committee shall also be a member of the Committee during the year following service as Chair if his or her regular appointed term expires at the end of the year of service as Chair and he or she is not appointed by the President to a subsequent term.

Meetings shall be scheduled in connection with the regular meetings of the Board of Directors and otherwise held at the call of the President or Chairman of the Committee.

V. REQUESTS FOR ASSISTANCE

A. All requests for support from the Legal Action Fund must be made in writing and initiated or supported by a Member Board. Requests not received at least 45 days prior to the next scheduled meeting of the Legal Action Committee may be deferred for consideration to the following scheduled meeting, at the discretion of the Chair of the (State) Association of Realtors Legal Action Committee.

B. The Legal Action Committee, in collaboration with Member Board counsel as appropriate and with the assistance of counsel to the _____ (State) Association of Realtors, shall study the merits and implications of each request for support. The requesting party may appear before the Committee to support the request and answer any questions posed by the Committee. The Committee shall adopt recommendations for support in appropriate cases, and submit such recommendations for consideration and approval or rejection by the Board of Directors.

C. The Legal Action Committee and/or the Board of Directors may condition its support on retention of counsel deemed most experienced in the issues and controversies presented, on various levels of support provided by the National Association of Realtors and/or local association(s), or on other prerequisites. All support of the Legal Action Committee is conditioned on the requirement that the (State) Association of Realtors and/or its counsel be consulted and advised on a current and continuing basis concerning decisions relating to the litigation which is being supported, including but not limited to, the theories and strategies of the case, the procedural steps to be taken, the parties to the litigation, the issues to be raised, the timing of discovery, motions and other matters, and the nature and scope of research to be performed. Failure to consult as required or failure to cooperate with the (State)

Association of Realtors may result in the immediate suspension of all support of the litigation and the termination of such support if the Member Board, member or other recipient of support fails to justify such failures or otherwise satisfy the Committee, in its sole discretion, that support should be continued.

D. (Include if appropriate): The Committee may conduct one or more special meetings per year to consider requests for assistance presented at times other than the regularly scheduled meetings of the Committee when, in the judgment of the Chair and Vice-Chair and with the concurrence of the President of the (State) Association of Realtors, it appears necessary and desirable to do so. Any recommendation for assistance adopted by the Committee at such a special meeting must be approved by the (State) Association of Realtors Leadership Team but need not also be approved the Board of Directors if the recommendation is for an amount which, when aggregated with all prior contributions by (State) Association of Realtors in connection with the case, does not exceed $25,000.

Requests approved in this fashion shall be reported to the Board of Directors at its next meeting.

E. (Include if appropriate): The Committee may also consider and adopt recommendations for support by conference telephone call to consider requests for assistance presented at times other than the regularly scheduled meetings of the Committee when, in the judgment of the Chair and Vice-Chair, it appears necessary and desirable to do so. Any recommendation for assistance adopted by the Committee at such a special meeting must be approved by the (State) Association of Realtors Leadership Team but need not also be approved by the Board of Directors if

(1) the recommendation is for an amount which, when aggregated with all prior contributions by the (State) Association of Realtors in connection with the case, do not exceed $25,000; and

(2) a majority of all the members of the Committee vote in favor of the recommendation to support the request.

Requests approved in this fashion shall be reported to the Board of Directors at its next meeting.

F. All appropriations from the Legal Action Fund shall be disbursed as authorized by the Board of Directors or the Committee, in the case of requests approved pursuant to subparagraph E. above, upon the satisfaction of all contingencies, conditions or prerequisites imposed and upon receipt of verified statements of expenses at least equal to the disbursement.

G. Any reconsideration of requests for assistance shall be based on information not presented at time of the original presentation of the request to the Committee.

VI. Criteria For Case Support and Other Case Support Policies

A. A case is eligible for support from the (State) Association of Realtors Legal Action Committee if it:

(1) Presents an opportunity for clarifying precedent on issues of significance to the (State) Association of Realtors, other REALTOR® associations or related organizations in the State of _____, or a substantial portion of the (State) Association of Realtors membership; or

(2) Involves legal issues of important precedential significance related to private property rights of members, the public, or others concerned with the protection of private property.

Cases supported must clearly evidence the potential for impact on real estate related matters, the operation of REALTOR® associations or private property rights in the State of _____. Support is not available for cases that will affect only the particular litigants or affect only the law of a particular local jurisdiction. The Committee may adopt guidelines for its use in determining when cases involving only issues of state or local law may nevertheless have such national significance

B. Financial support provided to litigants must be used for legal fees and expenses only, and may not be used to pay judgments, damages, fines, settlements, or opposing counsel's legal fees.

NATIONAL ASSOCIATION OF REALTORS®

DISPUTE RESOLUTION SYSTEM

Mediation/Arbitration

A CONSTRUCTIVE ALTERNATIVE

TO LITIGATION

Guidelines for Member Associations,

May, 1994

Introduction

The DRS Mediation/Arbitration Program is not intended to replace or to be used in connection with arbitration or mediation activities conducted by an association's Professional Standards Committee. The program is designed to accommodate and provide for disputes between buyers, sellers and agents, which are not covered under Professional Standards Policies and Procedures.

Dispute Resolution Systems (DRS) is a general term used to identify means of resolving disputes out of court, such as by mediation or arbitration. DRS programs are becoming increasingly important today as parties and the court system alike are now trying to find DRS programs that will take them out of the traditional legal system and solve their disputes in a quick and cost efficient manner. DRS reflects a serious effort to design workable and fair alternatives to traditional civil litigation.

There are several types of DRS programs. The more familiar are:

1. **Negotiation** - This is the direct bargaining between two parties to a dispute where they attempt to resolve the dispute without the intervention of others. Many real estate brokers utilize this form of DRS without realizing it. An example may be when a disgruntled buyer calls after a walk through and finds that the seller broke the mailbox when he was moving out of the home. A real estate broker may offer to purchase a new mailbox in order to resolve the conflict. This resolution has been accomplished using the DRS program of **negotiation.**

2. **Mediation** - In mediation, a neutral third party assists the disputants in negotiating a mutually acceptable settlement. Mediators do not render decisions but help to facilitate the parties to the dispute to come to their own agreement by clarifying issues, utilizing persuasion and other conflict resolution strategies. Although there is no guarantee that the dispute will be resolved, surveys reveal that settlements are reached over 80% of the time.

3. **Arbitration** - Arbitration is probably the best known DRS method. In arbitration agreements, parties agree to submit existing or future disputes to a neutral third party, an arbitrator, who will decide how the dispute will be resolved. In binding arbitration, that decision is a final resolution of the dispute. In non-binding arbitration, the parties elect whether to settle with the arbitrator's decision or to continue on to litigation.

Benefits of DRS Program

- Faster than litigation.
- Less expensive than litigation.
- Discourages litigation of frivolous claims.
- In mediation, parties do not forfeit their legal rights to arbitrate or litigate the dispute if mediation is unsuccessful.
- Parties actively participate in the process and control outcomes.
- Process contributes to long-term goodwill between brokers and their clients and customers.
- Provides a service which brokers and salespeople can offer to their clients and customers.
- Improves image of NAR, associations and members because they have taken the initiative to find and provide alternatives to litigation.
- Potential for lowering cost of E&O insurance by lowering the number of claims that must be settled or litigated by the insurance company.

The NAR Program

The materials in this manual were developed by the NATIONAL ASSOCIATION OF REALTORS® for Associations to use in setting up their own alternative dispute resolution system programs. Many associations have already implemented the mediation program developed by NAR in 1990. Other associations have designed and implemented their own arbitration programs.

The materials in this manual update the NAR mediation program and add guidelines for an arbitration program. Associations are free to use either the mediation materials, the arbitration materials or a combination of mediation and arbitration.

A combination mediation/arbitration program may be the most beneficial to settling disputes in a timely and cost-efficient manner. In a combined program, the DRS clause in the agreement provides for a two-step process, first mediation and then arbitration. The key to the combined program is to first have the parties mediate to come to their own settlement. If this does not occur, the parties then have

committed to arbitration, allowing a neutral third party to make a final determination of the dispute based on the facts of the situation.

The NAR programs are designed to resolve disputes between buyers, sellers, and real estate salespersons. The programs are not designed to be used for disputes between REALTOR® members. These disputes must still be arbitrated in accordance with Article 14 of the REALTORS®' Code of Ethics and through the Professional Standards Procedures.

Many court systems across the United States have incorporated some form of DRS into their processes for civil lawsuits. Generally, the DRS program is triggered at the time the lawsuit is filed. Depending upon the particular type of program, once the suit is filed, the parties to the lawsuit must first either go through mediation or non-binding arbitration. If the DRS program is unsuccessful, the civil litigation begins. Regardless of whether these DRS programs are successful, they are widely encouraged because they act as a measuring stick for the parties in viewing the strength of their cases and judging the success rate of future litigation. The NAR programs do not necessarily conflict with these court-annexed DRS programs as the NAR programs are initiated prior to the filing of litigation. However, where a court-annexed program exists, parties who have used either the NAR mediation program or a non-binding arbitration system, may find they will be required to use a similar DRS program again, prior to litigation.

The NAR programs are also designed to create minimal legal exposure to the associations. Association should review each component and, if a decision is made to adopt one or both components, follow the guidelines for implementation as they are set forth in this manual. An association that follows the guidelines and submits the appropriate documents to NAR will have professional liability insurance coverage for administering the NAR programs. Neither program contemplates that associations will act as mediators or arbitrators within the programs. This activity is currently outside the scope of the association's professional liability insurance coverage. An association that desires to become actively involved in mediating or arbitrating disputes will need to purchase separate insurance for the association and the individual mediator/ arbitrators.

Background

The concept of a REALTOR® DRS program was conceived in 1987 by members of the REALTORS® Liability Task Force. In January 1988, members of the then newly formed REALTORS® Risk Reduction DRS Subcommittee began the task of designing and developing a Dispute Resolution System that could be easily implemented by local associations and member firms throughout the country.

In their deliberations, members of the subcommittee evaluated and debated the merits of arbitration as well as mediation. Because of the non-adversarial nature of mediation and the fact that members did not give up legal rights in agreeing to mediation, the NAR program was developed initially as a mediation program. The Mediation Guidelines were developed and sent, in 1990, to every Association for their independent endorsement and administration.

Since 1990, several state associations have successfully developed and implemented arbitration programs. Because of their success and the interest in arbitration, in 1992, the Risk Reduction Committee decided to expand the NAR program to include guidelines for developing an arbitration program.

How the Mediation Program Works

After reviewing the information provided in this mediation component, associations voluntarily decide whether or not to endorse and participate in the program. Once this is accomplished, the mediation process is initiated through the use of a mediation clause in the association's standard agreements. The clause can be included in the body of the contract or as an addendum to the contract (See attached Appendix A and B). Similar clauses can be added to a listing agreement or a buyer representation agreement.

When they sign a contract or addendum containing a mediation clause, parties to the transaction pre-commit to submit to mediation any dispute that might arise from the transaction. Where parties do not pre-commit to mediate, an agreement to mediate can be signed by the parties when a dispute arises (See attached Appendix C). In either situation, while the agreement to submit disputes to mediation is binding when signed, parties retain their right to pursue other legal remedies if mediation is unsuccessful, Parties are not bound to agreements reached during the mediation conference until they sign a written mediation settlement agreement. Once parties have signed a written mediation settlement agreement, they are legally bound to abide by its terms and cannot subsequently arbitrate or litigate the dispute.

With few exceptions, almost any type of real estate dispute can be mediated under the NAR rules and procedures. Exceptions include disputes that involve extremely complex legal issues, allegations of criminal misconduct, violations of the state's license laws, and disputes and controversies that are covered under Professional Standards policies and procedures, including commission disputes between REALTORS® that are arbitrated under Article 14 of the REALTOR® Code of Ethics.

This mediation component contains all of the essential forms, materials and information that associations and members need to implement and use the mediation component.

Endorsing the Mediation Concept

In endorsing the program, an association must demonstrate that it can satisfy the criteria which NAR has established to safeguard the integrity of the program on a national basis. These criteria and the use of the mediation rules and procedures are the only conditions which NAR imposes on associations that want to endorse and implement the program as a service to members, sellers, and buyers.

The intent of the criteria is not to discourage or exclude associations from participating in the program, but rather, to make certain that an association's leadership, staff, and members know and understand the level of commitment and resources that are required to effectively initiate and administer the mediation program as an ongoing service of the association. In addition, associations must meet and maintain the below criteria in order to have coverage for claims arising out of the endorsement under NAR's Professional Liability Insurance Program.

STEP 1. Association president, E.O. and legal counsel need to first review the contents of these Guidelines, paying particular attention to the "Criteria For Association Participation" and the Mediation Rules and Procedures.

STEP 2. Leadership, staff and appropriate committees need to discuss the Guidelines and "Criteria for Association Participation" in the Mediation Program to determine whether association can satisfy criteria and to determine what resources the association will need to initiate, promote and administer the DRS program, e.g., staff time, volunteer time, administrative expenses. Costs for implementing, promoting and administering the program will vary depending on association size and level of activities which the association undertakes.

STEP 3. Identify and contact mediators and/or mediation groups in association's geographic area to initially confirm availability of mediator(s) and/or mediation group(s) who are:

a. Capable of providing mediation services which satisfy the program needs and requirements; and

b. Interested in DRS and willing to provide mediation services if the association adopts the program.

[**NOTE:** Association should defer actual selection of mediators until the Board of Directors has formally endorsed the program.]

STEP 4. Provide DRS program information to members; solicit and obtain feedback; identify and respond to specific concerns and questions which members may have about the program.

STEP 5. Present information to the Board of Directors with appropriate recommendation(s), e.g., that the association endorse the mediation program for implementation; that XYZ committee have oversight of program activities; that an implementation plan be drafted and submitted to appropriate individuals or group(s) by XXX (date); etc. [NOTE: Recommendations should include proposal for incorporating mediation clause into association's standard sales contract.]

STEP 6. Adopt and follow recommended guidelines and procedures for implementing, promoting, and administering DRS program.

STEP 7. Reproduce and provide seller/buyer information brochures, mediation forms and training materials to REALTOR® firm principals (See attached Appendix G).

STEP 8. Submit to the NATIONAL ASSOCIATION OF REALTORS® a written "Notice of Endorsement," signed by the association president and executive officer who will be administering the program (See attached Appendix D).

Criteria for Association Participation

In order to participate in the Mediation Program of the NATIONAL ASSOCIATION OF REALTORS®, associations must:

1. Have a full-time, paid executive officer or verify that administrative support will be provided by the executive officer or professional staff of:

a. A neighboring association.

b. The state association.

c. Mediation provider with whom the association has a written service agreement.

2. Consult with and obtain the opinion of legal counsel regarding the program's applicability under state law before the program is endorsed.

3. Confirm availability of qualified mediators or mediation groups that are capable of and willing to provide mediation services which satisfy the program needs and requirements.

4. Submit to the NATIONAL ASSOCIATION OF REALTORS® a written "Notice of Endorsement," signed by the association president and executive officer who will be administering the program (See attached Appendix D).

5. Ensure appropriate on-going involvement of legal counsel in the program activities following endorsement of the program.

6. Actively promote and encourage use of DRS programs by REALTORS®, sellers and buyers.

7. Monitor program performance; promptly submit mediation evaluation forms for all cases mediated through the program; respond to surveys which NAR may conduct uc sts efforts to evaluate the success of the program nationally; and notify the state association and NAR of problems or concerns which may arise.

Mediation Rules and Procedures

1. Agreement of Parties. These Mediation Rules and Procedures shall apply when the parties have agreed in writing to mediation under the NAR Program. By mutual written agreement of all the parties to the claim, any specific provision of these Rules and Procedures pertaining to mediation may be modified.

2. Initiation of Mediation. Any party may initiate mediation under these Rules and Procedures by completing, signing and mailing to the mediation vendor and all other parties, a Request to Initiate Mediation Transmittal Form (Transmittal Form found in attached Appendix E). Such form shall contain or be accompanied by the following information, to the extent known or readily available:

a. A fully executed true copy of the agreement containing the mediation clause;

b. A copy of such other written agreement invoking these Mediation Rules and Procedures;

c. In the absence of a contract clause or other such written agreement, a written request by any party seeking to have the mediation vendor attempt to persuade one or more of the others to submit an existing dispute or claim to mediation under these Rules and Procedures.

d. The names, addresses and telephone numbers of the parties to the case, including the name of the parties insurance company;

e. Nature and amount of the claim (brief statement of the facts that give rise to the claim, the damages of relief sought);

f. Preferred place and time of hearing.

3. Selection of Mediator. Not later than ten days after receipt of the Transmittal Form, the mediation vendor shall appoint a qualified mediator.

No person shall serve as a mediator in any dispute if that person has any financial or personal interest in the results of the mediation unless, after full disclosure, the parties have given their written consent.

4. Time and Place of Mediation Conference. Within ten days of his appointment, the mediator and the parties shall set the date, time, and place of the mediation conference provided, however, such date shall not be more than sixty days from date of receipt of the Transmittal Form, and shall allow for not less than twenty days advance notice of the conference, which notice shall be given by the mediation vendor to all parties.

5. Conduct of Mediation Conferences. At the mediation conference, the parties will be expected to produce all information reasonably required for the mediator to understand the issue presented. Such information will usually include relevant written materials and a description of any witnesses and what each could testify to. For more complex cases, the mediator may ask the parties for written materials or information in advance of the mediation conference.

At the mediation conference, the mediator will conduct an orderly settlement negotiation. Parties at the mediation conference shall have authority to enter into and sign a binding written agreement to settle the dispute. The mediator will be impartial in such proceedings and has no authority to force the parties to agree to a settlement.

6. Representation by Counsel. Any party may be accompanied by and represented at the conference by counsel. In the interest of fairness, however, a party who intends to be represented by counsel shall notify the mediation vendor and other parties of such intent at least ten days in advance of the conference.

7. Confidentiality. No aspect of the mediation shall be relied upon or introduced as evidence in any arbitration, judicial or other proceeding, including but not limited to:

- Views expressed or suggestions made by a party with respect to a possible settlement of the dispute;

- Admissions made in the course of the mediation;

- Proposals made or views expressed by the mediator or the response of any party thereto.

No privilege shall be affected by disclosures made in the course of mediation.

Disclosure of any records, reports, or other documents received or prepared by mediation vendor cannot be compelled.

The mediation vendor shall not be compelled to disclose or to testify in any proceeding as to information disclosed or representations made in the course of the mediation or communication to the mediator in confidence.

8. Mediated Settlement. The mediated settlement must be reduced to writing by the parties or by the mediator (if the mediator is an attorney), then dated and signed at the mediation conference by all parties agreeing to its terms, but in no event shall the settlement be signed later than ten days after the conclusion of the mediation conference (See attached Appendix F for sample agreement).

9. Judicial Proceedings and Immunity. Neither the mediation vendor, nor the mediator, nor the NATIONAL ASSOCIATION OF REALTORS® or any of its member associations, shall be deemed "necessary parties" in any judicial proceedings relating to mediation under these Mediation Rules and Procedures. Neither the mediation vendor, nor any mediator nor the NATIONAL ASSOCIATION REALTORS®, serving under these procedures shall be liable to any party for any act, error or omission in connection with any service or the operation of the NAR Mediation Program.

10. Mediation Fees. Mediation fees shall be in accordance with the published fee schedule.

11. Timing of Claims. The time limitation by which parties must bring claims in accordance with these Rules and Procedures are to be governed by state law. Local counsel should be consulted regarding this issue.

Implementing the Mediation Program

After the board of directors has endorsed and authorized implementation of the mediation program, the executive officer or appropriate committee should draft a step-by-step plan for implementing the program. Following is a list of major activities which should be covered in the plan:

1. [ ] Revise standard listing agreement, buyer representation agreement and sales contract to include mediation clause (See Appendix A and B). Plan to have firms add the mediation clause to their company contracts or use an addendum until the association's standard contracts are reprinted. [**Note:** If members use the state association's standard contract, request that the state association revise its contract to include a mediation clause.]

2. [ ] Identify and select mediation providers (per guidelines in this section).

3. [ ] Prepare reproduction proof for "personalized" seller-buyer information brochure (See attached Appendix G). Include association's name, address and telephone number. Include mediator's name, address, telephone number and fee schedule if association has exclusive Service Agreement; space permitting, include names, addresses, telephone numbers and fee schedules of mediators approved under Multiple Provider Option.

4. [ ] Prepare for reproduction a list of approved mediation providers. (Multiple Provider Option only.) Include name, address, telephone number and fee schedule for each provider.

5. [ ] Reproduce sufficient numbers of mediation brochures, mediation provider lists, mediation forms, and broker/ salesperson training materials to accommodate:

- Designated REALTOR® and Branch Office Manager Activities. Direct mailing and orientation handouts.
- Seller-buyer Information Packet. To be provided to sellers and buyers who contact the association or participating firms for information on how to initiate mediation under the program rules.
- New Member Orientation. Include brochure with New Member Orientation Kit and/or as handout during orientation; additional materials may be provided at the option of the association.
- Media Kits. To be provided to news media.
- E&O Insurance Companies (See Sample letter, attached Appendix H). Enclose with letter to E&O insurance companies requesting consideration of premium credit and/or full or partial payment of mediation fees for REALTORS® who are using mediation in their agencies.

[**Note:** Insurance company may ask for list of REALTORS® who are participating in the program. NAR recommends that this activity be coordinated through the state association for state-sponsored E&O insurance programs.]

- Member Promotion. Include brochure as insert in association newsletter; handout at association meeting(s).

6. [ ] Plan and schedule orientation/training program for designated firm principals and branch office managers to familiarize them with the mediation program and its use by salespeople, sellers and buyers.

7. [ ]Prepare media release and media kits for dissemination to news media; identify opportunities for using news media to inform public about the mediation program.

8. [ ] Identify and schedule promotional activities to inform members about mediation and to encourage their acceptance and use of mediation.

9. [ ] Revise new member orientation program to include section on mediation.

Identifying, Qualifying and Selecting Mediators

To ensure the broadest possible use of the mediation program, NAR chose not to endorse or enter into formal agreement with a single mediation provider. Participating associations have the responsibility of identifying qualified mediators who can provide mediation services in their respective areas.

IDENTIFYING MEDIATORS - WHERE TO LOOK

The National Association recommends and encourages the use of private mediators. The rationale for using private mediators is to dispel any perception among sellers or buyers that mediators are biased toward or sympathize with brokers and sales salespersons who may be parties to the dispute. Such biases could negatively affect both the mediation process and the success of the program.

The association should check the following sources for the names, addresses and telephone numbers of individual mediators and mediation groups operating within the association's jurisdiction or geographic area:

- Telephone "Yellow Pages"
- State and local bar associations
- State and local chambers of commerce
- Better Business Bureau
- Clerk of court's office
- State Attorney General's office
- Colleges and universities
- Real estate professionals trained in mediation
- Affiliate members (attorneys, lenders, title companies, etc.)
- Newspaper and trade journal advertising
- Community resolution centers
- United Way headquarters
- See attached Appendix I for a listing of DRS providers.

OPTIONS FOR PROVIDING MEDIATION SERVICES

There are two options for providing mediation services under the mediation program. The association may choose to negotiate an exclusive agreement with a single provider as outlined in Option #1 or to include multiple mediation providers as outlined in Option #2. Both options have advantages and disadvantages. Both options are acceptable to NAR.

Option #1. Exlcusive Service Agreement with Mediation Provider.
The association enters into a written contract or service agreement with a single mediation provider (individual or group) who is capable of serving all areas within the association's jurisdiction and who meets other criteria which the association establishes. Associations should review "Tips For Negotiating Exclusive Service Agreement With Mediation Provider" in attached Appendix J.

Under this arrangement, brokers and salespeople provide buyers and sellers with the name, address, telephone number and fee schedule of the mediation provider with whom the association has contracted. (Information is easily inserted into the Seller-Buyer Information Brochure).

ADVANTAGES	DISADVANTAGES
Ability to negotiate services & fees	Sellers/buyers have no choice of provider.
Greater control over performance and fee range	Services may be more limited
Allows mediator name, address, phone number and fee schedule to be published as part of Seller-Buyer Information Brochure	
Fees can be standardized for duration of contract	

Option #2 Multiple Providers
The association approves multiple mediation providers who individually or collectively are capable of serving all areas within the association's jurisdiction. Each of the providers must be able to satisfy criteria which the association establishes.

Under this arrangement, the association provides to member firms, for dissemination to their sellers and buyers, a list of names, addresses, telephone numbers, and fee schedules for all mediators and mediation groups selected by the association to participate in the mediation program. Sellers and buyers choose a mediator from among those individuals and groups listed.

ADVANTAGES	DISADVANTAGES
Sellers and buyers can choose a mediator who best satisfies their needs/wants	Less control over services and performance.
May provide a greater range of fees.	May not be able to standardize fees.
Less formal letter of agreement vs. contract/agreement.	Adds another component to formal seller-buyer handouts.
	Adds additional step in initiating mediation.
	Sellers-buyers may be uncomfortable with having to select a mediator; may generate more calls to association.

PRELIMINARY SCREENING

(COMPLETE PRIOR TO ASSOCIATION ENDORSEMENT)

Once the association has obtained the names, addresses, and telephone numbers of mediators and mediation groups operating within the association's geographical area, the next step is to pre-qualify potential mediators. The association should contact each individual and group on its list to establish their: 1) interest in the mediation program; 2) ability to provide mediation services that meet program needs and requirements; 3) current fees; and 4) credentials and qualifications. The association should inform individuals and groups about the mediation program, program requirements and criteria for mediators. The association should also inform providers that the program is being considered for endorsement by the Board of Directors and that the association will notify provider of the association's decision.

QUALIFICATION AND SELECTION

(COMPLETE FOLLOWING DIRECTOR ENDORSEMENT)

Procedures. The association should determine how individual mediators and mediation groups will be screened and selected. NAR recommends that a working group of no more than five members, including the chairman, be appointed to make recommendations for the selection of mediators. The association's Executive Officer and Legal Counsel should participate in the selection process.

Notice of Endorsement and Request For Proposal. At the same time that the association notifies potential mediation providers of the directors' decision to endorse and implement the mediation program, the association should send a letter (Request For Proposal) to each potential provider requesting them to submit a written proposal or letter that contains the following:

- Confirmation of provider's interest in the mediation program.

- Confirmation of provider's ability to serve designated areas within the association's jurisdiction.

- Provider's fee schedule and any terms or conditions that apply to fees, e.g., payment terms, time periods during which fees will be in effect, fee increases and related notices, etc.

- Confirmation of provider's willingness and ability to perform prescribed mediation activities and services, e.g., pre-conference and post-conference activities, filing of NAR evaluation form, etc.

- Education, training, experience, references and other qualifications that demonstrate provider's ability to execute activities required under the mediation program and conduct successful mediation conferences.

- Confirmation that provider meets the NAR recommended minimum qualifications.

- Confirmation of provider's ability to satisfy other criteria which association has established.

The association's letter should include the date by which the association must receive the written proposal and a brief summary of the association's timetable and procedures for selecting mediators to participate in the program. If individuals and groups being asked to submit proposals have not previously received copies of the Mediation Clause, Rules and Procedures, forms, and Seller-Buyer Information Brochure, these should be enclosed with the association's letter (A sample Request For Proposal For Mediators is included in attached Appendix K).

Interviews. Once all proposals have been received and reviewed, interviews should be arranged and conducted. Interviews can be conducted by telephone if personal interviews cannot be arranged.

Final Selection and Approval by Board of Directors. The working group's recommendations should be presented to the appropriate committees for final recommendation to the Board of Directors. Following action by the directors, the association should thank all providers for submitting proposals and inform them of their acceptance or rejection.

Keep Mediation Provider(s) Informed and Involved. Mediation Providers can be a valuable resource during initial implementation of the program. Keep your mediation providers informed of the association's progress and any problems that the association may be experiencing. Involve the provider to the greatest degree possible.

CRITERIA FOR QUALIFYING DRS MEDIATORS

Associations can help to ensure the success of their mediation program by establishing qualification criteria for individuals who wish to participate as mediators. Such criteria provides the basis for objective selection of individuals who possess the knowledge, skills and expertise needed to mediate disputes under the NAR Rules.

Establishing Qualification Criteria. NAR recommends that the Association appoint a committee to develop and recommend mediator qualification criteria for the Association and that the committee's recommendations be approved by the board of directors. Consideration should be given to special or unique needs of the Association as well as to the minimum qualification criteria developed and recommended by NAR.

Recommended Minimum Qualification Criteria. To help Associations qualify and select capable mediators, NAR developed the following minimum qualification criteria. **NAR recommends that Associations adopt these criteria as minimum standards for qualifying mediators**:

To Participate As A Mediator, An Individual Must Satisfy The Following Minimum Qualifications:

I. Mediator shall be:

A. A REALTOR® member who: (1) possesses the qualities of tact, diplomacy, and a sense of equity as stated in the NAR CODE OF ETHICS AND ARBITRATION MANUAL (110a), "Appendix 1 to Part Four;" (2) has a familiarity with real estate rules and regulations of the state; (3) has five years of real estate experience; and (4) has completed a course of instruction on mediation under guidelines approved by the state association or local association (*); **or**

B. A professional mediator who has been trained and who is a member in good standing of an established public or private agency such as the American Arbitration Association, other established private mediation groups, chambers of commerce or better business bureaus and who possesses a fundamental knowledge of real estate (**) that is satisfactory to the Association; **or**

C. A real estate professional such as a title officer, real estate attorney, appraiser, etc., who (1) is trained in mediation by an Association-approved mediation company; and (2) possesses substantial experience in real estate that is satisfactory to the Association.

II. Prospective mediators must agree to abide by the NAR Rules and Procedures

III. Prospective mediators must be willing to consider negotiation of a specialized fee schedule for mediation services/conferences.

An individual's experience and track record in mediating cases that have involved any of the following would also help to establish the individual's ability to conduct successful mediations under the NAR Rules:

- mediations involving other professionals, e.g., architects, engineers, lawyers, accountants, building contractors, homebuilders, etc.,

- mediations involving contracts for professional services

- mediation of disputes involving more than two parties

The Association should verify the credentials and qualifications of all individuals and groups being considered as potential mediators. The Association should ask for and check references provided by prospective mediators.

NAR discourages the use of paid Association staff and legal counsel as mediators under the mediation program. Association staff and legal counsel, however, should be allowed to participate in mediator training seminars to become more familiar with the program. As a reminder, mediators under the NAR mediation program are acting in an individual capacity and are not representing any association. All mediators will need to obtain their own professional liability insurance coverage for their mediation activities.

*** To protect the integrity of mediation as a viable, neutral source for dispute resolution, whenever an Association selects or approves REALTORS® as mediators it should also provide the name of at least one mediator who is not a member of the association.**

**** For Mediation Program purposes, "fundamental knowledge of real estate" means that the mediator is familiar with (has working knowledge of) the process by which real estate is marketed and conveyed in the local market area and is not meant to imply that a mediator must possess or demonstrate the same level of knowledge or expertise as a practicing real estate salesperson, attorney or lender.**

Summary of Mediation Components

1. Rules and Procedures. The rules and procedures that govern the participants' and mediators' duties and obligations from the time the commitment to mediate is made through the mediated settlement.

a. Agreement of Parties - The commitment to mediate.

b. Initiation of Mediation - Filing of the Request to Initiate Mediation Transmittal Form.

c. Selection of Mediator - Provider must appoint mediator within 10 days of receipt of the Transmittal Form.

d. Mediation Conference - Mediation conference must take place within 60 days of receipt of Transmittal Form. All relevant information must be presented. The Mediator has no authority to render a binding decision.

e. Representation by Counsel - Any party may be represented by counsel.

f. Confidentiality - No aspect of the mediation conference shall be relied upon or introduced as evidence in any arbitration, judicial or other proceeding.

g. Mediated Settlement - The mediated settlement must be put into writing and signed by all parties within 10 days of the conclusion of the mediation conference. Parties who do not agree with the terms as stated are not obligated to sign the settlement agreement.

h. Timing of Claims - The time limitation by which parties must bring claims in accordance with these Rules and Procedures are to be governed by state law. Local counsel should be consulted regarding this issue.

2. Mediation Clause. Clause states that the parties commit to submit to mediation any disputes which may arise out of the transaction.

Option A. Language to be incorporated as clause in the body of the sales contract. NAR recommends this option over Option B - Addendum. **(Appendix A)**

Option B. Language in addendum form; designed to be signed and attached to the sales contract. **(Appendix B)**

3. Agreement to Mediate. Serves the same purpose as the Mediation Clause but is not part of the sales contract. The Agreement is used by parties who have not pre-committed to mediation but who later agree to mediate disputes. The Agreement documents the willingness and commitment of the parties to submit disputes to mediation. It may be signed before or after a dispute arises. **(Appendix C)**

4. Endorsement Notice. Must be sent to NAR's Risk Reduction Department immediately after the association's Board of Directors endorses the mediation program. This triggers the professional liability insurance coverage for the endorsement. **(Appendix D)**

5. Request to Initiate Mediation Transmittal Form. The form which a party files with a mediation provider to initiate the mediation process. The form includes all information the mediator needs, including the names and addresses of parties to the dispute, the amount in dispute and the intention of the parties to be represented by counsel. **(Appendix E)**

6. Sample Mediation Settlement Agreement. Evidence of the settlement agreement between the parties. Parties who do not agree with the terms as stated are not obligated to sign the agreement. **(Appendix F)**

7. Seller/Buyer Information Brochure. Provides an overview of DRS in concise, easy to understand

language. Brochure is designed to introduce clients and customers to the DRS Mediation Program. **(Appendix G)**

How the Arbitration Program Works

Arbitration is an informal hearing in front of a neutral third party, the arbitrator, who discovers the facts of the dispute through testimony and documents and then renders a final determination of the dispute, called an arbitration award. The basic structure of an arbitration process is as follows:

If permitted under state law, parties to a real property transaction pre-commit to submitting their disputes to either binding or non-binding arbitration. Parties must be notified that if they commit to binding arbitration, they give up their legal right to litigate the dispute in the future.

A dispute arises and a request for arbitration is made to the endorsing association or arbitration company. This request may be accompanied by a written complaint.

Notice is given to the other relevant parties with a request for response to the complaint.

A list of qualified arbitrators is provided to the parties. Each party notes those arbitrators that are acceptable to them. The arbitrator lists are then matched and the arbitrator(s) are appointed. There will usually be the option to have one or three arbitrators on the panel.

The arbitrators shall notify all parties to the dispute of the time and place for the hearing. Parties are also notified that they may be represented by legal counsel.

Prior to the hearing, limited discovery is allowed.

At the hearing, each party may open with a statement as to their position on the dispute. Testimony from witnesses may be heard and the witnesses cross-examined. Documents in support of a position are also received at this time.

The hearing then ends and the arbitrators render an award within a specified time period following the hearing.

Under the NAR arbitration program, associations need to review the information contained in these guidelines and decide whether to develop and implement an arbitration program. Because of the various state arbitration statutes, associations will need to develop their own arbitration programs. This should be done following the guidelines set forth in this manual and in conjunction with the association's legal counsel. The mandatory arbitration guidelines below have been developed by NAR and must be followed by each association in their development of their arbitration program in order to maintain professional liability insurance coverage for the administration of an arbitration program.

The guidelines have also been adopted to ensure the integrity of the arbitration program on a national basis. The guidelines are requisite to association participation in the NAR arbitration program. The intent of the guidelines is not to discourage or exclude associations from participating in the program, but rather, to make certain that an association's leadership, staff, and members know and understand the level of commitment and resources that are required to effectively initiate and administer an arbitration program as an ongoing service of the association.

Mandatory Guidelines for Association Participation

In order to maintain insurance for your arbitration program under the NATIONAL ASSOCIATION OF REALTORS® Professional Liability Insurance Program, associations must:

1. Have a full-time, paid executive officer or verify that administrative support will be provided by the executive officer or professional staff of:

a. A neighboring association

b. The state association

c. Arbitration provider with whom the association has a written service agreement.

2. Develop the arbitration program in conjunction with legal counsel to be certain that :

a. Arbitration agreements in listing agreements, buyer representation agreements, and sales contracts are enforceable within the relevant state statutes,

b. The arbitration program is designed to minimize a real estate broker/salesperson liability for unauthorized practice of law claims. (If under state law the activities of a real estate licensee under the program would arguable be considered the unauthorized practice of law, the Association should seek an Advisory Opinion from the state real estate commission before proceeding with the arbitration program.) and

c. The state law regarding arbitration programs and clauses are followed.

3. Ensure on-going involvement of legal counsel in the program activities following development and endorsement of the program.

4. Develop the arbitration program using one arbitration provider company that:

a. Has been in the business for no less than three years,

b. Has available several professional arbitrators who possess a fundamental knowledge of real estate

that is satisfactory to the association, and

c. Who agrees to abide by the mandatory arbitration guidelines developed by NAR.

5. Reduce the association's arbitration rules and procedures to writing and make them available to real estate brokers/salespeople, buyers, and sellers prior to their commitment to arbitrate a dispute.

6. Submit to the NATIONAL ASSOCIATION OF REALTORS® a written "Request For Insurance" form that is signed by the association's legal counsel, president, and executive officer. (See attached Appendix L) The association must also submit the written rules and procedures with the Request.

7. Incorporate into its arbitration program the following elements:

a. That the entire arbitration process shall be completed within 60 days from the date the initial arbitration request was delivered to the arbitration company,

b. That the arbitration award shall be rendered not later than 30 days from the date the hearing is closed,

c. That the arbitration clause or addendum to the agreement clearly explains the arbitration process and is signed by all parties to the transaction, and
d. That the association's arbitration rules contain:

i. a statement that requires all parties to keep the proceedings and records of the arbitration private and confidential, and

ii. this statement: **"Neither the arbitration company, nor the arbitrator, nor the NATIONAL ASSOCIATION OF REALTORS® or any of its member association shall be deemed 'necessary parties' in any judicial proceedings relating to arbitration under these guidelines. Neither the arbitration company, arbitrators, nor the NATIONAL ASSOCIATION OF REALTORS® shall be liable to any party for any act or omission in connection with any arbitration conducted following these guidelines."**

8. Conduct training on the association's arbitration program and the unauthorized practice of law for member firms, brokers, and salespeople.

Information for a More Effective Arbitration Program

The following information is provided to assist association's in developing their own arbitration programs.

Sample Program

Several state associations have already implemented arbitration programs at the state level for use by their member associations. The elements of the Minnesota Association of REALTORS® Arbitration Program have been included in Appendix M for your review. Other associations with successful arbitration programs include the Missouri Association of REALTORS® and the Michigan Association of REALTORS®.

Binding versus Non-Binding Arbitration

An arbitration program can be developed which is either binding or non-binding on the parties. This decision is left to the discretion of each association.

In binding arbitration, a neutral renders a final decision on the dispute. Neither party may litigate any of the allegations resolved by the arbitration. The arbitration award may be confirmed by a court which then gives the award the full force and effect of a judgment.

In non-binding arbitration, the final award can be rejected by either party. If accepted, the parties must then adhere to the decision found in the award as in binding arbitration and there is no future ability to litigate the dispute. If rejected, the parties can proceed to litigation on all the issues in dispute. This type of arbitration is often used to gauge how the litigation may proceed. In this sense, the arbitration may ultimately encourage a later settlement of the dispute.

Hearing at the Property Site

Many arbitration programs are designed so that they arbitration hearings are actually conducted on the property site where a property condition is in dispute. This procedure is effective because it provides all parties to the dispute and the arbitration panel with the opportunity to see the actual damages that occurred to the property.

Oversight Boards or Committees

NAR recommends that each association maintain a standing committee, such as a Risk Reduction Committee, that will have oversight of its DRS program. This committee would be responsible for insuring that the association's program follows the NAR guidelines and that all procedures are fair and equitable to all parties. The committee may also be responsible for selecting the DRS providers, conducting the training on the programs, and insuring that the appropriate evaluation forms are completed and returned to NAR. Some associations may want to involve individuals other than members in the oversight of their DRS program. In this case, an oversight board can be created. The

Minnesota Association of REALTORS® maintains an oversight board over their arbitration program that consists of representatives from the Association, the Minnesota Real Estate Commission, and the arbitration provider. Please note that no professional liability insurance coverage exists under the NAR Professional Liability Insurance Program for members of an oversight board or committee other than members of the association.

Judicial Confirmation of an Arbitration Award

Once the arbitration award is final, should the prevailing party have reason to believe the decision will not be accepted and litigation will ensue, the party can seek confirmation of the arbitration award through a suit for declaratory relief. A petition for declaratory relief needs to follow the procedures established by the local court. No petition should be prepared without the assistance of legal counsel. The intent of the petition is to have a court confirm the arbitration award. Once this is accomplished, the award will have the same force and effect as a judgment.

Attorney Advisor

This concept is currently used by the Convention Liaison Council Program which arbitrates disputes that arise in the convention and exposition industry. Here, an arbitration panel is assisted by an attorney advisor. The advisor interprets the law and also questions witnesses. In addition, the advisor answers legal questions that arise throughout the hearing. However, the advisor does not have a vote in the final award decision. This is left to the arbitrators.

Fees

Arbitration companies may have a set fee structure and rules. Otherwise, an arbitration program can be developed where all the parties to the dispute divide the arbitration fees equally. Or, the party who files the arbitration request can pay the entire fee with the understanding that the party or parties held responsible will ultimately pay the fee.

Legal Considerations for Association's Legal Counsel

To assist an association's legal counsel in developing the associations arbitration program, the following issues are set forth for consideration:

Pre-Commitment To Arbitrate

Most states have adopted a state arbitration statute. Under this statute or related case law, it may not be legal in the state for parties to pre-commit to arbitration. This is true in the state of Nebraska and may be true in other states as well.

Antitrust Concerns

In the recent case of Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148 (5th Cir.), the Court of Appeals held that if the plaintiff can prove that a trade association used legal seminars and bulletins to provide members with information on arbitration clauses with the intent of letting them know that other members were willing to act in combination to require use of such clauses by customers, an antitrust case against the association would be established. This case should be further analyzed for its impact on associations in the Fifth Circuit.

Privileged Information

A California Court of Appeals ruling addresses whether arbitration testimony is privileged. In Moore v. Conliffe, California Court of Appeal, First District, No. A056436, January 19, 1993, rehearing denied February 11, 1993, the court held that the statements of those who testify in private arbitrations are not privileged because "neither a private arbitration proceeding nor a deposition held in connection therewith is a judicial proceeding...as that term has been interpreted by case law."

Broker/Salesperson Orientation

Vital to the implementation of any DRS program is the support of an Association's member firms. The association needs to provide each member firm with the information and materials necessary to take advantage of this new member service. Outlined below is a comprehensive orientation program for all parties involved in the program: brokers, salespeople, buyers and sellers.

DESIGNATED REALTOR - BRANCH OFFICE MANAGER MAILING.

The purpose of the mailing is to ensure that all principal brokers and office managers are aware of the association's endorsement of the selected DRS program, the applications of DRS and the principal broker's role in the successful implementation of DRS at the agency level. Mailing should include:

1. Cover letter signed by the association's president encouraging the firm's participation in the DRS program.

2. Copies of the following DRS materials:

MEDIATION COMPONENT

* Mediation Clause/Addendum
* Mediation Rules and Procedures
* Agreement to Mediate
* Request to Initiate Mediation Transmittal Form
* Evaluation Forms (Appendices O-R)
* Sample Mediation Settlement Agreement

* Seller-Buyer Information Brochure
* List of Approved DRS Mediators (if association does not have Exclusive DRS Service Agreement)
* Seller-Buyer Guide for Initiating Mediation (Appendix N)
* Broker Guide for Salesperson Orientation
* Broker Presentation Outline
* Outline for Salesperson Orientation
* Salesperson Checklist/Script

ARBITRATION COMPONENT (Materials to be developed by the association to be in line with the association's arbitration rules and procedures. The mediation materials can be used as guidelines in creating the arbitration materials).

* Arbitration Rules and Procedures
* Arbitration Forms
* A Seller-Buyer Information Brochure
* Seller-Buyer Guide for Initiating Arbitration
* Broker Guide for Salesperson Orientation
* Broker Presentation Outline
* Outline for Salesperson Orientation

If possible, the cover letter should include the date(s), time(s) and location(s) of an association-sponsored DRS training program(s) and request that brokers and managers bring enclosed materials with them to the orientation program.

DESIGNATED REALTOR - BRANCH OFFICER MANAGER DRS TRAINING.

The purpose of conducting DRS training program(s) for Designated REALTORS® and office managers is to provide them with information about DRS, techniques for implementing DRS at the firm level, and an opportunity to ask questions and discuss concerns. If possible, association counsel should participate in the program.

Each participant should have copies of the materials that were mailed (see above) and a program outline. The association's executive officer or other knowledgeable person should serve as facilitator for the program.

With regard to mediation, a video training kit has been developed by NAR for this program. The training kit is automatically mailed to each association upon receipt of the completed "Notice of Endorsement" form. The training kit contains a 25-minute videotape on mediation, a camera-ready workbook, and a facilitator guide. The videotape presents a true-to-life scenario that is resolved through the mediation process. Included in the tape is an explanation of the benefits of mediation, an effective presentation of the mediation process to buyers and sellers, and a sample mediation conference. This training kit should be used for the mediation portion of the DRS training. Likewise, a similar type of program should be used for an arbitration orientation program.

SELLER-BUYER INFORMATION PACKET.

The purpose of the packet is to provide sellers and buyers with more information about DRS than the Seller-Buyer Information Brochure contains. Sellers and buyers will need to have the information and forms in the packet to initiate mediation/arbitration under DRS program rules.

The association and participating member firms should have pre-made supplies of the packets so seller-buyer inquiries and requests can be promptly handled. Packet contents should include:

1. Form cover letter signed by principal broker or by association's president or executive officer.

2. Copies of the following forms and materials:

MEDIATION COMPONENT

* Seller-Buyer Information Brochure
* Mediation Rules and Procedures
* Mediation Clause/Addendum
* Agreement to Mediate
* Request for Initiating Mediation Transmittal Form
* Seller-Buyer Guide for Initiating Mediation
* List of Approved DRS Mediation Providers (if association does not have Exclusive DRS Service Agreement)

ARBITRATION COMPONENT

* Arbitration Rules and Procedures
* Arbitration Forms
* An Informational Brochure
* Seller-Buyer Guide for Initiating Arbitration

SALESPERSON ORIENTATION.

To participate in an association's DRS program, principal brokers need to conduct orientation programs for its salespeople. The purpose of this orientation is to acquaint the salespeople with the selected DRS program and how it works. In addition, the broker needs to ensure that the salespeople can successfully present and explain the program to clients and customers. Lastly, an orientation program gives the salesperson an opportunity to ask questions and discuss concerns.

Each participant in the salesperson training program should have the following materials:

Salesperson Orientation Outline

Salesperson Checklist (For Mediation Component)

Seller-Buyer Information Brochure
DRS Rules & Procedures

If Using The Mediation Component Also Handout,

Mediation Clause
Agreement to Mediate Form
Request To Initiate Mediation Transmittal Form
Sample Mediation Settlement Agreement
Evaluation Forms
Answers To Frequently Asked Questions (Appendix S)

If Using The Arbitration Component Also Handout Those Forms And Materials Developed By The Association Or Arbitration Company.

To assist in this training, the following Broker's Presentation Outline has been developed. This outline is based on the Mediation Component. Should an association endorse an arbitration program, the broker presentation outline will need to be amended to be in line with the association's arbitration rules and procedures.

BROKER PRESENTATION OUTLINE

I. Need For Alternative DRS

A. Broker-Salesperson Liability

1. Salespeople are aware of liabilities they incur in their everyday activities.
2. Claims against salespeople are sometimes frivolous or made because the salesperson is "there." DRS programs discourage frivolous claims.

B. Increasing Number of Claims in Recent Years

1. Research done by NAR shows claims against brokers and salespeople have increased dramatically over last five years.
2. Approximately 70% of claims are made by frustrated buyers.

3. Average claim is approximately $3,000 or less - excluding costs of litigation.
4. Cost for litigating claims can be as much as three times the amount of claim.

C. Higher E&O Insurance Costs

1. Because costs for litigating claims are so high - and takes so long -many frivolous or small claims are settled. DRS programs discourage frivolous claims.
2. Increased number of claims and settlement by insurance companies increases premium costs. Lowering number of claims may lower insurance costs.

D. Cost and Inefficiency of Litigation

1. Because of the increased number of cases being filed in court, decisions can take up to two years to be rendered.
2. Attorneys fees and court costs frequently cost more than the amount of the claim.

E. Win-Loose Litigation Hurts Long-Term Broker-Client-Customer Relationships

1. Litigation is adversarial - somebody wins and somebody losses.
2. Losers are usually unhappy and unhappy clients or customers, fairly or unfairly, blame the broker or salesperson.
3. Unhappy clients & customers:

a. Don't come back;
b. Don't speak highly of company; and
c. Don't refer other clients and customers.

II. DRS Mediation Program

A. Introduction

1. Voluntary participation by associations & firms.
2. Program gives brokers, sellers, buyers and other parties to a real estate transaction a non-adversarial, efficient, affordable alternative to litigation through mediation.
3. Almost any type of dispute can be mediated under DRS Rules.
4. Exceptions include disputes that involve:

a. Complex legal issues or allegations of criminal misconduct.
b. Disputes and controversies that are subject to ethics or arbitration proceedings under the Association's Professional Standards procedures including disputes between REALTORS®.
c. Violations of a state's real estate license laws.

B. How The Mediation Component Works

1. Sellers and buyers voluntarily pre-commit to mediate disputes by signing a sales contract or addendum to the contract that contains a mediation clause.
2. Salesperson presents and reviews mediation clause just as he presents other clauses in contract.
3. Signing a contract or addendum that contains a mediation clause legally binds the seller/buyer to submit disputes to mediation under DRS rules.
5. When a dispute arises, the initiating party completes the "Request To Initiate Mediation Transmittal Form" and delivers it to the association for process. The association will then either notify all parties involved of the mediation request and provide the parties with the list of mediators or will forward the "Request" to the sole mediation provider (depends upon the system selected by the association).
4. Mediation is the process of bringing disputing parties together with an unbiased, objective third party (mediator) who assists the parties in reaching a mutually agreeable settlement to the dispute. The mediator does not render decisions as do arbitrators and judges. Rather, the mediator acts as a facilitator.
5. Settlements reached as a result of mediation are not binding until parties have signed a written settlement agreement.
6. If mediation is unsuccessful, i.e., a settlement isn't reached, parties are free to pursue other legal remedies - arbitration and litigation.
7. If seller/buyer does not sign a contract or addendum pre-committing to mediation, seller/buyer can initiate DRS Mediation by signing the Agreement to Mediate. The agreement can be signed either before or after a dispute arises.

C. Benefits of DRS

1. For Brokers and Salespeople

a. Improves our public image because we have taken initiative to offer an alternative to litigation.
b. We are offering service to clients and customers that will save them time and money should a problem arise.
(1) Mediation is non-adversarial; parties participate in resolving the problem so they are satisfied/happy with results which means they are more likely to "come back" and to refer other clients and customers to us.
(2) Avoid delays that postpone closings by being able to resolve disputes quickly and efficiently.
(3) May lower E&O insurance costs by lowering number of claims. Insurance companies are recognizing value of mediation and may eventually give premium credits or deductible incentives to firms that use mediation.

2. For Sellers-Buyers

a. Faster.
b. Less expensive.
c. Non-adversarial approach; parties have control over outcome.
d. Avoid cost of litigating frivolous claims.
e. Freedom to pursue other legal remedies if mediation isn't successful.
f. Reliable - mediation is successful 80-90% of the time.

III. Mediation Components and Their Uses (Review and discuss each component).

A. Seller-Buyer Information Brochure
B. Mediation Clause
C. Agreement to Mediate
D. Rules and Procedures
E. Request to Initiate Mediation Transmittal Form
F. Seller-Buyer Guide for Initiating DRS Mediation
G. Evaluation Forms
H. Sample Mediation Settlement Agreement

IV. Presenting Mediation Information to Sellers and Buyers (Walk through and discuss Salesperson Checklist).

V. What to Do When a Dispute Arises.

A. Try to resolve through negotiation before mediation is invoked.
B. Provide buyer/seller with Information Packet and explain what he/she needs to do.
[**Note:** If dispute involves broker or salesperson, party will contact the association for this information.]

VI. Broker's Office Policy and Procedures for DRS (Cover any policies and procedures the company has.)

VII. Question and Answers (Refer to "Answers to Questions Most Frequently Asked" found in Appendix S)

SALESPERSON ORIENTATION
OUTLINE

I. The Need For Alternative Dispute Resolution Systems.

A. Brokers/salesperson liability.
B. Cost and inefficiency of litigation.
C. Win-Lose litigation hurts long-term broker-client-customer relationships.

II. The Selected Dispute Resolution System.

A. Introduction
B. How Mediation/Arbitration works.
C. Why one type of DRS was selected over another.
D. Benefits of DRS.

III. DRS Program Components And Their Use.

A. Seller-Buyer Information Brochure
B. Relevant Forms
C. Mediation/Arbitration Rules and Procedures
D. Seller-Buyer Guide for Initiating DRS Mediation.

IV. Presenting DRS Information To Sellers And Buyers.

V. What To Do When A Dispute Arises.

A. Try to resolve the dispute through negotiation before suggesting the DRS program.
B. Mail or deliver Seller-Buyer Information Packet upon request.

VI. Broker's Office Policy And Procedure For DRS.

VII. Questions And Answers.

CHECKLIST for PRESENTING DRS MEDIATION CLAUSE TO SELLERS AND BUYERS SALESPERSON

(If an association endorses an arbitration program, this checklist can be used to develop a similar one to explain arbitration to sellers and buyers. Because of the concern regarding salespeople engaging
in the unauthorized practice of law, any such checklist needs to be reviewed by the association's legal counsel)

1. [ ] Review Mediation program and Mediation Clause with seller/buyer.

___ Inform seller/buyer about the Mediation program.

___ Explain that mediation is a process that brings disputing parties together with an neutral, unbiased third party who, as a trained professional, helps parties reach a mutually acceptable solution to the dispute.

___ Emphasize that the mediator does not have the power or authority to render a decision as do arbitrators or judges. Explain that the mediator may suggest options and possible solutions in order to help the parties, but that the mediator does not pass judgment or render decisions.

___ Terms of settlement reached during mediation conference are not binding until all parties sign a written settlement agreement. This is usually done at the close of the mediation conference.

___ Review the mediation clause with the seller/buyer; explain that the mediation clause is similar to other clauses in the contract and does not imply or suggest that a problem or dispute is going to arise.

___ Explain that pre-committing to mediation binds the seller/buyer to submit any dispute that might arise to mediation. Agreeing to mediate does not mean that the seller/buyer is agreeing to a settlement, rather, he/she is agreeing to try to resolve the dispute through mediation rather than in court.

___ Emphasize that seller/buyer does not give up any legal right to pursue other remedies such as arbitration or litigation if mediation is not successful. Mention that mediation is successful in 80%-90% of cases submitted to mediation.

___ Explain that pre-commitment expedites the mediation process and that while parties can agree to mediate after a dispute arises, there is no guarantee parties will submit to mediation without precommitment.

2. [ ] Emphasize the value and benefits of mediation as an alternative to litigation.

___ Faster (typically, mediation takes about thirty days).

___ Less expensive (Fee ranges from $50-$1,500).

___ Seller/buyer should consult an attorney, but attorney does not have to be present at the mediation; as a rule, attorneys do not attend the mediation conference.

___ More positive and constructive method of resolving disputes because parties participate in the process and resolve the dispute themselves; win-win resolution vs. win-lose resolution.

___ Mediation is successful 80%-90% of the time. If mediation isn't successful, parties have not lost substantial amounts of time or money (parties usually share the cost of mediation), and parties are free to pursue other legal remedies.

___ Usually do not have problems enforcing terms of settlement because the terms and conditions have been developed by the parties themselves rather than being imposed by an arbitrator or judge.

3. [ ] Provide seller/buyer with copy of "Seller-Buyer Information Brochure."

4. [ ] Recommend seller/buyer consult an attorney.

5. [ ] Obtain signed disclosure verifying:

___ Seller/buyer received a copy of the brochure.

___ Salesperson reviewed and explained mediation clause and program.

___ Salesperson advised seller/buyer to consult an attorney.

6. [ ] Close with positive statement about decision to pre-commit to mediation.

SALESPERSON PRESENTATION GUIDE TO BUYERS AND SELLERS REGARDING MEDIATION

The following script is an example of how mediation can be presented by salespeople to buyers and sellers prior to the signing of a contract to purchase real estate:

Everything appears to be in order and I would like to again congratulate you on your wise decision to buy this home.

I would like to take just a moment to tell you about a new program that has been introduced by the NATIONAL ASSOCIATION OF REALTORS® and the Association of REALTORS®. Court costs, attorney fees and long delays have made traditional litigation through the courts an unattractive method of resolving disputes. These problems can be avoided through the Dispute Resolution System Mediation Program.

Mediation is less expensive and less time-consuming than litigation. Mediation brings the parties together with an impartial third party who is a trained, professional. With the mediator's help, parties usually reach a mutually agreeable solution. It is very important to understand that the mediator does not have the power or authority to render a binding decision on the parties as does an arbitrator or judge. The mediator assists the parties to reach an agreeable solution. The outcome of a mediation conference is not binding unless the parties agree, in writing, to a settlement. In the event that the parties do not arrive at an agreement, they are free to pursue other legal alternatives for resolving the dispute including arbitration and litigation. You do not forfeit any legal rights whatsoever.

Please take a copy of the Announcement Brochure and these program materials which describe the System in greater detail. I encourage you to review the information and consult with your attorney if you wish.

I want to emphasize that by encouraging you to pre-commit to mediation I am in no way suggesting that a problem is going to occur. Look at the mediation as a precaution. If a problem does arise, mediation allows you to resolve the problem without going to the time and expense of court.

I'm sure when you've read the brochure and talked with your attorney that you'll agree that pre-committing to mediation is a good decision.

Tips for Promoting DRS Program

Actively promoting the value, benefits, purpose and use of DRS is critical to the success of the program locally as well as nationally. A well-designed promotional plan will include promotional activities targeted to members of the association and the public. Be imaginative, and by all means, add your own ideas to those listed here.

MEMBERSHIP

- Provide members with information about the Association's DRS program. Keep members informed of association's plans and decisions via meetings and membership publications.

- Include copy of Seller-Buyer Information Brochure as an insert in the association's newsletter or magazine and as a handout at membership meetings.

- Include DRS presentations at membership meetings: invite an area mediator/arbitrator to speak to members about the value and benefits of DRS as an alternative to litigation; have association counsel discuss the selected DRS program, the relevant forms, and other legal considerations of program; ask REALTORS® who are participating in the program to share their experiences with other members.

- Design flyers and other promotional pieces that help REALTORS® understand the value and benefits of DRS to brokers, salespeople, sellers and buyers.

SELLERS, BUYERS AND PUBLIC

- Use news media to reach largest audience.

- Arrange radio and TV talk show appearances; encourage feature articles in local newspapers; use DRS as topic in columns which association or members may write for local papers.

- Prepare a "media kit" that can be distributed with media releases, public service announcements, etc.

- Inform state and local elected officials about the DRS program.

- Reach business community through public speaking engagements at Rotary Club and Chamber of Commerce meetings.

- Release or write guest articles for: local newspapers, real estate journals, affiliate member publications (e.g., lenders, title insurance companies, home inspectors Bar Association publications Chamber of Commerce newsletters, etc.)

[**Note**: A sample press release and media fact sheet on mediation have been included in this section. Similar press releases and media fact sheets should be developed for use in an arbitration program.]

Sample Press Release

(*Retype this release on Association stationery, filling in the appropriate information in the blanks as indicated. The contact at the top of the release should be the person who handles media calls. The retyped release should be mailed or hand delivered to area newspapers.)*

FOR FURTHER INFORMATION CONTACT:

Media relations contact : _____

Phone number: _____

Local Association of REALTORS® Launches Mediation Service For Buyers, Sellers

(Your Town) Date -- "Area real estate buyers and sellers now have an alternative to expensive and time-consuming litigation when there is a problem with their transactions," according to (Full Name of Association President) , President of the (Association Name).

The mediation component of the Dispute Resolution System (DRS), was developed by the NATIONAL ASSOCIATION OF REALTORS® for implementation by its more than 1,800 local Associations of REALTORS® nationwide. Through the service, sellers and buyers have access to mediators who have agreed to conduct mediations under the DRS Rules and Procedures.

"Although most real estate transactions are completed smoothly, occasionally there is a need to resolve a dispute," said (Last Name of Association President). "Many of the most common disputes, such as disagreements over earnest money deposits, are natural candidates for this type of service."

(Last Name of Association President) added that DRS is a very economical and efficient method of settling conflicts that otherwise might take months to resolve through the courts or through outside arbitration services. (Add sentence(s) briefly describing approximate fees involved for parties, indicating that fees may vary depending on the complexity of the case.)

In the mediation process, the parties meet with a trained, impartial mediator who helps them attempt to reach a mutually agreeable solution to the dispute. Unlike an arbitrator, the mediator cannot render a binding decision. If the parties cannot reach an agreement, they may pursue arbitration or litigation. Professional mediation groups around the country report a success rate of 80%-90%.

"It's a 'win-win' situation, with no risk involved for either party," said (Last Name of Association President) . "If the parties reach a settlement, the dispute is over. If they don't, they are free to take other courses of action without prejudice."

For additional information on the DRS, contact the (Association Name) .

Fact Sheet

ABC Association OF REALTORS® MEDIATION PROGRAM
FACT SHEET

(*Retype this fact sheet on Association stationery, filling in the appropriate information in the blanks as indicated. The contact at the top of the fact sheet should be the person who handles media calls. This fact sheet should serve as background information in conjunction with a news release or feature story idea for local media.)*

What: The Dispute Resolution System (DRS) Mediation Program is a dispute resolution service designed by the NATIONAL ASSOCIATION OF REALTORS® for its more than 1,800 local Associations of REALTORS®. The program offers sellers, buyers, brokers and other parties in a real estate transaction an efficient, affordable method of resolving disputes out of court. Associations voluntarily choose to endorse and participate in the program.

How: Participating associations identify qualified mediators who provide DRS mediation services. All parties involved must agree to use the DRS program before mediation begins. The mediator does not have the authority to render a binding decision, nor does the mediator have the authority to force any party to enter into an agreement. Rather, the mediator merely assists the parties in working together to reach a mutually agreeable solution.

Any settlement worked out through mediation must be put into writing and signed by all the parties to become a binding contract which is enforceable in a court of law. In the event the parties are unable to agree to a solution to the dispute, they are still free to pursue arbitration or litigation as though mediation had never taken place.

Benefits: - Faster than litigation.
- Less expensive than litigation.
- Discourages litigation of frivolous claims.
- Parties do not forfeit their legal rights to arbitrate or litigate the dispute if mediation is unsuccessful.

- Brokers are providing a service to their clients and customers.
- Potential for lowering the number of claims that must be settled or litigated by the insurance company, thereby lowering insurance costs for all parties.
- Mediation has a success rate of 80 - 90 percent.

Cost: (Write a brief statement outlining fees for parties involved.)

Who: The DRS program is available from the (Association Name) . The program was designed and distributed by the NATIONAL ASSOCIATION OF REALTORS®. For additional information on the DRS mediation program, contact, (Full name of contact) at (Telephone) .

The (Association name) is one of more than 1,800 Associations of REALTORS® that comprise the NATIONAL ASSOCIATION OF REALTORS®, the nation's largest trade association and The Voice for Real Estate.

Appendices

Appendix A. Mediation Clause (for insertion in Sales Contract)

MEDIATION CLAUSE
(For insertion in Sales Contract)

Any dispute or claim arising out of or relating to this contract, the breach of this contract or the services provided in relation to this contract shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; or (e) violation of a state's real estate license laws. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

By initialing in the place below, you hereby acknowledge that you have received, read and understand the standard announcement brochure for the Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Buyer's Initials

_____/_____

Seller's Initials

_____/_____

Listing Broker's Initials

_____/_____

Selling Broker's Initials

_____/_____

Note: Due to provisions in your state law, the mediation clause language may need to be revised to indicate that the contract survives past the closing of sale .

Appendix B. Mediation Clause (Addendum to Sales Contract)

MEDIATION CLAUSE
(Addendum to Sales Contract)

The undersigned hereby agree that any dispute or claim arising out of or relating to the attached contract dated
, between and , the breach of that contract or the services provided shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; or (e) violation of a state's real estate license laws. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

The parties hereby acknowledge that they have received, read and understand the standard announcement brochure for the Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Seller(s)

_____/_____

_____/_____

Buyer(s)

_____/_____

_____/_____

Listing Broker

___________________________/___________

Selling Broker

___________________________/___________

Appendix C. Agreement to Mediate

AGREEMENT TO MEDIATE

(**Note:** This Agreement does not have to be executed if parties have previously committed to mediation via the contract for sale or other written agreement to mediate.)

The undersigned parties agree that they are involved in a dispute concerning the purchase of real estate to the signed contract dated . A copy of the executed contract is attached and made part of this Agreement by addendum.

The following is a brief summary of the dispute:

The undersigned further agree to submit the above-described dispute to mediation in accordance with the mediation Rules and Procedures of the Dispute Resolution System. Any Agreement signed by the parties, pursuant to the mediation conference, shall be binding.

The undersigned hereby acknowledge that they have received and read the Dispute Resolution System Information Brochure and understand its contents.

Seller(s)

_____/_____

_____/_____

Buyer(s)

_____/_____

_____/_____

Listing Broker

_____/_____

Selling Broker

_____/_____

Other(s)

_____/_____

_____/_____

Appendix D. Endorsement Notice

ENDORSEMENT NOTICE
(Please Type or Print)

To: Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611

1. The Board of Directors of the _____ Association of REALTORS® voted on _____, 19 to endorse and implement the Mediation program of the NATIONAL ASSOCIATION OF REALTORS®.

2. Legal counsel was consulted prior to endorsement and has agreed to provide appropriate on-going advice and recommendations. ( ) Local ( ) State

Counsel Name:
Phone: _____
Address: _____
City State Zip Code

3. The program will be administered by (contact):

a. ( ) Association Executive Officer
Name:
Phone: _____
Mailing Address: _____
City State Zip Code _____

b. ( ) Neighboring Association Executive Officer ( ) State Association
[Associations without E.O.]
Association Name:_____
E.O. Name Phone:_____
Mailing Address: _____
City State Zip Code _____

c. ( ) Mediation Provider: Please attach documentation from the Mediation Provider. Documentation should include provider's name, address, and phone number.

4. We have reviewed the "Criteria for Association Participation" in the DRS Program and hereby confirm that we are able to satisfy each of the criterion listed.

_____/_____
Association President

_____/_____
Association Executive Officer

cc: State Association Executive Vice President

Appendix E. Request to Initiate Mediation -- Transmittal Form

REQUEST TO INITIATE MEDIATION - TRANSMITTAL FORM
(To be completed and mailed to DRS Mediation Provider
by party requesting mediation)

DATE : _____

1. **NAMES OF ALL PARTIES TO THE DISPUTE**

2. **PARTY REQUESTING MEDIATION**

Name Phone No. Fax: _____

Address: _____

_____

( ) Buyer ( ) Seller ( ) Broker ( ) Salesperson ( ) Builder/contractor ( ) Other

Professional Liability Insurance Company:

Name and Address of Legal Counsel or Other Representative:

Name Phone No. _____

Firm FAX : _____

Address: _____

_____

3. **OTHER PARTIES**

Name Phone No. FAX _____

Address: _____

_____

( ) Buyer ( ) Seller ( ) Broker ( ) Salesperson ( ) Builder/contractor ( ) Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name Phone No.

Firm FAX _____

Address: _____

_____

Name Phone No. FAX : _____

Address: _____

_____

( ) Buyer ( ) Seller ( ) Broker ( ) Salesperson ( ) Builder/contractor ( ) Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name Phone No.

Firm FAX : _____

Address : _____

_____

* * *

Name Phone No. FAX : _____

Address: _____

_____

( ) Buyer ( ) Seller ( ) Broker ( ) Salesperson ( ) Builder/contractor ( ) Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name Phone No._____

Firm FAX : _____

Address: _____

_____

Name and Address of Legal Counsel or Other Representative:

4. **BRIEF DESCRIPTION OF CLAIM:**

5. **AMOUNT OF MONEY INVOLVED:**_____ ($_____)

6. Have there been any formal court pleadings filed in this case? ( ) Yes ( ) No

If yes, are there any trial dates or time limitations involved? ( ) Yes ( ) No

Date _____ Court

County _____ Judge

Court Case # _____

7. Do you have authority to enter into and sign a binding written agreement to settle this on behalf of the party you represent? ( ) Yes ( ) No

Comment:

8. Do you need additional information from another attorney? ( ) Yes ( ) No

If yes, what?

9. Has a prior agreement to mediate been signed by the parties? ( ) Yes ( ) No

If yes, please attach copy of the signed agreement.

PLEASE MAIL THIS FORM TO THE DRS MEDIATION PROVIDER WHO HAS BEEN SELECTED AND AGREED UPON BY THE PARTIES. IF NO AGREEMENT EXITS, MAIL TO ANY QUALIFIED DRS MEDIATION PROVIDER IN YOUR AREA.

Please Provide CONFIDENTIAL Copy of this Form to:

Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Avenue
Chicago, IL 60611-4087

Name of DRS Mediation Provider Selected:

Appendix F. Sample Mediation Settlement Agreement

Mediation Settlement Agreement

In the matter of mediation between (insert name)
and (insert name).

DATE:

CASE NUMBER

MEDIATOR:

SETTLEMENT

We, the undersigned, having mediated our dispute in accordance with the DRS Rules and Procedures agree as follows:

Signed:

_____/_____

_____/_____

_____/_____

_____/_____

_____/_____

_____/_____

Appendix G. Brochure

INTRODUCTION

Although a majority of real estate transactions close without incident, there is a possibility that a problem or dispute will occur. When a dispute does arise, it is usually successfully resolved through normal channels of communication and negotiation. Occasionally, a dispute arises which cannot be resolved through negotiation. In the past, when negotiations failed, parties took their case to court. Today, they are taking their disputes to mediation.

WHAT IS MEDIATION

Mediation is a process in which disputing par-ties attempt to resolve their disagreements with the help of an impartial, trained third party -- the mediator. The mediator does not offer opinions, pass judgment, or render legally binding decisions. The mediator's only function is to help parties identify their differences and reach agreement on how to resolve them.

When the disputing parties have reached and agreed on a mutually acceptable solution, they sign a written agreement which outlines the terms of the settlement. Once the agreement is signed, parties are legally bound to abide by its terms. If the parties cannot reach a mutually agreeable settlement, they are free to arbitrate or litigate their dispute as if the mediation never took place.

In addition to being easier, faster, and less expensive than litigation, mediation is non-adversarial. Decisions rendered by an arbitrator or judge usually involve a winning party and a loosing party. In mediation, there are no loosing parties because the parties have been part of the process and together have agreed on the terms of the settlement.

HOMESELLERS/HOMEBUYERS DISPUTE

RESOLUTION SYSTEM MEDIATION

■ Access to Service

DRS mediation can be used by any of the par-ties to a real estate transaction -- sellers, buyers, brokers, builders, home inspectors, etc. With the exception of controversies that are subject to hearing under REALTOR® Professional Standards procedures, including disputes between REALTORS®, almost any type of dispute that arises from the transaction can be mediated under the DRS Rules and Procedures.

■ Rules and Procedures

How, when and by whom mediation is initiated and conducted is covered under the DRS Rules and Procedures. The Rules and Procedures ensure fairness, uniformity, and expediency.

■ Written Agreement to Mediate

Parties who decide to submit potential disputes to mediation sign either a sales contract that contains a mediation clause or an addendum that is attached to the sales contract. The clause states, in part, that parties agree to submit any dispute or claim that arises from the transaction to mediation under the DRS Rules and Procedures. Once the contract or addendum is signed by the parties, parties must submit their disputes to mediation. Parties who do not pre-commit to mediation when the sales contract is executed may agree to and submit disputes to mediation by signing a written Agreement To Mediate. Parties can sign this agreement either before or after a dispute arises.

■ Initiating Mediation

Any party can invoke DRS mediation by submitting a written request to the DRS mediation provider. The mediation provider arranges, schedules, and conducts the mediation conference. The mediation conference must be held within 60 days from the date on which the mediation provider receives a party's re-quest to initiate mediation. Usually the conference is scheduled within 30 days. The typical conference lasts between two to four hours.

■ Mediators

DRS mediators are experienced, qualified mediators who have agreed to participate in the program. Parties in a mediation select and agree on a mediator in advance of the mediation conference.

■ Role of Attorney

Although parties to the mediation have the right to be represented by counsel, attorneys do not have to participate in the mediation conference. Parties should consult an attorney if they have any questions or concerns about mediation or the DRS mediation service.

■ Fees

Fees for DRS mediation services are established by the mediation provider and are published in accordance with the DRS Rules and Procedures.

For more information, please contact NATIONAL ASSOCIATION OF REALTORS®, Office of the General Counsel, 430 N. Michigan Avenue, Chicago, Illinois 60611 or the local Board of REALTORS® in your area.

FACTS ABOUT MEDIATION

Mediation is **FASTER** than litigation. A lawsuit can take anywhere from several months to several years to be decided. As a rule, mediation takes about thirty days from beginning to end.

Mediation is **LESS EXPENSIVE** than litigation. Mediation fees range from $50 to $1,500. In some areas mediation services are free. Because parties typically split fees, no one pays an excessive amount.

Mediation is **NON-ADVERSARIAL**. Arbitration and litigation focus on disagreements between the parties and result in win/lose decisions imposed by the arbitrator or judge. Mediation, on the other hand, focuses on agreement between the parties and results in a win-win settlement reached and agreed on by the parties themselves.

Parties who agree to mediate **RETAIN THE RIGHT TO PURSUE OTHER LEGAL REMEDIES**. If parties cannot reach a mutually acceptable settlement during the mediation conference, they are free to arbitrate or litigate their dispute as if mediation never took place.

Statistics show that **MEDIATION IS SUCCESSFUL** 80%-90% of the time.

HOMESELLERS/HOMEBUYERS

DISPUTE RESOLUTION SYSTEM

NATIONAL ASSOCIATION

OF

REALTORS®

Homesellers/Homebuyers

DISPUTE RESOLUTION

SYSTEM

MEDIATION PROGRAM

A FAST, EASY, AND

INEXPENSIVE ALTERNATIVE

TO LITIGATION

Appendix H. Sample Letter to E&O Insurance Providers

SAMPLE LETTER TO E&O INSURANCE PROVIDERS

(This letter, or a modification of this letter, should be addressed to the appropriate representative of the insurance company. If the contact is not known, call the company and ask for the name and title of the person in charge of professional liability (E&O) insurance programs.)

Dear Name of Contact) :

The Association of REALTORS® has recently endorsed the Dispute Resolution System. This DRS mediation program is an alternative dispute resolution system in which sellers, buyers, brokers and other parties to a real estate transaction can settle disputes through mediation. The enclosed materials explain the program in greater detail.

Sellers, buyers, and real estate brokers will benefit from the use of the DRS mediation program. E&O insurance providers will also benefit since real estate brokers who agree to mediate claims will have claims that cost less to defend and settle.

Recognizing the value that the DRS mediation program can have to E&O insurance providers, we are asking you to consider the following:

1. Endorsement and use of the DRS Mediation Program.

2. Premium credits and/or full or partial payment of mediation costs for insured's who adopt and use DRS mediation.

Your company's endorsement will give the DRS additional credibility among brokers and their clients and customers which, in turn will encourage greater use of the program. Greater use of the program should result in lower costs for the insurance company.

We would be happy to meet with you or other representatives from the Name of Company to discuss the DRS Mediation program and the actions proposed in this letter.

I look forward to receiving your response.

Sincerely yours,

cc: State Association Executive Officer

Appendix I. List of Mediation/Arbitration Providers

LIST OF MEDIATION/ARBITRATION PROVIDERS

(No endorsement by the NATIONAL ASSOCIATION OF REALTORS® of any particular company is intended or implied.)

U.S. Arbitration 525 Westland Building 100 South King St. Seattle, WA 98104 206-467-0794 Loc: 30 Offices in U.S.	Resolve 1250 24th St. N.W., Suite 500 Washington, D.C. 20037 202-778-9634
Endispute 1820 Jefferson Place, N.W. Washington, D.C. 20036 800-448-1660 Loc: MA, NY, CA, IL, D.C.	American Arbitration Association 140 W. 51st Street New York, NY 10020-1203 212-484-4000 Loc: 35 Regional Offices
The Mediation Alternative 23 Empire Drive St. Paul, MN 55103 612-228-3526	The Private Adjudication Center Duke University School of Law 3024 Pickett Road Durham, NC 27705 919-493-7770
American Intermediation Servcie 1 Montgomery	Neighborhood Justice of Chicago 4040 N. Lincoln Avenue

West Tower, Suite 2100 San Francisco, CA 94104 415-788-6253 Loc: IL, NY, CT, LA, CA	Chicago, IL 60618 312-342-3290
Center fo Dispute Settlement 1666 Connecticut Avenue, N.W. Suite 501 Washington, D.C. 20009 202-265-9572	The American Mediation Association 1901-17 West Bay Drive Suite 191 Largo, FL 34640 813-797-7000
Judicate 1979 Marcus Ave., Suite E125 Lake Success, NY 11042 800-473-8853 Loc: PA, CA, NY	Judical Arbitration & Mediation Services, Inc. 500 N. State College Boulevard, Suite 600 Orange, CA 92668 714-939-1300 Loc: TX, NY, GA, West Coast
National Academy of Conciliators 1111 W. Mockingbird Lane, Suite 300 Dallas, TX 75247 214-638-5633	National Institute for Dispute Resolution 1901 L St. NW, Suite 600 Washington, D.C. 20036 202-466-4764
Council of Better Business Bureaus, Inc. 4200 Wilson Blvd., Suite 800 Arlington, VA 22203 800-537-4600 Loc: 170 offices in U.S.	

Appendix J. Tips for Negotiating a DRS Service Agreement/Contract

TIPS FOR NEGOTIATING A DRS SERVICE AGREEMENT/CONTRACT

Before negotiations are initiated, the association should confirm that the mediation provider meets the requirements of the program and has the capability and resources to accommodate the geographical and administrative needs of program.

The DRS service agreement (or contract) should specify:

- Parties to the agreement (association and mediation provider).

- Duration of contract (effective dates).

- Services which provider will perform, e.g., administrative, promotion, training, pre-conference and post-conference activities, etc.

- Services which provider will not perform.

- Any fees, other than mediation fees that will be paid by the parties, that the association agrees to pay to the provider for services performed; payment terms.

- All terms and conditions of the relationship including those recommended by NAR.

NAR recommends that the following conditions be included in the association's Exclusive DRS Service Agreement:

1. Provider must agree to abide by and follow the DRS Rules and Procedures and use the DRS Forms.

2. Provider must agree to defend, indemnify, save and hold the Association of REALTORS harmless against claims brought by third parties relating to the provider's handling of the mediation conference pursuant to the Agreement.

3. Provider must agree to a fee schedule for the duration of the Agreement.

4. The mediation provider must agree that DRS fees agreed to with the association are equal to or less than fees the provider may set in connection with other similar programs.

5. Provider must agree not to use the name or logo of the Association of REALTORS® without prior written consent from the association and must further agree not to use the name or logo of the NATIONAL ASSOCIATION OF REALTORS® without prior written consent from NAR.

6. Neither the Association of REALTORS® nor NAR shall be responsible for payment of mediation fees to the provider in the event of default by any party.

7. Provider must agree to waive the Terms of Agreement, without penalty to the association, if an individual who is a party to the real estate transaction has agreed to mediate under the DRS Rules and Procedures but objects to mediation by the provider on the grounds of economic or other bias.

Note: The association should consult legal counsel before executing any agreement or contract and may wish to have counsel negotiate the terms and conditions of the agreement with the mediation providers.

Appendix K. Request for Mediator Proposals

REQUEST FOR MEDIATOR PROPOSALS

The Association of REALTORS® is seeking proposals from qualified mediators for implementation of the NATIONAL ASSOCIATION OF REALTORS® Dispute Resolution System. Attached to this request are components of the system that should be reviewed and understood by prospective mediators prior to submitting a proposal.

Each proposal shall include:

1. Confirmation of the provider's interest in the DRS program.

2. Confirmation of the provider's ability to serve the Association's jurisdiction which includes:

3. The provider's fee schedule and any terms or conditions that apply to fees, e.g. payment terms, time periods during which fees will be in effect, fee increases and related notices, etc.

4. Confirmation of the provider's willingness and ability to perform prescribed DRS activities and services, e.g. preconference and post conference activities, filing the NAR evaluation form, etc.

5. Education training, experience, references, and other qualifications that demonstrate the provider's ability to execute activities required under the DRS program and conduct successful mediation conferences.

6. Certification that the provider meets the NAR minimum qualifications (see attached).

7. Certification that the provider is a mediator as defined in (see attached). (If applicable, cite any state laws that define the qualifications required to be a mediator. Failure to make this a requirement can effect the confidentiality of the mediation process in some states.)

The Association of REALTORS® anticipates that the contract with the mediator or mediators selected will include conditions provided in "Tips For Negotiating An Exclusive DRS Service Agreement/Contract With A Mediation Provider" that is also attached.

Proposals must be submitted to:

(Name of Committee)
(_Association of REALTORS®)

(Address)
(City, State, ZIP)

on or before P.M. on , , , 2000
in order to be considered.

The Association reserves the right to reject any or all proposals.

Those submitting proposals will be notified of the Association's action regarding the selection of a mediator or mediators within thirty (30) days of any action taken by its Board of Directors.

Questions should be directed to:

(Name)
(Association of REALTORS®)
(Address)
(City, State, ZIP)
(Phone Number)

Attachments:

Mediation Summary of Components

Dispute Resolution Brochure

Mediation Clause to be inserted in agreement or attached as an addendum (specify)

Agreement to Mediate

Mediation Rules and Procedures

Request to Initiate Mediation - Transmittal Form

Seller-Buyer Guide for Initiating Mediation

NAR Minimum Qualifications for Mediators

Tips for Negotiating an Exclusive DRS Service Agreement/Contract With a Mediation Provider

Copy of Applicable State Laws Regarding Mediators, If Applicable.

Appendix L. Request for Insurance Form

REQUEST FOR INSURANCE FORM

TO: Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611

1. The Board of Directors of the Association of REALTORS® voted on , 19 to endorse and implement an arbitration program. The Arbitration Program is being developed in conjunction with the following arbitration company:

Name:
Address:

Phone:

2. The Association's Arbitration Rules and Procedures are attached and do conform to the state's arbitration laws. The Arbitration Program also follows the NATIONAL ASSOCIATION OF REALTORS® Mandatory Guidelines for Arbitration Programs.

3. Legal counsel is working in conjunction with the Association and arbitration company to ensure the legality of the program.

Counsel Name:
Address:

Phone:

Signature/Date

_____/_____
Association President

_____/_____
Association Executive Officer

_____/_____

Association Legal Counsel

Appendix M. Sample Association Arbitration Program

SAMPLE ASSOCIATION ARBITRATION PROGRAM

Contact Nan Roytberg, Legal Affairs, 312/329-8248 for a copy of this Appendix.

Appendix N. Seller-Buyer Guide for Initiating Mediation

SELLER-BUYER GUIDE FOR INITIATING MEDIATION

When a dispute arises. The decision to initiate mediation under DRS program Rules should be made only after all attempts to negotiate an acceptable solution have been exhausted.

Call your broker or salesperson. Your broker or salesperson can be instrumental in resolving conflicts and disputes. Talk with your broker or salesperson before you initiate mediation proceedings.

Consult your attorney. You should inform your attorney of your intent to initiate mediation under the DRS Rules. Your attorney will be able to provide you with advice and counsel -- and may be able to help you resolve the dispute without having to proceed to mediation.

To initiate mediation. When all attempts to negotiate a settlement have failed, you should proceed as follows:

A. If You and Other Parties Have Pre-committed To Mediation i.e., you have signed a sales contract or addendum to the contract that contains a mediation clause or you have signed the DRS Agreement to mediation or other written agreement:

1. Contact your broker or salesperson or the local Association of REALTORS® to request a Seller-Buyer Information Packet. The packet contains everything you will need to initiate mediation.

2. If the Association has an exclusive DRS Service Agreement with a mediation provider, the provider's name, address, telephone number and fee schedule appear on the Seller-Buyer Information Brochure. This is the mediation provider with whom you will be dealing.

3. If the Association has approved more than one mediation provider, the name, address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS®.

4. Complete and sign the Request to Initiate Mediation Transmittal Form. Mail the original form and required attachments to the mediation provider. A copy of the signed form and attachments should be

mailed to the Association at the address shown on the Seller-Buyer Information Brochure and another to your attorney.

When the mediation provider has received your request, the provider will contact all parties named and will schedule the mediation conference in accordance with DRS Rules and Procedures.

B. If You or Other Parties **Have Not** Pre-committed To Mediation i.e., you have not signed a sales contract or addendum to the sales contract that contains a mediation clause:

1. Contact your broker or salesperson or the local Association of REALTORS® to request a Seller-Buyer Information Packet. The packet contains everything you will need to initiate mediation.

2. If the Association has an exclusive DRS Service Agreement with a mediation provider, the provider's name, address, telephone number and fee schedule appear on the Seller-Buyer Information Brochure. This is the mediation provider with whom you will be dealing.

3. If the Association has approved more than one mediation provider, the name, address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS®.

4. Complete and sign both the Agreement to Mediate and the Request To Initiate Mediation Transmittal Form. Mail both forms and required attachments to the mediation provider with a cover letter requesting the mediator's help in obtaining the agreement of other parties to mediate the dispute rather than litigating or arbitrating the matter and requesting that the mediator initiate mediation under the DRS Rules and Procedures upon agreement of all parties to mediate the dispute. (The mediator may charge an additional fee for this service.) One copy of both signed forms and attachments should be mailed to the Association at the address shown on the Seller-Buyer Information Brochure and another to your attorney.

The mediation provider will proceed with your request.

(**Note:** Your broker or salesperson and attorney may be able to assist you in obtaining the agreement of other parties to mediate the dispute.)

Appendix O. Mediator Evaluation

MEDIATOR EVALUATION

Name:

Firm:

What is your primary occupation?
Real Estate Professional
Attorney
Retired Judge
Mediator
Other

Number of years experience as a mediator? yrs.
Number of disputes mediated?
Number of real estate disputes mediated.
Percentage of successful mediation conferences. %
Is addendum clause or other agreement to mediate sufficient to
bind parties to mediate disputes? Yes No
Are the Rules and Procedures adequate to ensure efficiency
and fairness? Yes No
Are the time frames reasonable? Yes No
If the answer to any of the three previous questions was "No," please elaborate.

Appendix P. Evaluation of Parties

EVALUATION OF PARTIES

Which of the Following Parties What Was Your Involvement?
Were Involved In This Dispute?

Buyer Buyer
Seller Seller
Listing Broker Listing Broker
Selling Broker Selling Broker
Builder/Contractor Builder/Contractor
Appraiser Appraiser
Other

Were you an Attorney representing an above party? Yes No
What party? ( ) Buyer ( ) Seller ( ) Listing Broker ( ) Selling Broker
Other
Yes No Don't Know

Was the dispute resolved through DRS?

Do you think the outcome was fair?

Do you think the process was fair?

Do you feel DRS is faster and more
efficient than litigation?

Were the costs of DRS reasonable?

Would you recommend the use of DRS
to others?

Would you generally recommend DRS over
litigation?

Do you feel the mediator acted in a fair and unbiased manner? Yes No

If no, please explain.

Do you feel the mediator was knowledgeable about real estate transactions? Yes No

If no, please explain.

What were the damages claimed? $

What was the percentage of difference between damages claimed and amount of settlement? %

Comments (attach a separate sheet, if necessary).

Name:

Address:

Phone:

Appendix Q. Designated REALTOR® Evaluation

Appendix R. Association Executive Officer Evaluation

ASSOCIATION EXECUTIVE OFFICER EVALUATION

Please complete the following survey when you receive feedback from members of your Association who have participated in DRS mediation.

Name:

Title:

Name of Association:

Yes No Don't Know

Did the parties think the outcome was fair?

Did the parties feel DRS was faster
and more efficient than litigation?

Did parties feel the fees/costs were
reasonable?

Would the parties generally recommend
a DRS program over litigation?

Did the sales contract contain
a DRS clause?

Did the parties feel the mediator
acted in a fair and unbiased manner?

Did the parties feel the mediator/arbitrator was
knowledgeable about real estate transactions?

Would you recommend the use of DRS to other
Associations of REALTORS®?

If no, please explain:

Additional Comments:

Appendix S. Responses to Frequently Asked Questions

RESPONSES TO FREQUENTLY ASKED QUESTIONS ABOUT MEDIATION

Q: What is mediation?

A: Mediation is a non-adversarial process that brings disputing parties together with a neutral, unbiased third party (mediator) who assists the parties in reaching a mutually agreeable settlement of the dispute. The mediator does not render decisions or impose sanctions. Settlement terms reached and agreed to by the parties during the mediation become binding when parties sign a written settlement agreement.

Q: How does mediation differ from arbitration?

A: An arbitrator has the authority to render a binding decision, similar to a judge in a court of law. The parties, therefore, forfeit their right to have their dispute tried in a court of law. Mediators, on the other hand, have no authority to render a decision but merely assist the parties to arrive at a mutually agreeable solution. If the parties fail to reach a settlement, they are free to pursue other forms of dispute resolution including arbitration and litigation. In successful mediations all parties have a part in working out the terms of the eventual settlement and must agree to the final outcome for it to be enforceable.

Q: When the DRS mediation clause is presented to a buyer or seller, isn't the real estate salesperson raising a "red flag" by bringing up the issue of a potential dispute at the outset of the transaction?

A: Not if the salesperson presents mediation in a positive, non-threatening way. The salesperson should point out that the mediation clause is similar to other clauses in the contract that are designed to protect interests of the parties. The mediation clause in no way suggests that a dispute will arise, any more than the option to have a home inspection means that there will be defects in the property. The mediation clause provides parties with an efficient, less expensive alternative to litigation in the event a dispute should arise. The salesperson should emphasize that mediation does not involve high risks. Parties are not bound to agreements reached in mediation unless they sign a written settlement agreement, and if a settlement isn't reached, parties are free to submit their dispute to arbitration or go to court. Salespeople should stress that mediation is successful 80%-90% of the time.

Q: If a party signs a contract or an addendum that contains a mediation clause, is the party required to mediate if a dispute arises?

A: Yes. The signed agreement to mediate is binding and parties must submit the dispute to mediation.

The agreement to mediate does not bind the parties to results that might be achieved during mediation, and parties retain the right to go to court in the event that mediation is unsuccessful. If a settlement is reached during mediation it becomes binding only when it is put into writing and signed by all the parties. Once the parties have signed a written settlement agreement, they are legally bound to abide by its terms and cannot subsequently litigate the dispute.

Q: Who are the mediators?

A: DRS mediators are trained professionals who have absolutely no personal interest in the outcome of the mediation. Under the NAR DRS program, Association's do not handle the mediations but refer the mediations to either one mediation provider or to a list of mediation providers who are acting in their own individual capacity.

Q: Do the parties involved in a dispute have the option of choosing the mediator who will mediate their dispute?

A: Yes, however, if the local association has entered into an exclusive DRS Service Agreement with a single mediation group, the parties mediating under the DRS Rules and Procedures must select a mediator affiliated with that group.

Q: What types of disputes can be mediated?

A: Almost any type of dispute between or among buyers, sellers, brokers and other parties to a real estate transaction can and should be mediated. These include: disputes over earnest money deposits, e.g., who gets the deposit if the sale falls through; cost of repairs to property when there is a question of possible negligence or failure to disclose a known defect, e.g., a defective roof or termite infestation; claims for damages when there is a charge of possible misrepresentation concerning the condition of the property, e.g., central air conditioning was never connected to the new addition on the house.

Q: Are there any types of disputes that can't be mediated under DRS?

A: Yes. Disputes that cannot or should not be mediated under the DRS Mediation Rules include: disputes that involve extremely complex legal issues or allegations of criminal misconduct, violations of a states real estate license laws, disputes and controversies including disputes between REALTORS® that are subject to arbitration or hearing before a Professional Standards panel, and disputes that are not directly connected to a real estate transaction.

Q: Who pays for the mediation?

A: Parties are free to negotiate their own arrangements. In most cases, parties split mediation fees equally.

Q: How much does mediation cost?

A: The cost of mediation varies depending on the size of the claim, the complexity of the issues, and the mediator. Fees are established by the mediator and can range anywhere from $50 to $1,500. It is important to note that because the fee is usually split among the parties, no party pays an excessive amount.

Q: How long does the whole process take?

A: Under the DRS Rules, the mediation conference must be held within 60 days from the date on which the mediator receives the "Request to Initiate Mediation Transmittal Form" from the party initiating mediation. Most mediation conferences, however, are scheduled and conducted within 30 days. The typical mediation conference lasts from between 1 to 4 hours, and a second conference is rarely needed.

Q: Can parties be represented by counsel?

A: Yes. DRS Rules and Procedures state that any party may be represented by counsel. If a dispute involves a small sum and does not raise complex issues, parties may choose not to be represented by counsel which means that a party does not have to pay the attorney to attend the mediation conference. The Rules also state that all parties must be notified, in advance of the mediation conference, of another party's intention to be represented by counsel.

Q: Can commission disputes between REALTORS® be mediated under DRS?

A: No. Disputes that are normally arbitrated under Article 14 of the REALTOR® Code of Ethics are specifically excluded from mediation under the DRS Rules.

Q: Why should the Association adopt DRS when we already offer mediation services through our Professional Standards Committee.

A: The DRS Mediation Program is not intended to replace or to be used in connection with arbitration or mediation activities conducted by an association's Professional Standards Committee. The program is designed to accommodate and provide for disputes that are not covered under Professional Standards Policies and Procedures.

Q: Can DRS be used to resolve disputes for commercial real estate transactions?

A: Yes. Provided all parties in the dispute agree to mediate the dispute under the DRS Rules and Procedures.

Copyright Considerations for MLS Photographs

There are a number of different ways in which photographs of properties arrive in a Multiple Listing Service ("MLS"). An employee of the MLS can take the photographs used in the MLS, or the MLS Participant (or one of their employees) may take the photographs and provide them to the MLS, or the MLS or a Participant may hire a photographer to take the photographs. The purpose of this article is to address the copyright issues raised by each of these different methods of submitting photographs to the MLS.

Under traditional copyright principles, the photographer owns the copyright for the picture taken by the photographer. Even if the photographer provides the negatives to a third party, there is no automatic authorization to make additional copies of the photograph unless the permission of the photographer has been obtained separately. This is also true with digital cameras, where a file is sent to the MLS. In each instance, it is necessary to evaluate who owns the copyright for the photograph and what is needed to allow the MLS to use that photograph without infringing the copyright owner's rights.

MLS-Provided Photographs

MLS Employee

The first method described above, when an employee of the MLS takes the photograph, is an application of the so-called "Work Made for Hire" principle. Because an employee of the MLS took the photograph in the normal course of their work, the photograph is treated as if the MLS was the photographer. Applying the traditional rule of copyright ownership for photographs, the conclusion is that the MLS is the owner of the copyright and controls the right to reproduce and distribute it. Also, as the owner of the copyright the MLS can use the photograph without violating anyone's copyright. Although ownership of the copyright would in theory allow the MLS to require members to obtain a license to use the same photograph in a comparative market analysis or advertising for the property, in practice, no MLS is known to actually attempt to impose such a requirement upon its members.

The other two possible source of photographs mentioned above, photographs taken by a MLS Participant or a third party photographer hired by a MLS Participant or the MLS, involve more issues and will be the focus of the rest of this article.

MLS-Hired Photographer

It is common for a MLS to contract with a photographer as an independent contractor to provide photographs for all of the properties in the MLS. This service may be provided as part of the fees paid to the MLS by the Participants. Because the photographer has taken the photographs and the

photographer is not an employee, it is presumed the photographer is the owner of the copyright. In this situation, the MLS must obtain as a part of their agreement with the photographer the right to reproduce the photographs. There are two ways in which this can be accomplished. The agreement with the photographer can either: (i) expressly license the Board and/or MLS to use the photographs in certain manners: for example, real estate advertising and MLS services; or (ii) it may transfer all of the rights to the photographs to the MLS. While it might appear obvious to obtain all rights at the outset, this sometimes can be more expensive than just obtaining the specific rights needed, and so cost will occasionally be a factor in how the MLS acts. The potential extra cost can be significantly reduced if the rights to use the photographs are negotiated at the same time the contract to hire the photographer is negotiated. If cost is not a factor or the cost can be eliminated through negotiations, the preferred resolution would be for the board/MLS to obtain all rights for the photographs.

Suggested language for obtaining a license would be something like the following:

In consideration of (Board's/MLS's) payment of (photographer's/artist's/ architect's) fee for creating, preparing and delivering the (photographs/drawings/ renderings) to (Board/MLS), (Photographer/Artist/Architect) grants to (Board/MLS) and its members a license to use the (photograph/drawing/ rendering) in (Board's/MLS's) compilations of properties (current and sold) and in real estate related advertising, business cards, brochures and other promotional materials, including the right to reproduce, create derivative works from, distribute, and publicly display the (photograph/drawing/rendering) in print, on the Internet and otherwise.

In selecting this option, it is important to give careful thought to all of the actual and potential uses of the photographs, so that the rights obtained at the outset are sufficient to cover all intended uses. It is usually not desirable to have to go back and negotiate to get additional rights after the fact.

A clause to accomplish the second option, transferring all rights to the Board, would be a little less complex because it would not have to specify how the photographs might be used. It could say:

Photographer agrees that the photographs shall be deemed to be "works made for hire" with the meaning of the United States Copyright Act and (Board/MLS) shall own all right, title and interest in the photographs, including copyrights, or to the extent the photographs are not deemed to be "works made for hire," Photographer hereby assigns all right, title and interest, including copyrights, in photographs to (Board/MLS), and agrees to execute any documents which (Board/MLS) may reasonably deem necessary to effect such assignment.

Note that the suggested language includes both a statement that the photograph is a work made for hire and also that the copyright is being assigned. This is a "belt and suspenders" approach to the issue and is used because there is always a potential issue of whether the photographs can be properly categorized as having been made for hire when dealing with an independent contractor. You should note that this provision must always be in writing, as an oral agreement will not be enforceable against the photographer.

Participant Provided Photographer

Another possibility is that the MLS allows its Participants to submit their own photographs of properties. Either all photographs are submitted in this way or some are submitted as a substitute for the MLS's photographer. The issue remains assuring that the MLS Participant has obtained the necessary reproduction rights for use by the MLS and all other authorized entities. If the Participant or an employee of the Participant has taken the photographs, the Participant will own the copyright to the photographs. All that will be required will be the Participant's representation as discussed below regarding the Participant's rights and authorizing the use of the photographs.

Third-Party Photographer

If a third party photographer is used, there are again two options-a license or an assignment of rights-for addressing this issue. The license would be very similar to the one described above. The Participants should be made aware of this issue so that they can properly address it in their agreements. Possible language for a licensing arrangement:

In consideration of (Customer's/Real Estate Professional's) payment of photographer's/artist's/architect's) fee for creating, preparing and delivering the (photographs/drawings/renderings) to (Customer/Real Estate Professional), (Photographer/Artist/Architect) grants to (Customer/Real Estate Professional) a license to use the (photograph/drawing/rendering) in (Board's/MLS's) compilations of properties (current and sold) and in real estate related advertising, business cards, brochures and other promotional materials, including the right to reproduce, create derivative works from, distribute, and publicly display the (photograph/drawing/rendering) in print, on the Internet and otherwise.

The MLS Participant should also be informed that it is possible to obtain all rights to the photographs. Some MLS Participants may feel this is more appropriate because they believe this, as opposed to a license, is what they have paid for from the photographer. Such a provision could be similar to the following and would have to be in writing as a part of the broker's agreement with the photographer:

Photographer hereby assigns all right, title and interest, including copyrights, in photographs to Customer, and agrees to execute any documents which Customer may reasonably deem necessary to effect such assignment.

The MLS will want to make its members aware of this issue and the steps and language Participants may use to avoid potential liability for themselves and the MLS. In situations where the MLS does receive photos from Participants for publication in the system, it is recommended that an additional provision be made a part of the MLS rules which would indicate that if the MLS Participant submits photographs to the MLS, then the MLS Participant is representing that the Participant has the right to authorize and is authorizing the MLS to publish the photograph anywhere the MLS data is intended to appear. A provision requiring the broker to indemnify the MLS in the event of any litigation relating to the reproduction of the photograph by the MLS or other authorized entities could also be made a part of this provision at the option of the MLS.