CALIFORNIA ASSOCIATION OF REALTORS®

Issues Briefing Paper

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September 7, 2011

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C.A.R. MLS/Computer and Business Technology Committee
Photo Regulation Revisited

This Issues Briefing Paper is for Study only and has not been approved by the MLS/Computer and Business Technology Committee, Executive Committee, or the Board of Directors.

INTRODUCTION:

This issues briefing paper addresses the taking and dissemination of photos by non-listing licensees and others after having been granted access to the listing by the listing broker.

BACKGROUND:

At the May 2011 CAR MLS Committee meeting, the Committee discussed the problem of unauthorized taking and online posting of photos/videos of properties by non-listing licensees or others after having been granted lockbox or other access to the listing. As was discussed, such actions raise privacy and safety concerns and exceed the scope of what is intended to be permissible by virtue of allowing lockbox or other access to the property. To address this situation, C.A.R. staff had introduced an initial rules proposal for the Committee to consider for regulating this activity as follows:

Proposal from the May 2011 Meeting:

> **9.10 Photographs or Images Upon Entry.** Upon entry of a listed property, any taking of photos, videos, films or other types of imaging of the property, including the posting, display or distribution of said images online, by text, email or otherwise, by Participants, Subscribers or anyone else requires the consent of the seller and listing broker. Unauthorized taking or use of such images by Participants or Subscribers is prohibited. [add item to citation list]

The Committee engaged in a lively discussion of photo-taking by non-listing licensees at the May 2011 meeting. Questions were raised about how and from whom consent to take photos could be provided and whether it was advisable for an MLS to be involved in party dynamics at that level. While the Committee wanted to prohibit egregious behavior of MLS participants and subscribers related to photos, there was also concern about not wanting the MLS to overly-burden agent practice and inadvertently create any new standard of care. Based on the comments and concerns expressed from the floor, the Committee seemed to prefer that the rule "focus on the use of the photo rather than the taking of it" and asked the MLS Committee Leadership to tinker with the proposed rule and bring it back for further consideration at the September 2011 MLS Committee meeting.

DISCUSSION:

In light of the direction provided from the Committee, the MLS Committee Leadership has taken a more limited approach by focusing on the most harmful part of the photo-taking problem – i.e. unauthorized posting of photos on the Internet rather than instituting a formal MLS consent system. As such, the MLS Committee Leadership recommends the revised proposal as follows:

New Recommended Proposal for the September 2011 Meeting:

> **9.10 Photographs or Images Upon Entry.** Upon entry of a listed property, any taking of photos, videos, films or other types of imaging of the property for the purpose of posting or displaying said images online requires the consent of the seller or listing broker. Unauthorized use of such images by Participants or Subscribers is prohibited. [add item to citation list at Tier 3]

Alternate Proposal for the September 2011 Meeting:

On the other hand, should the Committee favor a broader and heavier approach that puts a formalized MLS consent system in place, it may wish to consider a different proposal. An MLS in Northern California is considering the following draft:

> ***Photographs or Images upon Entry.*** *Upon entering a listed property, any taking of photos, videos, films or other types of imaging of the property, including the posting, display or distribution of said images online, by text, email or otherwise, by Participants, Subscribers or anyone else requires the consent of the seller and occupant. Cooperating brokers shall obtain such consent from the listing broker. Consent may be provided by use of the appropriate field of the MLS printout as follows:*
>
> *Interior Photo Instructions (Required, one only)*
>
> - *Any Allowed – Photos may be taken by anyone*
> - *Restricted – As needed for Appraisal or Inspection reports only*
> - *Restricted CLA – Call listing Agent*
> - *None Allowed – No Photos may be taken*
>
> *Participants or Subscribers allowing the unauthorized taking or use of such images by anyone is prohibited. [add item to citation list at Tier 3]*

PROPOSED INCLUSION WITHIN MODEL CITATION POLICY:

Should the Committee desire to adopt the proposed photo regulation rule, it should also decide at what level it should be disciplined in the Model Citation Policy: Tier One, Two or Three. Tier Three is recommended as that is where other offenses for unauthorized access and uses of data online are located.

For reference, relevant portions of the Model Citation Policy are set forth below:

> Tier One:
>
> First Violation: Warning Letter
> Second Violation: Attend Class in Lieu of Fine (if such class offered by AOR/MLS) or $____ [Note: Selection of a fine

amount ranging from $100 to $250 is recommended].
Third and Subsequent Violations: $___ [Note: Selection of a fine amount ranging from $300 to $1,000 is recommended].
…

Tier One Offenses are as follows:

1. Non-Completion of Required MLS Orientation Program Within Set Time Allowed [Rule 4.0 (Orientation)]
2. Failure of Participant or Subscriber to Notify the MLS of Termination, Transfer, or Addition of Any Clerical Users Affiliated with Participant or Subscriber [Rule 4.3 (Notice re Clerical Users)]
3. Failure of Participant to Notify the MLS of Termination, Transfer, or Addition of any Licensees Under Participant's License [Rule 4.4 (Notice re Licensees)]
4. Failure to Properly Designate/Correlate License Type [Rules 4.1.3, 4.2.3 (Redundant Participant/Subscriber Qualifications)]
5. Failure to Properly Specify Listing Type or Class [Rules 7.2-7.3 (Listing Type or Class)]
6. Failure to Update/Change Listing Information [Rule 7.8 (Change of Listing Information)]
7. Unauthorized Cancellation/Withdrawal of Listing [Rule 7.9 (Cancellation/Withdrawal of Listing Prior to Expiration)]
8. Failure to Provide Complete Listing Information [Rule 7.11 (Detail on Listings)]
9. Failure to Offer Unconditional Compensation [Rule 7.12 (Unilateral Contractual Offer)]
10. Failure to Comply with Auction Listing Requirements [Rule 7.24 (Auction Listings)]
11. Failure to Input Accurate Information [Rule 8.3 (Accuracy of Information; Responsibility for Accuracy)]
12. Failure to Timely Report Listing Status Changes and Sales [Rule 10.2 (Reporting of Sales)]
13. Failure to Timely Report Cancellation of Pending Sale [Rule 10.4 (Reporting Cancellation of Pending Sale)]
14. Wrongful Use of Photographs/Use of Photographs on a Listing Without Proper Authorization [Rule 11.5 (Photos)]
15. Misuse of Public Remarks; Failure to Limit Public Remarks to Marketing, Description and Condition of the Property [Rule 12.5 (Use and Misuse of Remarks)]
16. Unauthorized Use of Term "Sold" [Rule 12.7 ("Sold" Signs and Use of the Term "Sold")]
17. Unauthorized Advertisement of Listing of Another Broker [Rule 12.8 (Advertising of Listing Filed with the MLS)]
18. Unauthorized Use of Statistical Reports, Sold Data or Comparable Reports in Advertising [Rule 12.9 (Limitations on Use of Information in Advertising)]
19. Failure to Provide Adequate Informational Notice on Print or Non-Print Forms of Advertising or Other Forms of Public Representations [Rule 12.9 (MLS Information in Advertising)]

<u>Tier Two</u>:

First Violation: Warning Letter
Second Violation: $____ [Note: Selection of a fine amount ranging from $200 to $500 is recommended].
Third and Subsequent Violations: $___ [Note: Selection of a fine amount ranging from $500 to $2,000 is recommended].
…

Tier Two Offenses are as follows:

1. Failure to Comply with "Certification of Nonuse" (back fees owing under Certification to be cumulatively added to citation amount) [Rule 5.1.6 (Certification of Nonuse)]
2. Failure to Input a Required Listing [Rule 7.5 (Mandatory Submission)]
3. Failure to Provide Signed Seller Exemption [Rule 7.6 (Exempted Listings)]
4. Entry of a Listing as New after Withdrawn without a New or Amended Listing Contract [Rule 7.8 (Change of Listing Information)]
5. Failure to Disclose Interest by a Broker Participant or R.E. Subscriber in the Subject Listing [Rule 7.17 (Broker/Agent as Principal)]
6. Failure to Remove Expired Listing; Failure to Obtain Seller's Written Authorization before Extension/Renewal [Rule 7.19 (Expiration, Extension and Renewal of Listings)]
7. Failure to Disclose Dual Variable Commission [Rule 7.22 (Dual /Variable Rate Commissions)]
8. Prohibited Co-Listing [Rule 7.25 (Co-Listing)]
9. Violation of DOM/CDOM Calculation [Rule 7.26 (Days on Market/Cumulative Days on Market Calculation)]
10. Failure to Provide Appropriate Written Documentation of Listing [Rule 8.2 (Written Documentation)]
11. Failure to Correct Incomplete or Inaccurate Information after MLS Notification [Rule 8.3 (Accuracy & Correction)]
12. False Representations; Failure to Abide by True Picture Standard of Conduct [Rule 12.10 (False or Misleading Advertising and Representations)]

13. Violation of Competency Standard [Rule 12.21 (Participant and Subscriber Standards of Conduct)]
14. Failure to Timely Remove Lockbox after COE or Expiration/Cancellation of Listing [Rule 13.12 (Lockbox Removal)]

Tier Three:

First Violation: Warning Letter
Second Violation: $____ [Note: Selection of a fine amount ranging from $500 to $1,000 is recommended].
Third and Subsequent Violations: $___ [Note: Selection of a fine amount ranging from $1,000 to $5,000 is recommended].
…

Tier Three Offenses are as follows:

1. Failure to obtain sellers authority to list in MLS [Rule 8.1 (Listing Agreement and Seller's Permission)]
2. Failure to be Present when Providing Access to a Listed Property to Buyers and Potential Buyers [Rule 9.9 (Presence of Participant or Subscriber)]
3. Failure to timely notify of DRE or OREA adverse action [Rule 12.1 (Notification of California Department of Real Estate (DRE) or California Office of Real Estate Appraisers (OREA) Action)]
4. Unauthorized Use of MLS Information [Rule 12.11 (Use of MLS Information)]
5. Unauthorized Sharing of MLS Information and Pass Codes; Use of MLS by Unauthorized Party [Rule 12.12 (Confidentiality of MLS Information)]
6. Unauthorized Clerical User Access and Use of MLS Information [Rules 12.12.1, 12.14.1 (Clerical Users)]
7. Misuse of Reproduction of MLS Information [Rule 12.15 (Reproduction)]
8. Sharing the MLS compilation or portion thereof with any third party vendor not authorized by the MLS [Rules 12.11 (Use of MLS Information), 12.12 (Confidentiality of MLS Information) and 12.15 (Reproduction)]
9. Unauthorized Reproduction of Confidential Fields and Information [Rule 12.15.2 (Confidential Fields)]
10. Unauthorized Compilation Downloading or Transmission of Data; Failure to Restrict Access to Authorized Party [Rule 12.15.4 (Downloading onto Computers)]
11. Misuse of MLS Data on Public Website; Violation of IDX Rules [Rule 12.16 (IDX)]
12. Misuse of MLS Data on Public Website; Violation of VOW Rules [Rule 12.19 (VOW)]
13. Unauthorized Sharing of Lockbox Key [Rule 13.2 (Key Use and Service)]
14. Failure to Account for Lockbox Key [Rule 13.4 (Accountability)]
15. Failure to Obtain Seller's Permission to Place a Lockbox [Rule 13.6 (Written Authority)]
16. Unauthorized Entrance into a Listed Property; Failure to Follow Showing Instructions [Rule 13.7 (Listing Broker's Permission)]
17. Failure to Report Lost or Stolen Lockbox Keys [Rule 13.8 (Unaccountable Keys)]
18. Wrongful Use or Removal of Lockbox Contents [Rule 13.2.1 (Use of Lockbox Contents)]

PROPOSED MOTION:

That, upon final approval by NAR, the C.A.R. Model MLS Rules be revised to adopt the photo regulation rule recommended by MLS Committee Leadership with inclusion within Tier 3 of the Model Citation Policy.

OR

That, upon final approval by NAR, the C.A.R. Model MLS rules be revised to adopt alternate photo regulation Rule with inclusion within Tier 3 of the Model Citation Policy.