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**NAR's VOW Policy**  
**by Saul Klein, *Internet Crusade***

It seems the U.S. Department of Justice (DOJ) has found at least two aspects of the proposed (yes proposed, not implemented) National Association of REALTORS® (NAR) VOW Policy objectionable and DOJ has gone so far as to threaten legal action. DOJ has also recently voiced objections involving the states of Texas, Oklahoma and Kentucky.

Is this a DOJ conspiracy against the real estate industry or just poorly informed government employees with nothing better to do...or both?

The current proposed (and well thought out) NAR VOW Policy has been under review by DOJ for the past 18 months and DOJ has found the following objectionable:

1. Selective Opt out provision (there are 2 types of Opt Out provisions in the NAR proposal, Blanket and Selective Opt Out)
2. Restrictions or limitations on use of VOWs to generate referral business by companies not involved in the actual listing and selling of real estate.

Public display of other broker's listings via the Internet has created the potential for major change in the real estate industry and that is exactly why we must move forward with our eyes open, going back to the basics and understanding the fundamentals before we move forward. It is time to re-evaluate where we have been and then where we want to proceed...or someone else will do it for us.

Let's start by looking prior to the days of the Web (the graphical part of the Internet), which has been around since 1992 or so, popularized by the development and then commercialization of "browsers" (The Internet has been around in some form since 1969).

Things were pretty simple in pre 1992 real estate. The two major ways to make money in real estate sales were listing and selling.

If I took a listing, I could use that listing to help me generate both buyers and more listings. "For Sale" signs and "just listed" mailings increased my "presence" and the chance that other home owners would recognize me as a real estate sales leader in the neighborhood (and that would, hopefully, help me get more listings). There was a recognized promotional value in the listing. Other brokers were not allowed to put their "For Sale" signs on my listings...they were not entitled to the promotional value I gained when I got that owner to sign my Exclusive Authorization and Right to Sell (listing agreement). It cost money to generate listings and as the listing broker, I was entitled to the benefits of my (or my agents) listings.

Listings and their promotional value helped me find buyer leads for any listings I might have, and because I was a member of the MLS (which was once a unilateral offer of sub-agency, and since the late 1980s a "unilateral offer of compensation"), buyers for listings of other broker members of the MLS.

If I had a listing, I could advertise the listing (when and where I deemed appropriate) and when calls came in (leads) I could begin to work with the caller by inviting them into my office to meet and discuss the listing they called on or perhaps other properties in which they might have an interest. This might include other brokers' listings as well as my own. I had no obligation to give the name and phone number of the listing broker when I provided listing information to a prospective buyer who came into my office. When I took a prospective buyer out to look at property, I had no obligation to give the prospect the name or phone number of the listing broker. I simply "showed" the property and provided information, answered questions, etc. If the buyer said: "This is great, now please give me the name of the listing broker so I can have another broker write an offer," I was under no obligation to provide that information to the buyer.

Once again, and this is an important concept, the listing itself has a promotional value that we all recognized and of which, only the listing broker could take advantage. Listing brokers had no obligation to let competitors benefit from the promotional value of the listings they worked to obtain. Listings are the property of the broker. Licensees learn this fundamental concept in pre-license classes and the Internet and web do not, because of their existence, change this very foundational aspect of the real estate business, regardless of what supposed consumer advocates, technology pundits, or other special interest groups might tell us. As a matter of fact, advertising another broker's listing without the listing broker's permission was and still is a violation of law and/or regulations in most jurisdictions. Some now say that not to promote listings on as many web sites as possible could somehow be interpreted as a breach of fiduciary duty to the seller.

Prior to the Web, when you took a listing, did you advertise it in every newspaper, every magazine? If you did not advertise a listing in every known publication were you (and are you today) breaching your fiduciary duty to the seller? When a broker takes a listing, the seller usually agrees to allow the broker to determine the method and means of marketing. If a breach of fiduciary duty occurs, sellers have the right to sue. Not advertising everywhere has never been considered a breach of fiduciary duty. Brokers choose where and how to effectively market a listing. That is how the business works. Advertising a listing so 1,000,000 people in India see it does not mean that the seller will receive more for the property because more people saw the property offered for sale. This argument does not work. How many properties, in a hot market, have sold before the listing gets into the MLS or is advertised in the local newspaper? If you take a listing today, and price the property based on all available data...and as soon as the For Sale sign goes in the ground, you have 5 offers for full price or better...do you advise the seller to wait and not accept the offers because the ads have not hit the paper yet? Most brokers and licensees would not advise a seller to wait, but to act on the offers on the table.

Now roll forward to today:

Today, there are at least 3 identifiable ways to make money in real estate sales: listing, selling and lead generating and referring (assisted greatly today by the Internet and the promotional value of listings).

While referring existed prior to 1992, it was not a major part of most real estate businesses (except for maybe relocation, which was usually done within the confines of particular companies).

Listing information is content and it still has that promotional value. So who is entitled to the benefit of the promotional value created by listings? Many are saying all brokers (and even their agents, without their broker's permission) have the right to display on their Web site as information, all the MLS listings without obtaining permission of the listing broker.

While IDX requires permission of listing brokers, VOWs do not. This is a major distinction and critical to any discussion on VOWs. Should listing brokers have the right to "opt out" (either blanket opt out or selective opt out) and not permit their listings and the corresponding promotional value of their listings to flow to all their competitors. The Department of Justice is saying brokers should not have this right to control the benefits developed by their labor and capital...and this prohibition and business restraint will benefit the consumer. The Department of Justice does not "get it" and/or the DOJ has some other agenda (maybe DOJ is frustrated by actions in Texas, Oklahoma, and Kentucky). The new DOJ position makes no sense when carefully examined and yet the DOJ will intimidate and threaten legal action...anti trust legal action, which strikes fear into the hearts of REALTORS. It is nothing more than bullying, but is anyone willing to stand up to the biggest bully in the school yard? That is the current 64 Billion Dollar Question.

As stated, listings generate leads for the listing broker and the real estate business has always been about leads. What is one of the biggest time-consumers in a REALTOR'S day? Prospecting, and working on the development of leads...from cold calls to door hangers to direct mail, to signs on listings to classified ads, to open houses...all designed to make

the phone ring or get prospects to show up. The question now is who is entitled to the leads generated by listings?

What are you paying for your leads right now in your time and marketing...how can you generate leads from the Internet? What will you (do you) pay for leads, in time, effort and cash? Are you paying online referral companies such as Homegain, Housevalues, Lending Tree and others? If so, is what you are paying less or more than you are paying for "conventional" leads (when you consider all your marketing, advertising, referral fees, prospecting, cold calling, door knocking, etc)? It is your job to find out what is right for you and how you fit into a changing real estate industry. Referral models are proving to be a third major area of revenue in the real estate sales business. Listings, Sales, Referrals. How do many of these third party referral companies acquire the leads? Using listing data as content on their Web sites? Is this inherently good or bad for the industry?

The government is now trying to push the peanut down a particular road, for a yet to be determined reason, cloaked in the veil of "consumer protection," tampering with the engine that has helped create such a good economy. The brightest spot in the economy for a number of years now has been real estate. Why the government hostility? Is anyone willing to stand up to the bully? It is time to study the issues and "Take Back Your Future."

As someone who has observed closely the evolution of listings and consumers on the Internet since 1993, from the inside and the outside (I was instrumental, as an evangelist and then as part of a sales force of four (Carl DeMusz, Roy Rainey, Derry Davison, and myself) in first bringing those listings to the Internet). I want to stress that VOWs are an important piece of a much bigger puzzle...who will put the puzzle together first is the question we are all looking to answer.

It makes no sense to compel brokers to share listing data if it would be detrimental to their survival as a business. If they want to, that is fine, but to force it by government mandate or threat is wrong.

Knowledge is Power, and knowledge is a differentiator...in a business where success constantly requires differentiation.

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### **Questions and Answers**

Q: Why should brokers be allowed to selectively opt out of participation for VOWs?

A: IDX allows brokers to opt out, VOW does not if DOJ has their way.

IDX allows for limited data fields, VOW feeds must allow all the MLS data and not selected fields, or at least more fields, if DOJ has their way.

So if you opt out of IDX and I can't put your listings on my site, you can still create a VOW and put all the listings (including mine) on your site. Your site has all the listings. I can't afford a VOW so my IDX site has only some of the listings because you opted out of IDX. Your site has more content than mine. I am at a competitive disadvantage because you have my listings to display and I don't have yours to display. To level the playing field, I should have the right to opt out of VOW participation selectively, and participate in VOW with other brokers who share their listing data.

What if a particular broker has no ethics and misuses the data. You should have the right as a listing broker not to deal with that broker professionally. Should you not have the right to make that type of business determination?

Opting In or Out, blanket or selectively, has its place. If the reason a broker opts out is to force a competitor out of business, then DOJ should go after that broker, but to say all brokers will misuse an opt out when sellers and the government have recourse for misuse is inappropriate.

Q: If in the traditional world I can invite a consumer to my office to look at ALL the listings in the market area (via my access to the MLS) and not be

obliged to reveal the listing agent's name or contact information, for the purpose of representing them on the buy side of the transaction, why not on the Internet once I have established a 'relationship'? The point being, in my office I have the 'right' to provide ALL the local listings to them. The listing broker cannot opt-out to allow my particular company from having this right, if they have opted to post their listing on the MLS.

A: The Internet is NOT the conventional or traditional world. Your ability to benefit from the promotional value of my listing is limited in a traditional world. People must physically make it to your office and this really does limit your ability to use my listing data for marketing benefit. The Internet is a much different place than the traditional world and allows for leverage never contemplated when brokers, as competitors, agreed to cooperate and share listing inventory when MLSs were created. I should have the right to limit your ability to use my data and hard earned listings to your marketing advantage at my expense.

Simple answer...the Internet is not the traditional world. It is not the same. Anybody who thinks so doesn't understand the power of the Internet. It is a charade to hint otherwise.

Q: I would also question the statement, "As stated, listings generate leads for the listing broker." Do not all REALTORS have the right to generate leads from those listings once the listing is on the MLS and cooperation is now offered?

A: No, No, No. That makes no sense at all. You can show my listing to your client, but you cannot use it to generate leads, that was not and is not the reason I cooperate with you, my competitor. It never was the intention of MLS and never will be.

Q: Whereas I would agree with your sentiment that some have used the 'consumers' interest in this debate to bolster their argument, the consumer's thoughts, opinions and concerns on this issue should not be ignored. As an industry we would ignore their interests at our peril. In 2005, to argue that the Internet is still just an advertising medium as Blanche of Realty Times insists, is to totally misunderstand what the consumer thinks on that issue. We talk to 300-400 consumers a day on behalf of our REALTOR members and I can tell you that they think that the agent's Web site they are visiting should be doing exactly what a visit to their office would be able to do and more. It is why they are using the Internet. They do not want to go to the office. That was yesterday.

A: The consumer does not always get what the consumer wants, nor should they. I am a consumer of computers and I think IBM should give laptops to my staff for free. That is an obvious unrealistic "want" and easy to understand how IBM would be under no obligation to give me (the consumer) what I want. While it is a little more subtle in the areas we are discussing, it is still the case. The consumer does not always get what they want. Consumers want all brokers to provide full service including fiduciary responsibilities and not charge more than \$500 to list and sell a home. They can "want" all they want. If consumers want advanced technology available at Web sites, then let brokers offer it and they will prosper and those who do not offer it will perish...let the market take care of itself...but this strays from the listing question. If I take the listing, pay for pictures and virtual tours, advertise in newspapers, put up signs, etc...all on a contingency of payment (commission), I should have the right to decide if I want my competitors to use my "capital" to their advantage. If I want to fine, if I don't want to, that should be fine as well and if consumers don't like it, they can list somewhere else...it is a free country...or at least it should be.

Q: In an MLS, are we not cooperating to bring buyers to the seller? You have the listing and I have my source of clients. I will show them what listings I want to, and if you and I have been cooperating with each other and you are offering a reasonable split on the transaction, I will bring the buyer and my work will be equal to your work by potentially attracting the buyer. You win and I win - real cooperation.

A: No, I am going to work to sell the listing myself, or have an agent from my office or branch office sell it. You are an agent of "last resort." I

have selling clients as well...and I want more selling clients and my listings allow me to attract selling clients. I am in the "selling client" business as well as the listing business. Also, everyone knows I work much harder than you so I will end up doing a lot of your work. Cooperation does not mean compensation - we need to make sure we are clear about that. As a member of the MLS, I agree to making you an offer of compensation.

Q: You and I have often had a coffee together and visited each other's open house walk-throughs and my understanding was that you wanted me to bring my buyers to the table. Why do you now want to make it so difficult for me to do that? If what you are saying is that you are only doing all of this so that you can have me do all the work with the buyer, but in the end they ditch me and call you, well, I don't know if I find that very cooperative?

A: Don't mistake my good nature for charity. This is a fiercely competitive business. I can be competitive and drink coffee at the same time. Also don't mistake cooperation with friendly. I can be cooperative in the transaction and not be friendly.

Q: If I take the listing, pay for pictures and virtual tours, advertise in newspapers, put up signs, etc...all on a contingency of payment (commission), should I have the right to decide if I want my competitors to use my capital to their advantage?

A: Yes you should.

#### **Final note**

Real estate compensation is "contingency based." Brokers and Agents "work for free" most of the time.

Brokers only get paid if the listing sells. If it does not sell, they have invested not only time but cash. When brokers list, they work on a contingency. Most other occupations that work on contingencies charge a lot more than 6%. Attorneys charge 30% to 50% when they work on a contingency fee arrangement.

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