NINE PILLARS OF THE CITADEL

DAVID BARRY

How Realtor association price fixing, tie-ins, punitive fee splits, and trademark fraud have cost realty agents and consumers billions of dollars per year and destroyed competition

How to restore competition, including a proposal for a national MLS

A report submitted to the
Federal Trade Commission/U.S. Department of Justice
Workshop on Competition Policy and the
Real Estate Industry

NOVEMBER 2005

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Summary

Realty agents sell six homes per year and work about five productive hours per week; their pay is over $50,000 per year – the lowest productivity of any job in America.

1.1 million real estate agents in America[1] average only six home sales per year.[2] Each works about forty hours per sale,[3] which amounts to 12% of the work year,[4] or five hours per week. Most of the balance of hours is devoted to getting new business.[5] Brokers receive a median $52,800 income yearly.[6]

The average couple selling the average home will need to work five weeks each – ten weeks total – to pay the commission of the agent who will work only one week on that transaction.[7]

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[1] Appendix, page 65, bottom of third column.

[2] The Statistical Abstract of the United States, published by the U.S. Census Department, states the number of homes sold and realty agents working each year. These figures are stated in the Appendix at page 4 for the years 1972 to present. Dividing number of homes sold by the number of agents gives the number of homes sold per agent.

[3] California Association of Realtors member survey, 2002. The reported figure is per "transaction," but since most transactions involve two sides, the correct figure for hours worked per transaction for all agents would be 40 hours.

[4] If a work year is 50 weeks (two weeks off for vacation), then 50 hours times 40 hours per week is 2,000 hours.

[5] U.S. Government Accountability Office, Report to the Committee on Financial Services, House of Representatives, *Real Estate Brokerage – Factors That May Affect Price Competition*, August 2005 (referenced as GAO report).

[6] 2004 NAR member survey. The median income of a salesperson was $37,600.

[7] The 2005 Statistical Abstract reports that the median family income in 1999 was $41,994. A two-member head of household would need to work a total of 4,000 hours to earn that sum, at $11 per hour. The commission a home sold currently is about 5.1%. GAO report, page 10. The median price on a home sold in 2003 was $170,000: 2005 Statistical Abstract, Table 937. Thus, the commission on the home would be $8,670, at 5.1%. At $11 per hour, it

The real estate brokerage profession should be ashamed of its dismal performance.

Two recent reports – one by the General Accountability Office and the other by AEI-Brookings – documented a lack of competition in the real estate brokerage market but identified no causes.[8] The FTC and Department of Justice held a workshop on the restraints in the brokerage market on Oct. 25, 2005; published reports of the workshop contained no causes for the lack of competition or solutions to stimulate competition.

In this report I describe how nine different violations of the law by the National Association of Realtors (NAR) and its affiliated Realtor associations have prevented competition and boosted consumers' prices. I offer solutions and projected benefits in the billions.

The direct victims of Realtor association abuses are realty agents who are members of Realtor associations. Because they are unorganized and Realtor associations have betrayed them, realty agents are unrepresented in protecting their rights. Most realty agents are eager to do an excellent job for their clients, but are restrained from doing so by NAR, which calls itself the world's largest trade association.

Chapter 1: NAR's non-solicitation rule is an agreement not to compete

Nearly every real estate agent in America has agreed not to compete with other realty agents, under NAR's so-called non-solicitation rule. A similar non-competition rule was declared illegal by the Supreme Court in the *Professional Engineers* case.[9]

Under NAR's rule, once a seller lists a home with a realty agent, other agents are prohibited from contacting the seller. NAR claims the rule's purpose is to prevent unscrupulous agents from persuading sellers to break their listing contracts, but state law already bars such conduct. The true purposes of the rule are twofold. First, the rule operates in the situation when the listing agent can't sell the home during the initial listing period. Under the non-solicitation rule, competing agents are prevented from contacting sellers during the listing and urging them to switch agents and list with them rather than re-listing with the first agent.

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would take 788 hours to pay the commission. At 40 hours per week, that's about 20 weeks, or ten weeks for a husband and wife.

[8] GAO report, and AEI-Bookings report, November 2005.

[9] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

Thus, the rule harms competition by protecting non-performing realty agents.

The second purpose of the non-solicitation rule is to bar realty agents from contacting the seller and offering to represent the seller *in his/her role as buyer*. Most sellers buy another property. There is a small and growing group of buyer specialists who offer many advantages to buyers over their listing agents. Thus, this aspect of the non-solicitation rule affects nearly every transaction.

Chapter 2: MLS use is tied to purchase of Realtor association memberships

One of the greatest sources of NAR's power is the tie-in between multiple listing services and Realtor association membership. In 84% of the country, realty agents cannot participate in the local multiple listing service (MLS) unless they purchase a Realtor membership.[10] Several courts have declared MLS tie-ins illegal. In most cases, Realtor associations have evaded the court rulings. Realty agents need MLSs. In the jurisdictions where we've litigated the issue, the Realtor associations we sued couldn't name a single realty agent who did business without the MLS. Thus, NAR became the world's largest trade association not by selling a better product but by forcing real estate agents and appraisers to purchase memberships in Realtor associations against their will.

Chapter 3: NAR's 97% of the membership market, member diversion

There are about one dozen regional and national trade associations that compete with NAR: nine associations of realty agents and three of appraisers. NAR has 97% of the memberships for realty agents and 62% of the memberships for appraisers.

Realty agents and appraisers both use the MLS, and therefore both are forced to purchase Realtor association memberships in 84% of the United States. Thirty percent of realty agents and appraisers don't buy Realtor association memberships when they aren't forced. In this chapter we observe that in four of the five trade associations studied, membership sales rates are statistically higher in open MLS regions than closed MLS regions.

Thus, the transition between closed and open MLS regions shows that Realtor association memberships fall and memberships in other associations rise. Thus, NAR is able to steal members from other trade associations through the MLS tie-in.

The loss in memberships of other trade associations goes beyond money. One of the functions of a trade association is to pre-

[10] Page 25.

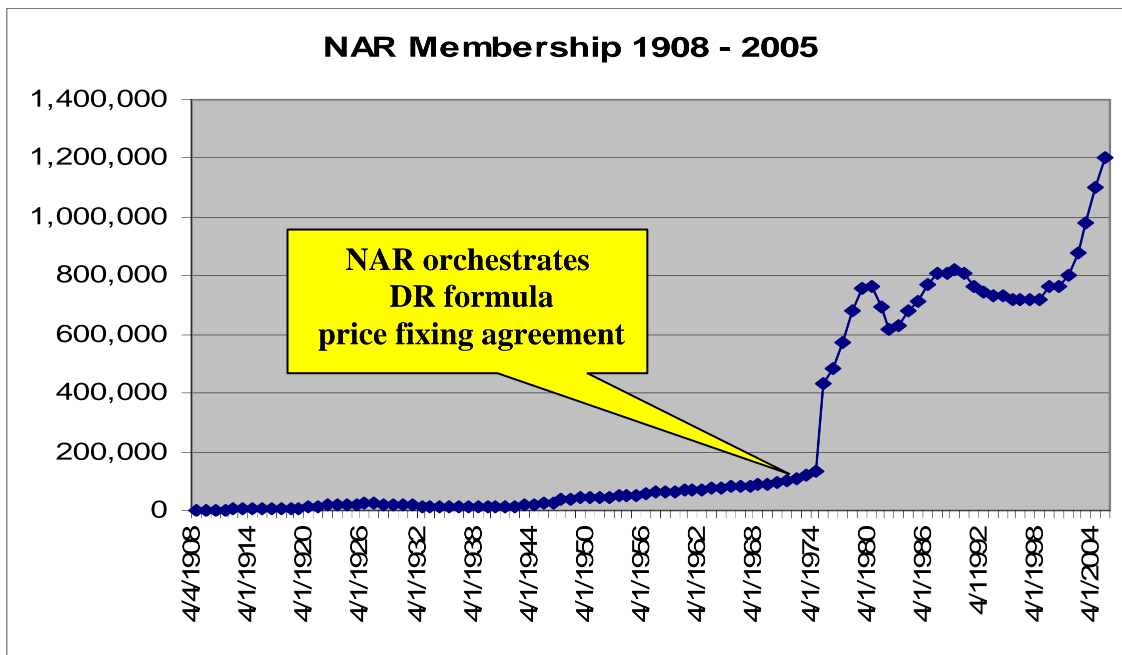
sent the unique point of view of its members. The trade associations whose members are spirited away present different points of view. All of them are potential alternatives to the NAR-dominated industry we now see.

Chapter 4: NAR's 1972 price fixing agreement is still active

I accuse NAR of the crime of price fixing and urge public prosecutors to commence criminal proceedings against NAR and its affiliated Realtor associations.

On Nov. 15, 1972, NAR orchestrated a price fixing conspiracy between all Realtor associations at its national convention in Honolulu. This price fixing agreement – still active – is engraved into the bylaws of all 1,453 Realtor associations. The agreement, called the DR formula works as follows: a broker decides to join the local Realtors association. She will be told that dues are $427 a year for each agent, and she'll be called the Designated Realtor (the DR). Under the DR formula, she will be billed for all agents in her office. If there are ten including her, she'll be billed $4,270 – ten times the amount for a single agent. If she protests that *only she* wants to join the Realtors association, they will tell her, sorry, but that's the DR formula – that Designated Realtors are charged for every agent in the office. Brokers always pass on Realtor association dues to their agents.

Before the DR price fix, NAR sold memberships to 31% of real estate agents; within a single year it shot to 95%. I accuse NAR of the crime of price fixing and urge public prosecutors to commence criminal proceedings against NAR and its affiliated Realtor associations.



Chapter 5: NAR obtained its "realtor" trademark through fraud

NAR obtained its "realtor" trademark through fraud on the U.S. Patent and Trademark Office. In 1908 C.N. Chadbourn coined the word realtor and urged the National Association of Real Estate Boards (NAREB, NAR's original name) to use the word to refer to its members. Three years later, in 1914, Sinclair Lewis, America's first novelist to win a Nobel Prize, wrote *Babbitt*, about a fictional realty agent who coined the word realtor and urged that it be used to refer to realty agents. After the runaway success of *Babbitt*, the word realtor began popping up in books, newspapers, and general usage. After two decades of public use, in 1947 NAR applied to the Patent and Trademark Office for a trademark on realtor, fraudulently claiming it had the exclusive right to use the word. No one stepped forward to dispute NAR's claim. A trademark obtained by fraud is subject to cancellation. Additionally, the trademark law forbids anyone owning a generic word as a trademark, because of the unfair advantage it gives them against others selling the same product or service. Ninety percent of the public perceives realtor as generic.

Chapter 6: Half a century of antitrust violations have destroyed competition

Starting at least as early as 1944, Realtor associations fixed commission rates. In 1950, when the U.S. Supreme Court declared commission fixing a Sherman Act violation, Realtor associations continued fixing commission rates for another twenty-eight years. Only when the Department of Justice began a string of civil and criminal cases in the 1970's did the Realtor associations disavow commission fixing.

Just as commission price fixing was winding down, two new price fixing methods sprang up: the DR formula (commenced by NAR on Nov. 15, 1972), and punitive fee splits (commenced by NAR on Nov. 10, 1974). Punitive fee splits were declared to be price fixing violations in two published cases. The DR formula was held to be a potential price fixing violation in one unpublished decision.

Realtor associations use two types of tying. The MLS tie-in has been held to be illegal several times. The second type of tie-in, involving the forced sale of memberships in the state and national associations when only the local is wanted, is also a tying violation, but not yet challenged. It should be.

In the early days realty agents wanting MLS simply joined Realtor associations. To keep out competitors, Realtor associations

imposed membership restrictions such as two-year waiting periods, requirements that prospective members have a favorable reputation in the community (keeping out newcomers), and full-time offices open in a town in the community (keeping out brokers seeking to gradually expand from elsewhere). These restrictions were banned by court decisions and disappeared by the end of the 1970's.

It's an automatic violation of the antitrust laws for competitors to divide up territories. NAR has divided up the United States into exclusive territories for Realtor associations. It also maintains control of the names they use. These restrictions act to prevent Realtor associations from competing with one another by offering superior services or lower prices. Realtor associations are competitors, but NAR keeps them from competing through these practices.

Six of these nine violations continue today. The current violations and the legacy of past violations have destroyed the ability of realty agents to fully compete.

Chapter 7: Conclusions and recommendations

Consumers and real estate agents and appraisers deserve a neutral market to transaction real estate business. I call on public prosecutors to end these violations through litigation. I also call on Congress to enact a Real Estate Brokerage Reform Act to create a national MLS and end the abuses described in this report.

My calculations show that when these violations have ended, and real estate is sold in a neutral, fair marketplace – an open MLS – that commissions would be cut in half and the average realty agent's income would rise by 30%. That rise in efficiency would result in 83% fewer agents.

1. NAR's non-solicitation rule is a non-competition rule

In this chapter I describe NAR's non-solicitation rule, which bars NAR members from contacting buyers or sellers who have a relationship with another NAR member. I show this rule is an antitrust violation because it amounts to an agreement between competitors not to compete, and tends to raise commission rates.

Not competing is ok; agreeing not to compete is not

If a business owner wants to go golfing instead of making sales calls, no one is going to stop her. There is nothing illegal about deciding not to work as hard as other business owners. But there's a likely antitrust violation when several business owners decide they're not going to compete with one another. For example, the Federal Trade Commission declared it illegal for competing auto dealers in Detroit to agree to close on Saturdays, since showroom hours were a form of output and an area in which they competed.[11] A court entered an injunction against competing cemeteries in Tennessee after they agreed not to hold burials on Sunday.[12] The Supreme Court declared that a group of dentists in Indiana had illegally restricted competition by agreeing not to furnish x-rays to insurance companies for the purpose of verifying coverage of procedures.[13]

When groups of competitors agree to limit competition, they almost always wrap their agreements with high-sounding justifications. The National Society of Professional Engineers once had

[11] *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 469 (6th Cir. 1992).

[12] *Tennessee ex rel. Leech v. Highland Memorial Cemetery, Inc.*, 489 F. Supp. 65 (E.D. Tenn. 1980).

[13] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

an ethics rule prohibiting members from negotiating fees with clients before being selected for a project. The Justice Department sued the Society, asserting the rule violated the Sherman Act. The Engineers argued the rule was proper since competitive bidding would lead to sloppy engineering and structural failures, threatening lives. In other words, if the rule disappeared, people would die. The Supreme Court declared the rule illegal under the Sherman Act, since it robbed customers of the benefits of competitive bids.[14] Significantly, the high court denied the Society a chance to put on evidence of the so-called dangers of competitive bidding, calling the Society's rule a "frontal assault" on the competitive policy of the Sherman Act.

NAR has a similar rule, which it calls the non-solicitation rule, part of its code of ethics. The rule forbids NAR members from communicating with sellers or buyers of other NAR members under certain circumstances. Penalties can range up to $5,000 and MLS suspension up to three years. Since MLS service is essential, a three-year suspension is effectively a death sentence for a business. The full text of the rule and the "standards of practice" interpreting the rule are found in the Appendix at pages 69-71, along with case 16-2 which applied the non-solicitation rule to a particular case.

As to *sellers*, NAR members are not allowed to communicate with sellers who have a current listing contract with another NAR member – unless the seller initiates it, or unless the communication is part of a mass mailing. What's mass? No one knows. More on that below.

NAR members *are* permitted to solicit sellers with current listing contracts with *non*-members of NAR. This aspect of the rule tends to prove that the purpose of the rule has nothing to do with the welfare of owners. Additionally, once a listing expires, the rule permits NAR members to solicit the seller, and many do, further indicating that privacy concerns do not motivate the rule.

Here's how the non-solicitation rule acts to keep realty agents from competing with each other:

Realty agents take "listings" for three or six months, with the typical duration depending on the community in question. If the listing is an exclusive right to sell listing and the property sells during the period, the seller owes the agent the commission. If the property does not sell during the listing period, the agent is unpaid for her work. There is no guarantee the owner will re-list with the agent if it does not sell during the listing period. If the owner decides not to renew the listing, the listing expires. That's when

[14] *National Association of Professional Engineers v. United States*, 435 U.S. 679 (1978).

many agents will pounce on the seller, because the non-solicitation rule permits it. Before the listing expires, the non-solicitation rule does not permit contact.

In depositions of MLS directors,[15] we heard consistently that agents in many offices send mailers to owners of expired listings. While direct mail is more common with newer agents who don't have an established base of business, many seasoned agents also use it, including many MLS directors. Once established, many agents send mailings to past clients and contacts in groups that vary from 200 to 2000, on a basis that varies from monthly to yearly. But new agents have no past real estate clients, and therefore target fsbos[16] and expired listings. Large offices are aggressive mailers, often subsidizing part of the mailing costs of its agents, and offering specialized staff to assist agents in their mailing programs.

The agents who target expired listings would *love* to send to expiring listings. Here's why: the owner of an expiring listing is undoubtedly disappointed the home did not sell. If they have any doubts about the talent of the existing agent in final weeks before the listing expires, an energetic pitch by a competing agent might be successful in getting the owner to switch to the second agent. As it stands now, the current agent is the only one allowed to meet with the owner to get the renewal listing. Thus, the first agent has a huge advantage in getting the renewal listing. And that's precisely why the non-solicitation rule is harmful to competition: it prevents all the other agents from competing as the listing comes back on the market for renewal.

The non-solicitation rule protects under-performing agents, but the Sherman Act, to put it bluntly, contemplates some roadkill on the turn-pike to Efficiencyville.

Because new agents are the most frequent to market to expired listings, the rule falls heavily on them. Courts have struck down restraints adversely affecting newcomers. In one case[17] a tobacco board of trade limited the auction time allotted to new tobacco warehouses. The court declared it an automatic violation based on market exclusion. The non-solicitation rule has a similar hindering effect.

The non-solicitation rule has more of an impact in the real estate market than the Engineers' rule in its market. While the *Professional Engineers'* non-bid rule prohibited *price* competition, NAR's

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[15] We are currently prosecuting three cases seeking make MLS services available to realty agents and appraisers without having to purchase Realtor association memberships. These cases are described in the Appendix at page 72.

[16] A person selling their own home – for sale by owner – is a fsbo, pronounced FIZZ-bo.

[17] *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 496 F.2d 284 (6th Cir. 1974).

non-solicitation rule prohibits both *price and non-price* competition. The non-solicitation rule is an absolute prohibition on competition between members during the time when sellers are most intently focused on deciding whether to re-list. The non-solicitation rule restrains trade even more seriously than the no-bid rule in *Professional Engineers*. While the Engineers' restraint affected only 21% of professional engineers,[18] the non-solicitation rule affects 100% of active residential agents in most regions.

The rule protects under-performing Realtors but the policy of the Sherman Act is to the contrary. The Ninth Circuit stated, "Inefficiency is precisely what the market aims to weed out. The Sherman Act, to put it bluntly, contemplates some roadkill on the turn-pike to Efficiencyville."[19] If the first agent does a poor job of marketing a property during the initial listing period, competing agents are barred from approaching the seller and offering better solutions.

The anti-competitive intent revealed in case 16-2

NAR publishes cases as teaching tools. One such case is 16-2, Appendix page 70, where the seller listed a property with a broker. After time passed and the property had not sold, a second broker approached the seller to see if he could get the re-listing if it did not sell during the remaining period of the first broker. The seller agreed. The second broker was prosecuted for violation of the non-solicitation rule. The owner testified at the hearing that he listed with the second broker because the first broker could not perform, and the second broker seemed better suited for the assignment. A violation, decided the hearing panel. The opinion stated:

"Broker 2's attitude of regarding the client's relationship with Broker 1 as a kind of misfortune, of presenting his own service as superior to Broker 1's, and of suggesting to the client that, having a better capacity to serve him, he could wait until Broker 1's listing had expired, was, the panel said, contrary to the respect for another Realtor's exclusive agency required by Article 16."

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[18] At that time there were 325,000 registered professional engineers in the United States, and the Society had 69,000 members throughout the United States and in some foreign countries. *Id.* at 681-82.

[19] *Freeman v. San Diego Assn. of Realtors*, 322 F.3d 1133, 1154 (9th Cir. 2003).

Haves versus have-nots

Many agents believe Realtor association restraints originate with large firms to gain an advantage over small firms. I've never agreed with that point of view because many MLS directors are small firm owners. Instead, I see the struggle as the haves versus the have-nots. As a rule, the haves are the agents with the most listings. The have-nots are the new and struggling agents who would like better tools to compete against entrenched players. Sending targeted letters to owners with a known need for listing services is an ideal answer.

Direct mail is big. In 2001 3,132 direct mail firms had a total payroll of $3 billion.[20] Instead of wasting most of an ad budget sending mail to everyone, targeted mail sends the pitch to only those with a known interest in the product.

Consider a direct mail strategy used in many states: jail mail. In this system direct mail firms collect the names and addresses of people arrested for crimes. Attorneys doing criminal defense work hire jail-mail firms to send the attorney's pitch to criminal defendants. One jail-mail firm explains, "CourtClerk.net obtains the names and addresses of individuals who are known to need legal assistance. Since these individuals are known to need legal assistance the return on marketing investment is much higher than traditional forms of advertising."[21]

Sending direct mail to owners with expiring listings would work the same as jail mail. The essential feature of direct mail is that it lowers the cost of marketing. The non-solicitation rule therefore denies to the have-nots an extremely effective marketing tool, essentially raising the marketing costs for the have-nots.

Defenses by the Realtor associations

Realtor associations defend the non-solicitation rule on several grounds. They claim the non-solicitation rule offers abundant opportunities for agents to get the listing. True, but the abundance occurs when the customer is not in the market. The owner's interest in a second listing obviously builds during the first listing, reaching a climax toward the end. The non-solicitation rule bars all contact during this critical period.

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[20] U.S. Census, http://www.census.gov/epcd/susb/2001/us/US54186.HTM

[21] http://www.courtclerk.net/start.aspx

They argue: Once the listing expires, all agents have a fair shot at the renewal listing. This is not a benefit, but merely the observation that the rule does not snuff out all competition.

They say the non-solicitation rule does not bar a general mailing to all homes in a neighborhood; that it only bars a *targeted* communication. Standard of Practice 16-2, final para, Appendix page 69. Three ripostes: (1) the general mailing "exception" requires a thousand letters[22] be sent when only one is desired, needlessly driving up costs; (2) if the competing agent sends the thousand letters and uses competitive language ("if your current agent can't get your home sold, call us for the renewal listing.") the competitor can still be prosecuted for sprinkling active listings into the thousand sent; (3) the "targeting" prohibition means the agent can't argue the shortcomings in the first agent's marketing efforts ("I drive by your home every day and noticed a few ways to improve your marketing efforts, if your home doesn't sell in the remaining 17 days of the listing….").

Realtor associations suggest the rule is necessary to prevent agents from inducing sellers to breach their listing contracts with the first agent. There is no evidence to support that supposition. This is not surprising because state law – Wisconsin, for instance – provides a remedy for such a tort.[23] Wisconsin grants agents their real estate licenses, recognizes their right to compete, and recognizes the public interest in competition. Yet NAR and all Realtor associations require agents to surrender their state-granted right to compete as a condition of gaining access to the MLS, and thereby extinguish Wisconsin's consumer protection interest in competition.

Realtor associations speculate that agents would not submit listings to the MLS without the non-solicitation rule but the testimony has been to the contrary. In all our depositions, not a single witness testified they would stop using the MLS if the non-solicitation rule disappeared or MLSs were open to any licensee regardless of Realtor membership.

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[22] Standard of Practice 16-2, final paragraph, contains no safe harbor explaining what "general mailing" efforts will avoid prosecution for violation of the non-solicitation rule. Since no minimum number of provided, my use of one thousand in this example is conjectural as to whether it would comply.

[23] *Landess v. Borden, Inc.,* 667 F.2d 628 (7th Cir. 1981) (holding that Wisconsin law recognizes the public interest in competition and provides remedies for *protectible* interests in contractual relations).

2. MLS Tie-Ins

Real estate agents and appraisers are required to buy Realtor memberships in order to gain access to the MLS in 84%[24] of the markets in the United States. About 30%[25] of those MLS buyers don't want to buy Realtor memberships; they only want to buy MLS services. As a result, over 250,000 realty agents and appraisers were forced to pay about half a billion dollars against their wills to Realtor memberships since 2000.[26]

In antitrust parlance, Realtor associations *tie* Realtor memberships to MLS usage. Under established law, tie-ins are automatically illegal whenever four conditions are met. This chapter demonstrates that all four conditions are present, making MLS tie-ins illegal throughout the nation.

Punch cards and the four required factors for tie-in violations

Tie-ins are everywhere and most are completely legal because at least one of the four required conditions was absent. As I'll show, the four conditions are common sense. First, a little vocabulary: The *tying* product is the one everyone wants. The *tied* product is the one they don't want, and the one they have to buy to get the one they really want.

An example of an illegal tie-in: In the 1930s people used computer punch cards to tabulate large numbers of census figures, insurance policies, state welfare data, etc. IBM had 81% of the tabulating machine market. IBM's policy was that it would not lease its tabulating machines to any customer who did not buy punch cards from IBM. The U.S. Justice Department sued IBM to end this tie-in. The U.S. Supreme Court declared the punch

[24] Give the citation to the Appendix for this calculation.

[25] Citation to page where we lay this out.

[26] See calculation in the Appendix, at table 1, page 73.

card tie-in was illegal, ending the practice.[27] Here are the four factors, all present in the IBM case:

1. The tie must be mandatory, and it must be between two different products. Tabulating machines are very different than punch cards, even though one is of no use without the other.

2. The seller of the tying product must have *market power*, a specialized antitrust phrase which means the seller has a large impact in the market and the basic ability to set its own prices. Firms generally need at least a 65% market share before they will be considered to have market power. When they have 90%, they definitely have market power. IBM had market power in the market for tabulating machines.

3. The seller of the tying product must get some economic benefit from sales of the tied product. Since IBM was the seller of both the tying and tied products, the condition was met.

4. The tie-in must produce some non-trivial impact on interstate commerce.[28]

First factor: separate products; frozen corn and left shoes

From consumer's point of view, a belt is a single product and its strap and buckle just components. The same is true for most of the things we buy: frozen corn at the store is a combination of the corn plus its plastic bag. A car has hundreds of components. Most of the time, we *want* the components brought together nicely in a single package, and we pay more for the package than the price of the components bought separately. It's a convenience to buy, say, a watch, rather than its components.

One of the striking things about illegal tie-ins is their *weirdness*: the seller is selling things together *that we don't want together*. Tabulating machine users didn't need economists to tell them IBM was ripping them off with the punch card tie-in because they could buy punch cards elsewhere for less, *and IBM was forcing them to buy products they didn't want to buy together*. The victims knew instinctively punch cards were separate from tabulating machines.

Are MLS services a separate product from Realtor memberships? If not, then tying Realtor memberships to the MLS isn't illegal.

Antitrust uses standard tests to tell whether two products are components of a single product, or separate products. Before listing them out, let's look a little closer at frozen corn at the market. *Why* do people intuitively think of a plastic bag holding frozen

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[27] *International Business Machines v. United States*, 298 U.S. 131 (1936).

[28] The courts don't give an exact cut-off for what is trivial, but generally $25,000 is sufficient. If only a trivial amount of interstate commerce is impacted, the Sherman Act does not apply. Many states have their own antitrust laws that would outlaw these same practices and do not require interstate commerce effects.

corn as a single product? *Why don't they feel ripped off when the market makes them buy the plastic bag, when all they wanted was a few handfuls of frozen corn?* Have you ever seen anyone at the checkout stand arguing they only wanted frozen corn, and didn't want to pay three cents for the plastic bag? Have *you* ever wanted the frozen corn without the bag? Have you ever wanted just the bag and no corn?

Would it seem odd if a store made you buy a lot of bread when you bought a toaster? Suppose, back in the days when cameras only used film, you had to buy five years of film when you bought the camera – would it seem weird? Do auto dealerships sell gas? Do gas stations sell cars?

Have you ever seen a shoe store sell left shoes separately from right shoes? They could if they wanted to, but why *don't* they? When asking whether anesthesia services are separate from hospital services, is it significant that no one buys anesthesia services without also buying hospital services?[29] Does it undercut your intuitive impression that people often buy hospital services without buying anesthesia services?

You get the idea. A few deductions:

First, whether products are separate has nothing to do with whether they are used together or even essential to each other. Cameras need film and vice versa, but they seem very separate. While *in theory* things could be sold separately seems much less important than *the fact* they never are: shoes sold in pairs.

Second, things feel like single products when we buy them in the same fixed ratio. When buying a belt, we buy a buckle and exactly one strap, never a buckle and zero straps or multiple straps. People buy one toaster but different amounts of bread and bagels and pop tarts, indicating toasters are separate from the things they toast.

In sum: Antitrust considers it significant when things are sold separately; when they are, it matters little that they *usually* are sold together. Antitrust cares little that two products are essential to each another. And it's significant when things are purchased in different ratios. Let's apply these tests to MLS and Realtor memberships.

First: Are MLS subscriptions and trade association memberships ever sold separately? We studied a dozen regional and national trade associations of residential realty agents and appraisers, shown in the following table.

[29] This was the essential observation in the Justice O'Connor concurring opinion in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 39 (1984).

Residential agent and appraiser trade associations		
Association	**Acronym**	**Focus**
Asian Real Estate Agent Association	AREAA	Asian agents
Chinese American Real Estate Professionals Association	CAREPA	Chinese agents
Chinese Real Estate Association of America	CREAA	Chinese agents
Colorado Association of Exclusive Buyer Agents	CAEBA	Col. buyer agents
Massachusetts Association of Buyer Agents	MABA	Mass. buyer agents
National Association of Exclusive Buyer Agents	NAEBA	Buyers agents
National Association of Hispanic Real Estate Professionals	NAHREP	Hispanic agents
National Association of Real Estate Brokers	NAREB	Minority agents
National Association of Realtors	NAR	Agents and appraisers
Appraisal Institute	AI	Appraisers
National Association of Independent Fee Appraisers	NAIFA	Appraisers
National Association of Real Estate Appraisers	NAREA	Appraisers

We found none of them sell MLS services. We found dozens of MLSs don't sell trade association services. MLS is sold separately from trade association memberships in most of Alaska, Massachusetts, California, and Washington.

Second: Do we see MLS always sold in a rigid one-to-one ratio? Or is there a variability of sales? A variability of use? Are they always sold together?

In every MLS-Realtor association tie-in we've studied, there are users who buy one product but not the other. And universally, MLS services are sold separately from Realtor memberships through separate billings (i.e., Realtor memberships are billed annually in November of December, while MLS services are billed quarterly).

The only case[30] to analyze the issue rejected the defense that MLS service and Realtor membership are components of a single product.

Second factor: market power: wide screen TVs, Hershey bars, sardines

You walk into a store to buy a wide screen TV and they say they'll sell you the TV only if you *also* buy a high-end refrigerator. You just want the TV. What do you do? Probably walk out the door and find a store selling TVs without tie-ins, of which there are plenty.

The first store tied TVs to refrigerators – we know this because of the preceding section (TVs sell without refrigerator tie-ins; people buy them in varying ratios). But the TV-refrigerator tie-in isn't illegal because the store *doesn't have market power*. It couldn't force you to buy the refrigerator because there are lots of electronics stores selling TVs.

But suppose TVs were invented yesterday and the inventor flooded the country with stores selling patented TVs tied to his

[30] *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).

brand of refrigerator. The difference in the two cases is how much of the market the seller controls. High market share creates *market power,* the ability to *force customers to buy what they don't want.* Viewed this way, it's immediately obvious the antitrust law of tying is really the law that *applies only to monopolists and near-monopolists.* There's nothing illegal about a monopolist gaining supremacy through skill, foresight, and industry. But once they've gained near-total control of a market, they have to play by different rules than the rest of us. One of the rules is that while it's ok for monopolists to profit richly in markets they won fair and square, it's not ok to use that monopoly power to leverage their way into different markets.

This is where Realtor associations consistently violate the law: they don't acknowledge they are monopolists in MLS markets. Our research shows MLS owners are monopolists everywhere they exist. The only non-monopoly situations occur in the zones between MLS centers, such as in Jefferson County Wisconsin, midway between the Milwaukee MLS and the Madison MLS.[31]

MLSs aren't just near-monopolists, *they are 100% monopolists.* The MLS system is so complete, so accurate, so fast, rich in detail, powerful, and cheap, it's blown away every other real estate information source. In the markets we've studied, the Realtor associations can't find a single active realty agent or appraiser who doesn't use the MLS.

In two of our cases the Realtor associations make half-hearted attempts to dispute the market power issue by claiming the true market is not MLS services (of which they admit they are monopolists), but the real estate information market, of which they are but a small part. This defense is legitimate in many cases. As before, antitrust uses standard tests to tell when markets are separate. A few examples intuitively refute the Realtor association defense that the MLS is in the same market as newspapers, internet listing sources like Yahoo, and government deed sites.

Are Hershey bars in the same market as Snickers? If United made all flights half-price, would you switch from your current airline? Do tins of sardines compete with Volkswagens? Rephrased: If Volkswagen lowered prices, would you buy fewer sardines?

The standard questions antitrust asks when determining whether two products are in the same market are: Does the industry perceive the two products as being part of the same market? How do the features of the two products compare? Are the production facilities for the products the same? The same raw materials? Are the customers of the products the same? Are the prices the same? Is there price sensitivity between the products? [32] Here

[31] The two MLSs listed homes in Jefferson County. The Madison MLS had 357 Jefferson County homes, and the Milwaukee MLS had 799 Jefferson County homes. Thus, Madison had 31% of the MLS market, and Milwaukee had 69%.

[32] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) gives the standard tests.

is how these standard tests play out with MLS and other information sources.

Market perceptions: buyers, sellers, realty agents and appraisers universally perceive the MLS as distinct from information sources. We've found no market yet where any realty agents or appraisers could survive without MLS. None use any combination of newspapers or online alternatives to avoid paying for MLS services. In every case, Realtor association executives testified their Realtor association wasn't in competition with local news papers or web sites.

Product features: the MLS does things that newspapers and web sites don't and can't: it has nearly 100% of resale homes on the market,[33] listings and information updates are mandatory, punishments apply when rules are broken, MLS has for more powerful search and filter tools than online newspaper listings, realtor.com or the public version of the MLS;[34] MLS has rich background information missing from other real estate information sources. Of very great importance, only the MLS has closed sale prices allowing realty agents and appraisers to compare subject properties with comparable ones that sold recently.

Production facilities and raw materials: Hershey bars are a little different than Snickers but they compete in the same market. One reason is it's easy for their candy factories to copy each other's features, such as by adding nuts to candy bars. The theory is that when competing products use essentially the same production facilities, if one product becomes very profitable, its competitor *can easily shift its factories to copy the popular features.* It was probably nothing for Hershey to add nuts, but it would be difficult for Volkswagen to shift over to fish production if sardines suddenly took off. MLS is produced by specialized firms like FNIS in Kansas City and Rapattoni in Los Angeles that don't produce daily newspapers of web portals like Yahoo. That is, the production facilities of MLS producers are nothing like the production facilities of newspapers, web portals (with all their news and entertainment writers and editors).

Customers: MLS is bought by real estate professionals. Newspapers and web portals are used by everyone.

Prices: The MLS costs about $35 per month to the user.[35] Public web sites are free to buyers and hundreds of dollars to ad-

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[33] The MLS tracked the fsbo site, fsboMadison.com, and noted it held approx. 12% - 15% of the number of listings in the MLS.

[34] Filtering is important. It does little good to have a site that flings back hundreds of listings making the user slog through them one by one, when a quality filter will let the user select factors to include and those to exclude. MLS software does an excellent job of filtering.

[35] The wholesale price by the vendors to the MLS is about $8 to $10 per user per month, depending on options.

vertisers. Products with prices this far apart are not considered competitors.[36]

Price sensitivity: Airlines illustrate price sensitivity: All it takes is a small difference in air fares to cause big shifts in traffic between carriers. The same is true for interest rates paid by banks. So, when price changes cause business to flow from one product to another, it's a sign the products compete. In our study, there was no price sensitivity between MLS services and any of the paid alternatives.

All these tests point to the MLS as a separate market from the other sources of real estate information. Therefore, the Realtor associations are monopolists in their MLS markets. But that still does not mean they have violated the law; two tests remain.

Third factor: benefit from the tie-in

The third tying requirement is that the tying seller obtains some economic benefit from sales of the tied product.[37] Since about 30% of MLS users do not buy Realtor memberships when not forced,[38] the tie-in benefits Realtor associations by gaining them members they would not otherwise have.[39]

Fourth factor: impact on interstate commerce

The fourth and final requirement for automatic tie-in violation is that the impact of the tie-in on interstate commerce be some-

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[36] *Avnet, Inc. v. Federal Trade Commission*, 511 F.2d 70, 77 (7th Cir. 1975) (prices of rebuilt used automotive electrical devices 25% to 50% below prices of new units indicated they were in separate markets).

[37] A tying seller who gets no economic benefit from sales of the tied product is not attempting to gain a share in a second market.

[38] The data is of two types: actual and survey. First, in Massachusetts, Alaska, and western Washington, where open MLSs operate, a non-join rate is computed using the number of MLS users and the number of Realtor members in the same region. The second source is based on written surveys administered to MLS users in two MLSs in Wisconsin.

[39] Some MLSs are operated as subsidiaries of the Realtor association. The economic benefit requirement is satisfied in such conditions. *Carl Sandburg Village Condominium Assn. v. First Condominium Dev. Co.*, 586 F. Supp. 155, 157 (N.D. Ill. 1983)(citing *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) and *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958)), aff'd *Carl Sandburg Village*, 758 F.2d at 208, fn. 3.

thing more than trivial. Generally, $25,000 or more sent across state lines is required. [40]

But $25,000 of *what?*

Courts have measured the impact requirement four different ways: *gross* sales of the tied product, *involuntary* sales of the tied product, *high market share* attained in the tied product market, and *diverted sales* from rival trade associations. Any one suffices.

Gross sales Each local Realtor association bills for its own membership dues, plus dues for the state Realtor association and NAR. The NAR dues are sent to Chicago, which means for Realtor associations outside Illinois, the NAR dues collected are sent interstate – supplying the interstate impact requirement. In recent years NAR has charged dues of $84 per year. Thus, for an MLS with 1,000 members, the local Realtor association will collect 1,000 NAR memberships each at $84, and will send $84,000 interstate.[41] Because Realtor associations coordinate their actions through NAR across the United States, gross sales could be computed for all MLSs in the United States to arrive the appropriate measure of the impact of the MLS tie-in. The measure in that case would be approximately 1.2 million Realtor association members times $84 = $101 million,[42] easily meeting the $25,000 requirement.

Involuntary sales One court ruled that involuntary purchases would be an appropriate measure of the interstate impact.[43] Thus, for the hypothetical MLS is the previous paragraph with 1,000 members, about 300 of them would not belong to Realtor associations if given a voluntary choice, so 300 x $84 = $25,200 in co-

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[40] *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1419 (11th Cir. 1987) ($10,091 sufficient); *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430, 436 (E.D. Pa. 1976) ($50,000 over 4 years, or $12,500 per year not *de minimis*); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1130-1131 (6th Cir. 1981) ($140,000 over three years, i.e., $47,000 per year).

[41] Many courts have use the gross dollars measure: *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-502 (1969) (annual purchases of houses from U.S. Steel were measured, $190,000 was sufficient); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977) (relevant variable not measured by size of market foreclosed but "total amount of business"); *Tic-X-Press v. The Omni Promotions Company of Georgia*, 815 F.2d 1407, 1417 (11th Cir. 1987) (relevant variable is the "total volume of sales tied," including sales to buyers who would have purchased the tied product in the absence of the tie); *Cheryl Perry Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2nd Cir. 1976) (all vacuum cleaner purchasers, including voluntary purchasers; 10,000 purchasers not *de minimis*); *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002 (5th Cir. 1979) (relevant variable was all recreational facility rental fees paid by condominium owners, not just those paid involuntarily);; *Wells,* 850 F.2d at 815, fn. 11, quoted above.

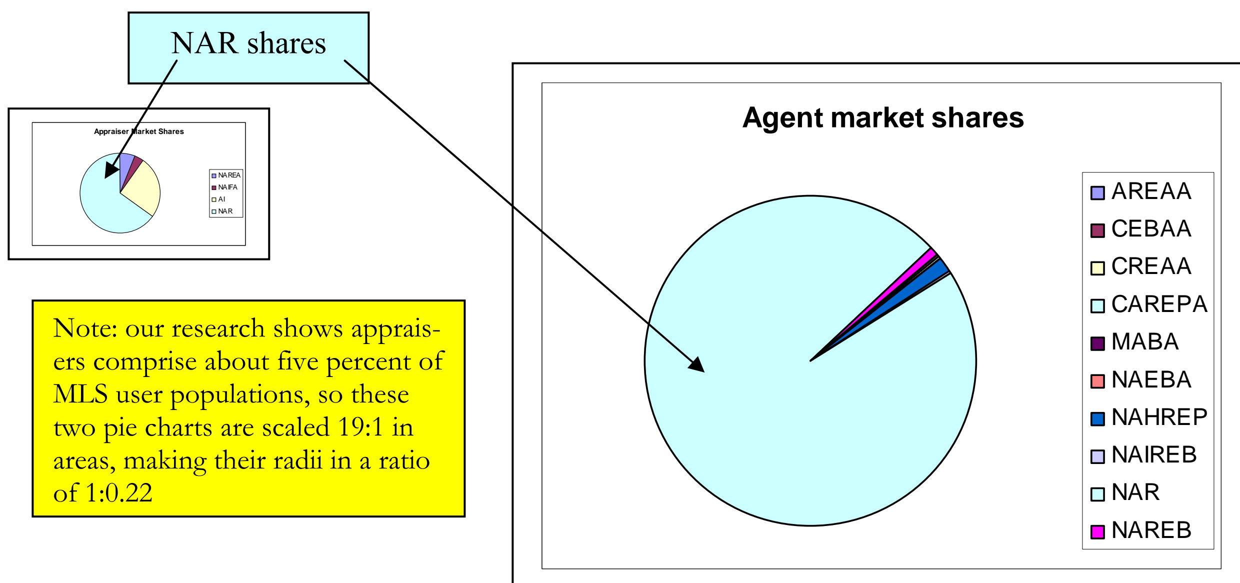
[42] To be completely accurate, a further calculation should be made: Local Realtor associations in Illinois should be subtracted out, since Illinois Realtor associations don't send their NAR dues interstate.

[43] *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).

erced dues are sent interstate each year to Chicago from this MLS. As in the previous paragraph, the same effect can be repeated for MLSs across the United States to aggregate the total involuntary sales, subtracting regions where the MLSs are open, and therefore voluntary.

High market shares in the trade association market Tie-ins are illegal because we don't want firms dominating one market to use that power to dominate others. If they want to win in the second market, they have to win through superior products, not forcing sales. Some courts[44] find the impact requirement has been met by evidence that the tying seller has achieved high market shares in the tied market, in this case the market for trade association memberships.

We computed NAR's shares of the markets for trade association services for realty agents and appraisers.[45] NAR holds a 97% market share in the market for realty agents and 65% of the market for appraisers, both computed based on membership. Either one is sufficient to establish liability.



Diverted sales from rival trade associations The fourth alternate way of showing interstate impact is through diversion of members from one trade association to another because of an MLS tie-in. This topic occupies the whole of the following chapter. But to preview the results, the data show that MLS tie-ins force realty agents and appraisers to purchase NAR and other

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[44] *A.O. Smith Corp. v. Lewis, Overbeck & Furman*, 979 F.2d 546, 552 (7th Cir. 1992) (market power in tied market sufficient and possibly required to prove a tying claim); *Associated Press v. Taft-Ingalls Corporation*, 340 F.2d 753, 768 (6th Cir. 1965) (plaintiff's burden met by proof that Associated Press market share in the tied product market was 94% by circulation and 87% by newspapers).

[45] Member shares are computed in the Appendix at page 76.

Realtor association memberships, which dampens their enthusiasm to purchase a second trade association membership. Of five trade associations studied, four showed substantial diversion of memberships. The loss of memberships has been held to be a sufficient basis to establish the impact requirement.[46]

[46] *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991).

3. Diversion of trade association memberships

This chapter proves the MLS tie-in of chapter two has the effect of diverting members of four trade associations of real estate agents and appraisers to NAR. Before diving into the data, I'd like to outline the method using Coke and Pepsi as examples. Suppose we wanted to see if lowering the price of Coke had the effect of diverting sales from Pepsi. It might not. After all, Pepsi drinkers might be Coke-haters, and lowering the price of Coke might have the effect of making Coke-lovers buy more, but not converting any Pepsi-lovers. Only a careful test would tell the difference. What steps would we take?

First, we'd select a geographic region to study – let's say a single town. Then, we'd study the amount of Coke and Pepsi sold – but sold *where?* Cans in machines? Movie-theatre sales? Restaurant sales? Six-packs in supermarkets? Let's focus on supermarket sales, where the products are side by side. Restaurants and movie theatres don't offer a choice of either Pepsi or Coke, and machines are devoted to one and not the other.

In one month, we measure six-pack sales of Coke and Pepsi through supermarkets using scanner data. Let's say the sales are equal at a time when the prices are equal.

Next, we write letters to the supermarkets and Coke asking politely that they lower the price of Coke by 25%, explaining we're doing a study. They write back saying they will do no such thing, since they're in the business of making money, not doing academic studies. *Oops!*

Ok, plan B. We look around and find a similar town where Coke prices are lower because of a promotion by a local supermarket chain advertising 25% lower Coke sales as a sales leader to bring in traffic. We measure scanner data for a month, and notice sales per capita are up 30% for Coke and down 20% for Pepsi. This data would tend to prove 20% of new Coke sales came from Pepsi drinkers and 10% came from Coke drinkers buying more than usual. Overall, it would tend to prove Coke's lower price was taking sales from Pepsi. To confirm the results, we'd roll out the study to other towns, comparing towns where Coke and Pepsi

prices are equal with towns where Coke prices were 25% lower than Pepsi prices.

I use the same method. Since I can't order Realtor associations to do my bidding to open or close their MLSs, I observe membership sales of national trade associations in open and closed MLS regions to see if these trade associations sell more memberships in open MLS regions than closed MLS regions.

Open and closed MLSs in the top 100 cities

We hired a consultant, Michael Clarke, to survey the top 100 markets in the United States to determine the open/closed status of each MLS in those markets. He contacted MLSs in the 100 largest cities and asking two questions: (1) was MLS use available to people who were not members of any Realtor association, and (2) what areas were covered by their MLSs. These seemed like straight-forward questions, but as we discovered they were not always so.

Only 16% MLSs open, due to lockbox and comparable data restrictions

Clarke found MLS personnel well-trained in the qualifications required for purchase of MLS privileges. It's a question they field often. Every MLS staff member delivered a crisp yes or no as to whether it was necessary to be a member of a Realtor association in order to purchase MLS usage. In the Eleventh Circuit – Florida, Georgia, and Alabama – we expected to find all MLSs were open because of the 1991 *Thompson*[47] decision. It is common knowledge, which I'd verified myself, that MLSs in those states sell MLS subscriptions to brokers who are not members of Realtor associations. That means open, right? No. What Clarke found is that while MLSs sell subscriptions to brokers who are not members of Realtor associations (they call them "Thompson" brokers, after the case), they will *not* sell lockbox services[48] or comparable data[49] to such brokers. Since lockboxes and comparable data are

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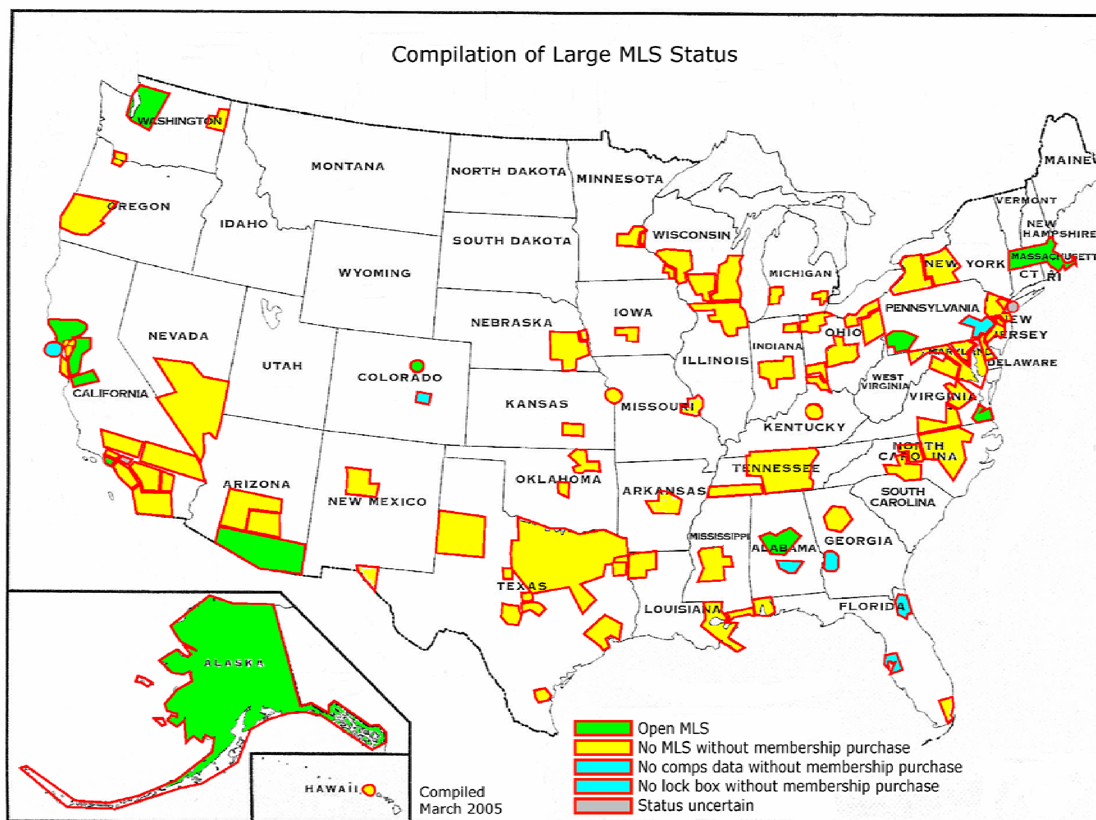
[47] *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991). That decision declared that an MLS-Realtor membership tie-in would violate the Sherman Act if the MLS had market power in its region.

[48] Lockboxes are mechanical boxes affixed to sellers' front doors. A computer key or a mechanical key held by all realty agents in that MLS region will open the lockbox, and inside they will find the key to the front door. A lockbox allows realty agents to show a home to a prospective buyer when the owner is not home. Without lockbox access, realty agents are effectively barred from the business because they would have a much harder time showing homes to buyers.

[49] When MLS homes sell, realty agents update the MLS listing with the final sales price. The MLS listing then moves to an archive section of the MLS where appraisers and realty agents can access the data to perform a valuation

just as essential to brokers as MLS services, the practices of such MLSs in Florida, Alabama, and Georgia are simply evasions of *Thompson,*[50] and we scored these as closed MLS regions. Thus alerted, Clarke uncovered the same practices in other parts of the United States – all in jurisdictions where courts had declared that MLSs must be open.[51]

Once Clarke finished his work, we verified the results with the forensic accounting firm, Engel and Engel, in Los Angeles. The compilation shows only 16% of the top markets are open. The other 84% of the MLS markets require purchase of Realtor association memberships to obtain full access to the MLS.



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of homes in the area based on recent closing prices. This information is called comparable data. As a matter of competence, nearly all listing agents use comparable data to determine the correct asking price for a home, and buyer agents to the same data to determine the correct price to offer for a home. Without access to comparable data, a realty agent would be at a severe disadvantage compared to all other agents.

[50] These practices are just as illegal as the tie-ins of *Thompson*, but MLS users in those states have not challenged the practices.

[51] Legal decisions required open MLSs in California, Colorado, New Jersey, and the 11th Circuit (Alabama, Florida, and Georgia), and those states had all the lockbox/comparable data tie-ins.

Four states mostly open

Clarke found most of Alaska and Massachusetts were served by state-wide open MLSs, although each state has a few scattered closed MLSs.[52] It was thus possible to do a natural experiment: What percent of MLS users – who had a voluntary choice as to whether to join Realtor associations – purchased Realtor memberships? I traveled to Boston and Anchorage where I took depositions of the executives of the MLSs and state Realtor associations and collected data on the number of MLS users and Realtor associations. The *join rate* is the percentage of MLSs users in each jurisdiction who voluntarily purchase a Realtor membership. The non-join rate is the percentage who do not. By subtraction:

1 – join rate = non-join rate

We were interested in the non-join rate because it would indicate the damages to be claimed in our class action cases.[53]

The Alaska and Massachusetts data showed non-join rates of about 30%. We retained our economist, Dr. Jon Riddle, to survey MLS users in two MLSs in Wisconsin, where all MLSs are closed. On the Madison survey's third day the Wisconsin Realtors Assn. sent an email to all its members condemning our plaintiff Jay Reifert and our survey. The Madison MLS survey showed a relatively lower non-join rate, which I attribute to the WAR email effort. The email may have rallied the pro-Realtor association forces to send in a higher percentage of survey responses, because the result was a non-join rate of about 20% in Madison area, the lowest we've seen in the United States. By comparison, the LaCrosse Wisconsin MLS, 150 miles northwest of Madison, showed a non-join rate of 32%. At a later time I took depositions in Seattle to get non-join rates in western Washington, where the nation's largest open MLS operates as Northwest MLS, with over 26,000 users. The non-join rates in the five regions studied are shown in the following table.

Non-join rates in selected open MLS regions

Region	Non-Join Rate
Alaska	37%
Massachusetts	28%
LaCrosse, Wisconsin	32%
Madison, Wisconsin	22%
Western Washington	30%

The non-join rate is the percentage of MLS users who do not purchase Realtor association memberships, when optional. In a closed MLS region, the non-join rate is the percentage of MLS users who report they would not voluntarily purchase a Realtor membership if not forced.

[52] In each case, over 75% of the state is served by the open MLS.

[53] These three cases are explained in the Appendix at page 72.

Dues involuntarily paid because MLS tie-ins

I use non-join data to compute dues involuntarily paid to Realtor associations. The number NAR members is known and shown in the Appendix at pages 64-65. Arica Armitage, a paralegal with Barry & Associates, surveyed Realtor associations around the United States to obtain Realtor dues. The results are shown in Appendix, pages 74-75. In the years 2000 – 2005, Realtor associations collected about $2 billion in dues. Of that, over half a billion dollars was forced from MLS users involuntarily. The calculation is in the Appendix at page 73.

County-level analysis

MLS personnel clearly described the core geographic area of MLS coverage, but coverage dithered out as properties were located farther from the center of the MLS. As a result, coverage areas had diffuse edges. And there were definitional issues. If an MLS listed a handful of properties in the far corner of the state, were those properties in the coverage area? As we discovered, the most fruitful way to study MLS coverage and non-join rates was on a county-by-county basis.

Up to this point we've done the first part of the test – we've found areas where Coke costs less than Pepsi, so to speak. That is, we know the regions where MLS costs just what MLS costs, without the added burden of buying unwanted Realtor association memberships, and we know where MLS costs its own cost plus Realtor association dues.

Diversion of memberships from four trade associations

Now it's time to present the evidence that MLS tying has the effect of diverting sales to NAR from other trade associations. This issue cuts to the heart of tying theory. The whole reason tying is forbidden is that it has the potential – proven to be true in many cases – of diverting sales from small suppliers to monopolists.

Let's return to the example from the chapter two – IBM and punch cards. IBM forced users to buy its computer cards because it wanted the whole market without earning it through a better product or lower prices. The Justice Department interceded with its suit to protect producers and buyers of punch cards. If it hadn't interceded, IBM could have driven competing punch card makers out of business, pushed up prices, narrowed consumer choice, and built up a new monopoly in the punch card business.

Over the decades courts witnessed many tie-ins drive customers away from competitors and into the arms of monopolists. In the same period, courts observed that there were never pro-

competitive benefits flowing from the tie-ins. For this reason, courts declared tying to be *automatically* illegal, not requiring the plaintiff to prove customers were diverted from competitors to the monopolist.[54]

The rule of automatic illegality was last challenged in the Supreme Court in the *Jefferson Parish* case[55], where the court ruled 5-4 that the automatic rule of illegality would remain, having been in place for over 25 years.[56] Despite *Jefferson Parish,* the MLSs in our litigation asserted that plaintiffs should *still* be required to prove realty agents and appraisers were being driven away from other trade associations to NAR. The MLSs' defense broke down to two assertions: (1) NAR had no competitors, and even if it did, (2) we hadn't proven the tie-in caused any diversion of memberships. To anyone familiar with the real estate industry, the first claim is like saying Coke doesn't compete with Pepsi. The second proposition requires detailed analysis of data.

We agree that if NAR has no competitors the tie-in is not automatically illegal. That's as much of a concession as they'll get out of us, because tie-in law also permits plaintiffs to prove that a tie-in is illegal *under the rule of reason*.[57] But first, let's start with defendants' proposition that NAR has no competitors. Obviously, if NAR has no competitors, then there's no one from whom NAR can divert membership sales. Thus, logically, the first question to answer is whether NAR has any competition.

7 factors indicating whether products compete

Antitrust cares a lot whether firms compete in the same market. Courts look at seven significant factors to decide whether firms compete in the same market: Does industry perceive the products in the same or separate markets? How similar are the products' features and uses? Do the products have unique production facilities? Unique vendors? Distinct customers? Do the products sell for distinct prices? Is there price sensitivity between products? We already saw these questions in chapter two applied to the question whether the MLS competed with newspapers and free throw-away real estate magazines. The same questions determine whether NAR competes with the trade associations of realty agents and appraisers listed in chapter two at pages 17-18.

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[54] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). In the legal world, this is called *per se* illegality, and I use the adjective "automatic" instead.

[55] *Jefferson Parish Hospital District. No. 2 v. Hyde*, 466 U.S. 2 (1984).

[56] *Northern Pacific* was decided in 1958; *Jefferson Parish* was decided in 1984.

[57] After *Broadcast Music v. Columbia Broadcasting System*, 441 U.S. 1 (1979), all *per se* cases have an embedded potential defense that the pro-competitive benefits of the restrain cannot be attained without the restraint.

1. Industry perception How industry players perceive each other is a factor in deciding whether they compete with one another. NAR has always perceived NAEBA (the exclusive buyer association) to be a significant player. NAR's top legal officer, Laurene Janik, was present in Mississippi at the founding of NAEBA in 1995. At that meeting Janik threatened to sue NAEBA if it proceeded to organize.[58] NAEBA wasn't scared off and organized; NAR never sued. NAR responded by purchasing another buyer agent trade association, REBAC, making it part of the NAR organization.[59] Thus, NAR, through REBAC, offers trade association services to the very same customer group as the exclusive buyer groups NAEBA, CEBAA, and MABA. Although the latter two are confined to Colorado and Massachusetts, respectively, in those two geographic markets NAR/REBAC competes with them. NAR also once sued a rival trade association[60] and alleged the rival was siphoning away members from NAR because it offered malpractice insurance, a member benefit not offered by NAR. Conclusion: these associations perceive themselves to be in the same market.

2. How similar are trade association benefits and services? If two products do the same thing, it's a sign they compete. The comparison is easiest when the products are physical and are interchangeable: rubber windshield washers from different manufacturers will compete when each can be snapped into position on the same cars and function equally well. But products need not be identical to compete. Fords and Chevrolets compete even though they don't look alike. That's why these seven factors are necessary: to determine when products that *don't* look alike still compete, despite their differences. The seven factors are also used to separate out products that don't compete *even though they have many superficial similarities*. When it comes to services, the same reasoning applies. For instance, although each bank in its ads tries to distinguish itself from others, nearly all banks offer the same mix of services, which would tend to indicate they all compete.[61] NAR and the dozen trade associations all offer the same mix of benefits. For instance, AI offers discounts for Avis and Hertz; NAIFA offers discounts on Avis and insurance; NAREA offers discounts on prescription drugs; NAR offers discounts also. All three of the appraiser associations have professional standards; CAREPA, MABA, NAEBA, NAR, and NAREB also have professional stan-

[58] In litigation, Janik denied *she* made the threat. However, she admitted the threat was made by one of NAR's lawyers in a letter to NAEBA.

[59] These facts were all developed in the *Buyer's Corner* and *Reifert* litigation.

[60] *National Assn. of Realtors v. National Real Estate Assn, Inc.*, 894 F.2d 937 (7th Cir. 1990).

[61] Ing Direct, sometimes calling itself Orange Bank, exists only online. IngDirect.com. It offers many of the same services as neighborhood banks. Does Ing Direct compete with neighborhood banks? These seven factors would be used to answer the question.

dards. Every association except CEBAA offers education and training. Three appraiser associations offer legislative monitoring and advocacy. CREAA, CAREPA, NEABA, NAHREP, NAR and NAREB offer legislative monitoring and advocacy.

3. and 4. Do the trade associations have the same production facilities and vendors? It's a sign that firms compete when they use the same production facilities and buy from the same vendors. Let's apply these factors to the question of whether children's cereals compete with adult cereals.[62] Both groups buy the raw ingredients (rice, wheat, raisins, sugar, etc., for the food itself, and cardboard and ink for the boxes) from the same vendors. Both use the same factory equipment to make wheat flakes, rice puffs, etc., and the same printing presses and folding machines to make the boxes. This indicates they compete. The importance of these factors lies in the ability of these firms to switch over to make related products. If children's cereals became more lucrative than adult cereal, adult cereal makers need only slap cartoons on their boxes and spray sugar on their wheat flakes. Because of that easy transition, we would not expect the profits from one cereal type to grow far apart from the other. If they did, makers of the other type of cereal would switch to compete in the more lucrative market.[63]

The United States Census Bureau classifies all types of business in the United States in its NAICS coding system according to whether they are similar in activities and production methods. As the Census Bureau explains, "NAICS firms are grouped together based on primary activity, and using similar raw material inputs, similar capital equipment, and similar labor. In other words, establishments that do similar things in similar ways are classified together."

The Census Bureau gives trade associations of professionals have their own six-digit NAICS code,[64] number 813920, indicating that all trade associations of professionals do similar primary activities using similar raw material inputs, similar capital equipment, similar labor, i.e., they do similar things in similar ways. Thus, as measured by vendors and production methods, NAR and the dozen other trade associations compete in the same market.

5. Do the trade associations sell to the same customers? One of the seven factors is whether firms sell to the same customers. We just saw that all professional trade associations have the

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[62] This is shorthand for whether the *firms* that make the children's cereals compete with *firms* that make adult cereals.

[63] Thus, this factor lumps firms as competitors even when they are only *potential* competitors. In a very real sense, firms that are potential competitors can limit profitability of each other.

[64] The SIC classification system has been replaced by the North American Industry Classification System (NAICS) (http://www.census.gov/epcd/www/naics.html. (http://www. census. gov /eos/www/napcs/papers/industries covered.pdf. Last visited Sept. 27, 2005.)

same NAICS code. That means trade associations of morticians, economists, lawyers, engineers, realty agents, and mathematicians all have the same NAICS codes. Those trade associations don't all compete. A mathematician would have no interest in a mortician's trade association; hence, having the same NAICS code does not prove products compete. It's but one factor of seven. But when a group of professional trade associations all sell to the same customers, it begins to look a lot more like they might compete.

A Google tour under "bar association" finds thousands of entries, including the American Bar Association and state and county bar associations. Other bar associations group under practice areas (such as the NTSB Bar Association,[65] the Customs and International Trade Bar Association,[66] and the Inter-Pacific Bar Association[67]), ethnic and personal identities (such as Hispanic National Bar Association,[68] Mexican American Bar Association,[69] South Asian Bar Association of Northern California,[70] Lesbian and Gay Bar Association of Chicago,[71] and Armenian Bar Association[72]) and activities (such as Lawyer Pilots Bar Association[73]).

In short, the lawyer trade associations show the same clustering as the realty agent and appraiser trade associations: geographic, ethnic, and special interest. Thus, when NAR sells memberships, it sells to the very same universe of customers: realty agents and appraisers in the United States.

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[65] Founded in 1984, NTSB Bar Association consists of attorneys who practice before the United States National Transportation Safety Board, the Federal Aviation Administration, and the Department of Transportation. ntsbbar.org

[66] Founded in 1926, CITBA consists of attorneys who maintain an interest in the field of customs law, international trade law and related matters. citba.org

[67] Founded in 1991, IPBA consists of business and commercial lawyers with a strong interest in the Asia-Pacific region. ipba.org

[68] HNBA is a national association representing the interests of over 25,000 Hispanic American attorneys, judges, law professors, and law students in the United States and Puerto Rico. hnba.com

[69] MABA is one of the largest Latino bar associations in Southern California and the nation. MABA's members include over 500 attorneys, judges, politicians, and business people of various ethnic backgrounds. mabalawyers.org

[70] SABA represents the interests of South Asian legal professionals in northern California and throughout the nation. southasianbar.org

[71] CHILAGBAC is a professional organization of judges, attorneys, law students, and affiliated law workers promoting the interests of the lesbian and gay legal community. chilagbac.org.

[72] Founded in 1989, Armenian Bar Assn. promotes the interests of the Armenian community in the United States and abroad. armenianbar.org.

[73] LPBA is an international bar association of 1300 members, mostly attorneys and pilots, interested in aviation law or aviation safety. lpba.org.

6. How close are the prices? Products with wildly different prices don't compete. If A and B do the same thing but A costs much more than B, people will buy B over A. B will flourish while A will go out of business. If they are close in price, people select one over the other based on the minor differences between them and both can prosper. Courts have held that price differences of more than 50% put products in different markets.[74] Thus, while the price test, by itself, cannot prove that two products compete, but it can prove they don't compete.

From highest to lowest, the annual membership dues per person of the realty agent trade associations are: 125, 100, 100, 100, 100, 99, 91, 84, 79, and 30, with an average of $91. NAR's price is $84. NAR's position in this clustering tends to indicate that NAR competes with the realty trade associations.

The appraiser trade association dues per person: 740, 400, 215, and 84, with an average of $360.[75] Again, NAR's price is $84. Its price is so far away from the rest that it indicates that NAR does not offer a truly competitive price, and appraisers belong to NAR only because they are forced to join to get MLS services.

7. Price sensitivity Competitive products steal customers by lowering prices. It happens with airline tickets, interest rates offered on savings accounts, the price of different cell phone plans, and so on. A price change causes price-sensitive customers to leave the higher-priced product for the lower-priced product. If two products *don't* compete, a relative price change has no effect on customer buying patterns. Thus, the seventh test of whether two products compete is whether relative price changes lead to fewer customers for the higher-priced product and more for the lower-priced product. [76] This test is dynamic, attempting to visualize the motion of customers.

A price sensitivity test notes prices and market shares at two points in time when there was a relative difference in prices. An alternate method notes price and market share data at the same time in different geographic markets where relative prices were different.[77] In both cases, if the lower-priced product gains market share, it indicates the two products compete. No change indicates the products don't compete.

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[74] See footnote 36, page 19.

[75] The large price difference between the real estate agent associations and the appraiser associations tends to indicate that the appraiser associations are in a different market than the real estate agent associations, and that NAR is active in two product markets. However, nothing in this case turns on whether or not this court agrees with our view of this evidence.

[76] *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

[77] These two methods are called geographic-constant and time-constant, respectively.

We did a price sensitivity test[78] for five realty agent and appraiser trade associations.[79] Our method was the time-constant method, noting prices and market shares in different geographic markets at the same time. We utilized a two-step process. First, we made a series of non-join studies to see what happened when MLS access was not conditioned on purchase of Realtor memberships. As discussed above, about 30% of MLS users drop Realtor memberships when it's optional.

For the second step we studied whether membership sales rates in non-Realtor trade associations were different in open MLS regions as compared to closed MLS regions. We measured sales rates in terms of actual memberships sold in a given county per million residents of the county. We studied 12 open MLS regions and 46 closed MLS regions. We selected the regions to study based on getting complete coverage of the county of the MLS in question. In other words, we only considered MLSs that were unambiguously open or closed, and only where the MLSs covered 100% of the central county.[80]

We found that four out of five of the trade associations showed strong price sensitivity. Our economist, Dr. Jon Riddle, studied the data and found that the results were statistically significant.

These two steps show price sensitivity: In closed MLS regions, with Realtor memberships forced on MLS users, the sum of the two prices (MLS plus Realtor membership) would be perceived as the MLS price, with Realtor memberships thrown in for free. But in open MLS jurisdictions, MLS users would perceive Realtor memberships at their actual price, because Realtor memberships are optional. Thus, in moving from closed MLS jurisdictions to open, with the perceived increase in NAR's membership price, two things happen: NAR memberships drop by about 30%, and membership sales rates of four other associations rise. This shows price sensitivity between NAR and four other associations.

Thus, the seventh test indicates that NAR competes with at least four other trade associations.[81]

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[78] This test is also known as a cross-price elasticity test. *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

[79] We were only able to get reliable membership data for five trade associations.

[80] Less than full coverage of the county would lead to an error in the rate calculation. Thus, with the membership lists showing addresses, we determined, based on towns, how many members in each state were in the county under study. Thus, we had a precise match between membership sales in the county and the population of the county based on US Census data.

[81] *Thompson* relied on price sensitivity and similarity of services as conclusive evidence that the Realtor association and the African-American Empire Real Estate Board were competitors, despite the fact that Empire agents specialized in representing buyers, while the Realtor association agents had no orientation.

4. 1972 price fix – DR formula – still active today

While working as a salesperson in east San Diego County in 1995, Jim Alexander associated with a broker who belonged to the local Realtor association. Under the rules, Alexander was forced to purchase a membership. The broker closed the office a short time later and Alexander joined an office owned by broker Jerry Scantlin. When Alexander's membership expired in 1996, he tore up the renewal bills.

In January 1997 the wife of the Realtor association's president called Alexander to ask why he had not paid his renewal dues. He said he had no interest in the Realtor association. Scantlin also encouraged Alexander to join. Alexander refused.

A year later, Scantlin, who had become Realtor association treasurer, told Alexander he would immediately have to join the Realtor association or his MLS access would be cut off. Scantlin said, "I'm getting forced by the Board to do this." Alexander told Scantlin he had no desire to become a member of the association. Scantlin repeated that he had to join or lose his MLS, and gave him three days for a decision.

Three days later Alexander paid the dues. Alexander received paperwork as part of the association membership process; he crossed out the parts pertaining to becoming a Realtor. He told the association staff he had no desire to be a Realtor and considered the membership dues to be ransom. When asked where he wanted his Realtor magazine sent, he said he didn't want the magazine, and did not fill in a mailing address. When told to appear at the association for a photo for his ID card, he refused to appear because he did not want to be identified as a Realtor.

The Designated Realtor (DR) formula

The rule that forced Alexander to join the Realtor association is called the Designated Realtor formula – DR formula – and it works as follows: If a broker in an office belongs to a Realtor association, that broker is charged the regular annual dues *times the number of agents in the office.* Every local Realtor association in Amer-

ica has the same formula, because they all agreed to that formula in Honolulu on Nov. 15, 1972 at the NAR national convention. NAR orchestrated the agreement, promoted it, and continues to promote and enforce it in over 1,400 Realtor associations in America. This agreement to create and enforce the DR formula is a criminal price fixing conspiracy that continues to this day

By the early 1970's, before the advent of the DR formula, Realtor associations were searching for ways to encourage all the Jim Alexanders to join their associations. Instead of building a better product or lowering prices, NAR and its Realtor associations created the DR formula at NAR's national convention in Honolulu in 1972. The chief architect and advocate of the formula was Bill North, NAR's executive vice president at the time. His article extolling the agreement was published in NAR's Realtor magazine, and has been reprinted many times. Each year the article is reprinted and included in NAR's thick manual on arbitration and ethics, the enforcement manual by which Realtor associations prosecute Realtor association members, reprinted in the Appendix at pages 66-68.

The key ingredient of the DR formula was the near-universal practice of realty agents acting as independent contractors. To an outsider, a large realty office with many real estate agents is an impressive organization. It looks like a single firm, but in reality the realty agents are separate businesses, each with their separate profit and loss statements. Thus, when the DR formula was introduced, it was easy for brokers to swallow, since a broker with ten or 100 agents would simply pass on the Realtor association dues to the agents. The broker heading an office paid no more than before.

The dramatic effect of the DR formula is illustrated as follows. Consider a firm owned by three partners, with five affiliated brokers and salespeople, who were not principals of the firm – a total of 8 realty agents. If one partner, let's call her Jones, chose to join the Lexington, Kentucky association of Realtors, the 2005 Lexington association dues would be $800.[82] If this were almost any other trade association, the dues obligation would stop there. By comparison, lawyers in a law firm each make their own decisions whether to join any of the hundreds of law firm trade associations described at page 31, and the decision of each lawyer has no effect on any other lawyer in the firm. But under the DR formula, Jones is compelled to purchase a membership in the Kentucky Assn. of Realtors and NAR, for a total membership dues bill of $982. Not only that, but Jones is on the hook for every member of her firm, a total obligation of $7,856.

Thus, although Jones only wanted to pay for one Lexington membership, she and her partners would be compelled to buy a total of 24 memberships (8 realty agents each paying dues to three

[82] This local Realtor association dues is taken from the Armitage dues survey, in the Appendix, pages 74-75.

associations). Instead of paying $800, Jones and her partners and agents would be compelled to pay $7,856.

Jim Alexander held a salesperson's license, and states generally require salespeople to work under a broker.[83] In the trade, this is known as "hanging their license" in the broker's office. All contracts are taken in the name of the broker, and only the broker can receive the commission. The broker divides the commission with the salesperson according to the agreement between the agent and the broker. Salesperson licenses generally outnumber broker licenses. The effect of this license rule is agents holding salesperson licenses have no choice but to go along with the DR formula – they cannot start their own offices.

It's likely there were many complaints about the DR formula. A portion of NAR's article explains how to deal with these complaints:

> If a question should arise as to the application and enforcement of the local Board dues with respect to the dues obligation of a designated Realtor as related to a real estate firm, the following is recommended:
>
> (1) Invite the Realtor to attend a meeting of the Membership Committee, and in a friendly, constructive atmosphere, ask the Realtor to explain his relationship to any real estate firm about which the question has arisen.
>
> (2) After a firsthand discussion with the Realtor, determine and explain the Realtor's dues obligation. If he agrees, the question is resolved. If he does not agree, the matter should be reviewed by Board Legal Counsel prior to recommendation of the Membership Committee to the Board of Directors. Board Legal Counsel should specifically review the dues provision of the Board Bylaws to ensure that they support any recommendation to be made to the Directors.
>
> If it appears that the Realtor may challenge the recommendation of the Membership Committee, and may litigate against the Board, the Member Policy Division of the National association should be informed immediately and no final action should be taken prior to a complete review by the State and National association. [**North article, Appendix, page 68**]

The results of the DR formula were electrifying: NAR's membership sales zoomed from 31% of the agent market to 95% in a single year.[84] Since 1975, there were some years when NAR's realty agent population exceeded the number of full-time agents in the United States, likely because some individuals working full-time in other jobs held part-time realty agent occupations.

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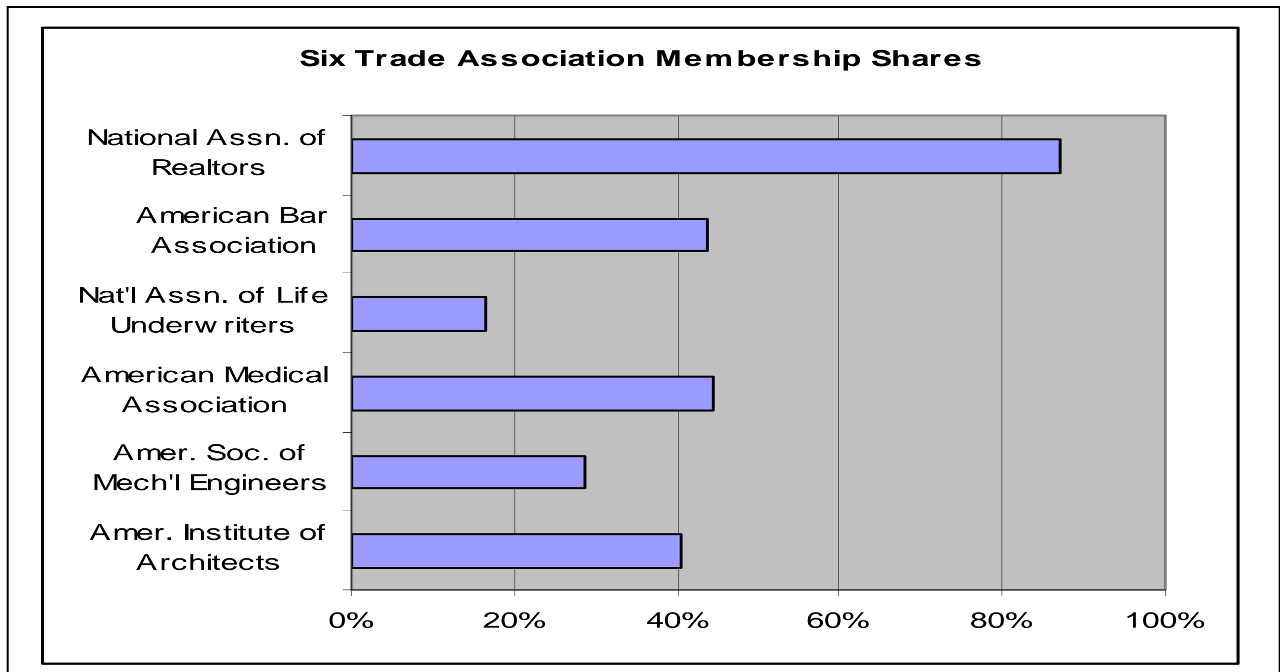
[83] In California, a holder of a real estate salesperson's license can work only when affiliated with a real estate broker. California Business & Professions Code sect. 10137

[84] See the graph at page 4. Data is shown in the Appendix, page 65.

It's not normal for 100% of the individuals in a profession to voluntarily purchase memberships in a single national trade association, especially when there are many trade associations. I collected data on the memberships of other large national trade associations: lawyers, doctors, insurance agents, mechanical engineers, and architects and compared the membership numbers to numbers employed nationally, as reported by the Statistical Abstract. Join rates vary between 16% and 44%. As noted above, NAR's rate hovers around 100%. The join rates of six professions are shown in the following chart.[85]



At page 27, I described that over half a billion dollars had been forced from realty agents and appraisers by the MLS tie-in in the past six years. We now see why that calculation was incomplete: even if some realty agents were free to purchase MLS services without buying a Realtor membership, if they were affiliated with offices that belonged to the Realtor association, the DR formula would *still* force them to buy Realtor memberships.

If forcing purchase of Realtor memberships is so easy, why did Realtor associations commit the crime of price fixing with the DR formula? The answer lies with the relatively primitive state of MLS systems in the 1960's and 1970's. Back then, before online computer systems were common, weekly books were the way MLS was practiced. While listings might have been entered by electronic means, searching databases was still years away. Therefore, several agents in an office could use the same book and

[85] All data for 1997, which happened to be an uncharacteristically low year for NAR. In 2002, its market share was 99%.

transact business by telephone. If they didn't think a Realtor membership was worth the money, they didn't join. Thus, by 1972 Realtor associations had achieved only a market share of only 31%.

These days, every realty agent needs to belong to the MLS to be effective. In the three cases we MLS tie-in cases we litigated in 2004-2005, none of the Realtor associations we sued could name a single realty agent active in residential resales who did not use the MLS. Those associations had every reason to find such individuals because if a closed MLS lacks market power, there is no violation.[86] There is no free-riding for MLS users, because all the data resides on the computer server, and it takes a login and password to get on the system. If an MLS user lets another use her login, the system will lock out anyone trying to use the same login while the borrower is using it. In addition, an agent will not be able to enter a listing, since the login is linked to the password owner. In practice, at $25 to $45 per month, the MLS is so cheap that anyone in the business even part time will find it affordable. Thus, if a Realtor association owns the MLS, it can easily force 100% of realty agents and appraisers to buy Realtor memberships simply by closing its MLS.

The DR formula is still in effect. My office staff called Realtor associations around the country and obtained copies of current bylaws. They all contained the DR formula. In our current litigation all Realtor association bylaws contained the DR formula.

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[86] Cite to the theory; cite to the cases where MLS was not a major factor in the market, such as HF, etc.

5. The "realtor" trademark, obtained by fraud, generic

In 1916 C.N. Chadbourn wrote in the National Real Estate Journal, "I propose that the National Association adopt a professional title to be conferred upon its members which they shall use to distinguish them from outsiders. That this title be copyrighted and defended by the National Association against misuse…. I therefore, propose that the National Association adopt and confer upon its members, dealers in realty, the title of realtor (accented on the first syllable)."[87] The "National Association" referred to by Chadbourn was NAR, then calling itself the National Association of Real Estate Boards – NAREB. NAR did not act on Chadbourne's suggestion till decades later.

Chadbourn's coinage of the word realtor required no brilliance. The suffixes –or and –er are commonly added to old verbs to make new nouns, one of the many ways our language grows. For the suffix –er, there are butcher, baker, candlestick maker. For –or, there are surveyor, actor, director. The coinage of realtor was obvious and probably inevitable.

Sinclair's *Babbitt* championed the word "realtor" as generic

In 1922, six years after Chadbourn's proposal, Sinclair Lewis published the novel *Babbitt*. The fictional protagonist in *Babbitt*, a real estate agent active in real estate association politics, coins the word realtor with the same meaning and for the same reasons as Chadbourn. "We ought to insist that folks call us 'realtors' and not 'real estate men'. Sounds more like a reg'lar profession.[88]" While Chadbourn advocated control and ownership of the word, with restriction of its use to members of NAR, Lewis's protagonist

[87] Oxford English Dictionary entry for "realtor," citing article published Mar. 15, 1916.

[88] The novel was so widely read and influential, that that the title character's name, Babbitt, passed into general usage as indicating a complacent individual conforming to middle-class standards and incapable of appreciating the world of art and ideas.

Babbitt advocated a generic usage. The parallels are so close that Lewis must have modeled Babbitt on Chadbourn, and SAREB (Babbitt's state realty association) on respondent NAR, then known as NAREB (National Association of Real Estate Boards).

Thus, from a historical point of view, there were *two* advocates for the word realtor. Chadbourn advocated that the word would be controlled (via copyright) by the National Association to designate NAREB members. The *other* advocate for the word realtor was the fictional character Babbitt, who advocated that the word apply to *all* real estate agents, to elevate their public standing. "Sounds more like a reg'lar profession." Babbitt urged that it be applied to the *profession*, not the trade association.

Sinclair was a leading author of the time, the first American awarded the Nobel Prize in literature. The popularity of *Babbitt* undoubtedly influenced the writers of the day. Whether the inspiration was Lewis or others, it is undisputed that writers began to use the word realtor generically.

If all the written materials from that era were digital and searchable on the web, it would be easy to show the degree to which the generic usage of realtor spread. But few publishers have moved their archive libraries to digital, searchable forms. State and federal court decisions are an exception. Judges are sticklers for verbal precision. Thus, each instance of generic treatment of the word realtor by a court reflects popular and correct use of the word at the time each case was decided.

Usage decade by decade is presented below, combining entries for federal cases, and historical records from the Oxford English Dictionary, and California published decisions.

The history of usage of realtor is important for several reasons. First, the word became generic with the publication of *Babbitt*. U.S. trademark law does not allow generic words to become trademark. If a valid trademark becomes generic, it is subject to cancellation.[89] Examples: aspirin, ping-pong, escalator. When NAR filed a trademark registration for realtor in 1947, it fraudulently told the Trademark Office it had the sole authority to control the language. The statement was fraudulent because the word was in common usage, and no one controlled it. A second reason the history is important is because NAR initially claimed the word was copyrighted, even though the Copyright Office shows no evidence of registration. And if realtor was every copyrighted, the

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[89] "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it – ... (e) consists of a mark which (1) when used on or in connection with goods of the applicant is merely descriptive or deceptively misdescriptive of them..." 15 U.S.C. §1052. *Abercrombie & Fitch, Co. v. Hunting World Inc.*, 537 F.2d 4, 9 (2nd Cir. 1976); *Two Pesos, Inc. v. Taco Cabana Inc.*, 505 U.S. 763, 768 (1992); *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 935 (7th Cir. 1986).

copyright has expired and the word reverted to the public domain.

Generic usage of realtor 1920's and 1930's

Federal case decisions show no entries for realtor before *Babbitt,*[90] but afterward, generic usage grew steadily. Two years after Babbitt was published, in 1924, the first federal court decision used the word realtor generically. "In this connection it must be noted that M. Lowenstein & Sons, Inc., were not realtors, and were not in the business of loaning money on real estate."[91] Including that case, there were a total of 12 generic usages of the word realtor by federal courts during the 1920's. In 1925 Oliver Wendell Holmes, then associate justice of the United States Supreme Court, wrote in a private letter, "These realtors, as they call themselves, are influential."[92] In 1929 the Baltimore *Sun* headlined, "Realtors doubt plan for Fox Theatre here."

In 1931 the *Evening Standard* headlined "'Realtor' recommends Surrey," and Ezra Pound wove realtors into his poetry in 1934: "His Wife now acts as his model and the Egeria Has, let us say, married a realtor." During the 1930's, there were 21 generic usages of the word realtor in published federal court opinions. In the same decade there were four generic usages of the word realtor by the California Supreme Court, and six generic usages by the California courts of appeal. The word realtor was used generically in a narrative by a former slave in a compilation gathered for the Works Project Administration in 1938.

By the 1930's the word realtor was thoroughly generic. NAR began a campaign to falsely advise publishers that the word realtor was copyrighted. Every publisher has had the experience of being badgered by local Realtor associations for not using the capital R when using realtor. I use the capital R in Realtor in other parts of this report to avoid confusion. I think the trademark on realtor should be cancelled and the word returned to its rightful owners – readers of the English language.

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[90] Actually, a few entries appear, but they are clearly typos, where the technical legal term "relator" is intended.

[91] *M. Lowenstein & Sons, Inc. v. British-American Mfg. Co.*, 300 F. 853 (D. Conn. 1924).

[92] For this entry and some later ones, see the Oxford English Dictionary history of usages in the Appendix at page 63.

Ripley's Believe It of Not ran the following cartoon in newspapers across the United States on December 5, 1934.

The Believe It or Not cartoons were highly popular because they presented amazing facts. The realtor entry is therefore telling: to the public it would be amazing that the word realtor was anything other than a generic word meaning realty agent.[93]

Generic usage of realtor 1940's; NAR applies for trademark

In 1942 *American Speech* published this passage, "The ambitious realtor's favorites, the over-worked [street names] Grand, Broadway, and Inspiration." During the 1940's there were 30 generic usages of the word realtor by the federal courts, including one by the U.S. Supreme Court, and 16 by California courts of appeal.

NAR applied for the realtor mark in 1947, declaring the "National Association of Real Estate Boards … is the owner of the collective mark … and that no other person, firm, corporation, or

[93] I also suspect NAR paid for this placement. The menacing tone of the realtor entry isn't consistent with the usual fun tone of the cartoons. The falsity of the statement also strikes a discordant tone.

association has the right to authorize the use of, and no person, firm, corporation, or association other than members has the right to use, such collective mark in commerce…." The statement was fraudulent.[94] The word realtor had been in generic use for decades. Ezra Pound, Oliver Wendell Holmes, the entire Supreme Court, numerous federal and California courts, Sinclair Lewis, newspaper writers, among others, had the right to use the word realtor, when they did so in the quoted passages.

NAR applied to register realtor as a trademark in 1949 in the United States Patent and Trademark office. Registration was granted in 1950, No. 519,789.[95]

Generic usage of realtor since 1950

The evidence of generic usage of the word realtor exploded after the issuance of the trademark in 1950. I say the *evidence* of usage, because modern use is so much more evident with the advent of publishing on the web, where word searches are simple. The widespread pattern of use by the courts and modern publishing media strongly suggests that generic use of the word realtor was widespread before the web, but difficult to detect.

The United States Supreme used the word realtor generically eight times after the trademark was issued. The First, Second, Third, and Ninth Circuit Courts of Appeal used realtor generically 45 times since trademark issuance. The California appellate courts used realtor 174 generic times, nearly all of them after issuance of the trademark. California is but one state of fifty.

Titles or subtitles to at least nine books found on Amazon.com and BarnesandNoble.com use the word realtor generically in the title or subtitle of the book.

Federal cases have used the word realtor generically over a thousand times since the trademark was issued. Usage is accelerating. In January of 1990, there were six instances of the word realtor, indicating, at that rate, over 70 generic uses per year, and over 700 per decade.

I found over 200 instances of generic use of the word realtor in the online versions of books, magazines and newspapers: NYTimes.com, Britannica.com, LATimes.com, Forbes.com, Fortune.com, BusinessWeek.com, Time.com, People.com, Freep.com (Detroit Free Press), Philly.com (Philadelphia Daily News),

[94] Courts make a distinction between false statements and fraudulent statements in applications. *Metro Traffic Control v. Shadow Network*, 104 F.3d 336 (Fed. Cir. 1997). A large amount of prior infringing use is evidence that a statement of exclusive use is fraudulent, and not merely an error. *L.D. Kichler Co. v. Davoil, Inc.*, 192 F.3d 1349 (Fed. Cir. 1999).

[95] The PTO also issued a trademark for "realtors," to NAR, no. 515,200, issued Sept. 13, 1949.

Slate.com (online only), USAToday.com, WashingtonPost.com, and CSMonitor (Christian Science Monitor). An examination of the dates of publication indicates that these uses were mostly in a recent two-year period.

To obtain a survey of how newspapers in America are using the word realtor, I canvassed one newspaper chosen randomly from each of 25 states, chosen randomly. A total of 24 states were selected, and the newspapers and states are shown below. All newspapers sampled for usage of the word realtor used the word generically. There was not one instance of brand-name usage.

State	Newspaper
Alaska	Daily News-Miner
Arkansas	Log Cabin Democrat
Colorado	Denver Post
Florida	The Miami Herald
Hawaii	Star-Bulletin
Illinois	Herald & Review
Iowa	Cedar Rapids Gazette
Kentucky	The Gleaner
Maine	Bangor Daily News
Massachusetts	Daily Hampshire Gazette
Minnesota	Duluth News-Tribune
Missouri	St. Louis Post-Dispatch
Nebraska	Grand Island Daily Independent
New Hampshire	The Union Leader
New Mexico	Albuquerque Tribune
North Carolina	The Herald-Sun
Ohio	The Morning Journal
Oregon	The Oregonian
Rhode Island	The Call
South Dakota	Madison Daily Leader
Texas	Plano Star-Courier
Vermont	Rutland Herald
Washington	South County Journal
Wisconsin	Daily Citizen

Twice I've prosecuted petitions before the United States Trademark Trial and Appeals Board to cancel the trademark realtor. My first attempt was unsuccessful because my client had previously been a member of NAR, and under the doctrine of licensee estoppel, the TTAB ruled she was ineligible to challenge the realtor trademark. The second attempt, on behalf of a broker of domain names containing the word realtor, was also unsuccessful. I used a survey created by a nationally known survey expert showing that ninety percent of the public considered the word realtor to be generic. The TTAB decided there were flaws in the survey, and without the survey, there was no evidence to prove the word realtor was generic. The ruling left the door open to another petition to cancel the realtor trademark.

6. Chronology of violations

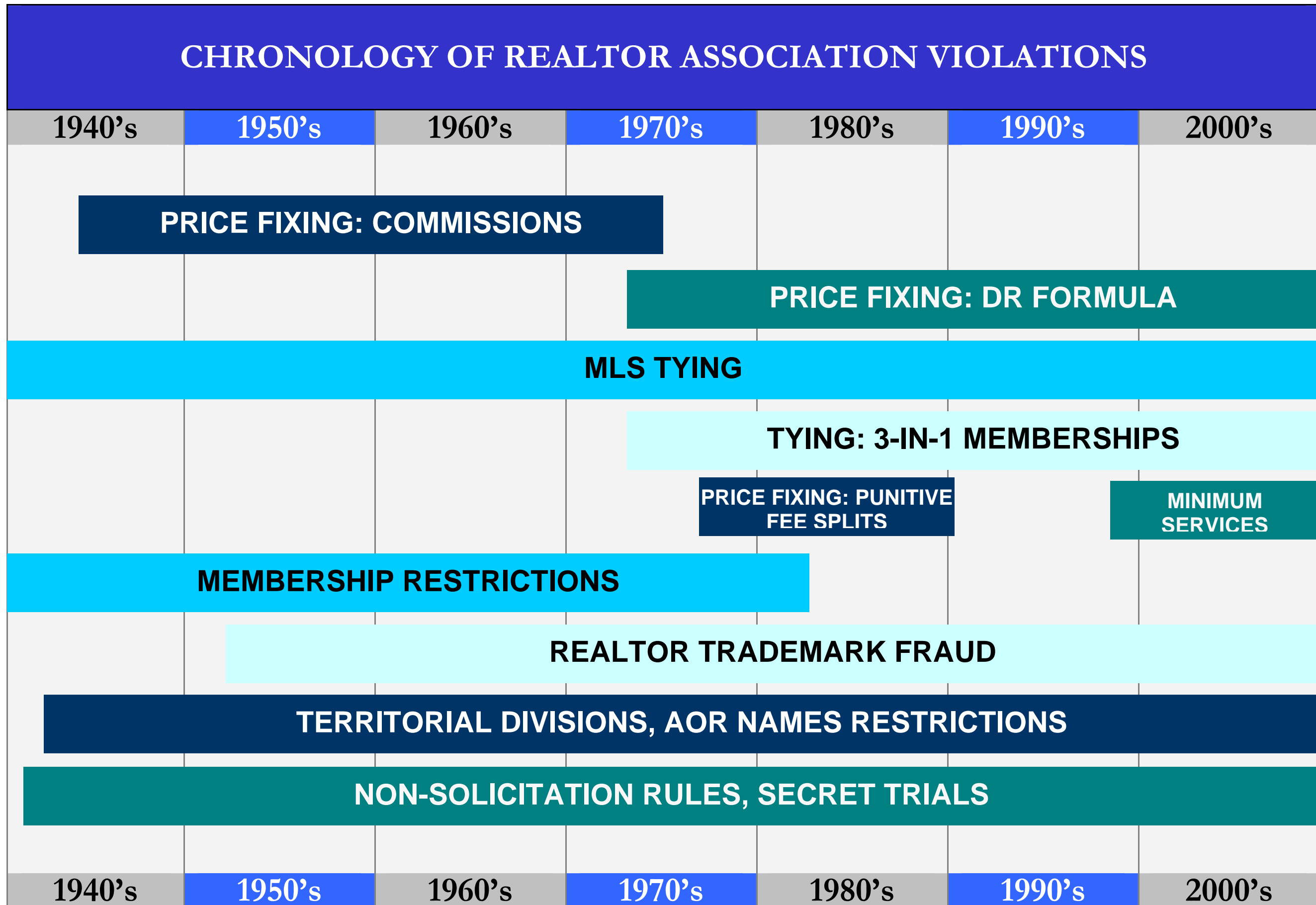
The graphic chronology on the next page illustrates several types of practices since the 1940's.

It shows the four current violations I've already discussed: the non-solicitation rule, MLS tie-ins, the DR formula, and the realtor trademark obtained by fraud.

The chronology also illustrates four more legal violations that currently restrain competition: territorial divisions, Realtor association names restraints, the 3-in-1 tying violation, and secret trials of Realtor association members who deviate from the practices recommended by Realtor associations. I discuss each of these in this chapter.

The graph also charts three past violations: price fixing of commission rates, Realtor association membership restrictions, and punitive fee splits. I discuss the dates and important events involved in these violations, which dramatically illustrate Realtor association intentions and character.

The value of the graph is that one can see that as one violation ends, another begins. It also makes quite palpable the number and variety of ways that Realtor associations injure competition.



Price fixing: commissions

Beginning in at least 1944, real estate brokers fixed commissions through Realtor association fee schedules. In 1950 the US Supreme Court ruled commission fixing by boards of Realtors was illegal.[96] The Washington, D.C Realtors association (then called the Washington Real Estate Board) was found liable for violating

[96] *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). The Washington association first adopted fixed prices in 1944. 339 U.S. at 495. The Supreme Court decision related that the Washington association adopted standard commission rates, and that its code of ethics provided that brokers "should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates." Members also agreed to abide by that code. Commissions at lower levels than allowed by the code of ethics occurred only in exceptional situations, and the Washington Board never punished such instances. Although the Washington assn. claimed lack of punishment made the code "non-mandatory," the Supreme Court held that lack of punishment for departures from the rate schedule did not render the agreement any less illegal. The illegality was based on the consensual action setting a uniform or minimum price.

the Sherman Act, but NAR (then called the National Assn. of Real Estate Boards) was found not liable, the district court having found that NAR did not conspire with the price fixing by the Washington association.[97]

On appeal, the government asked the Supreme Court to overturn the finding that NAR had not conspired with the Washington association. At the time, NAR had a code of ethics which included an article stating that "the schedules of fees established by the various Real Estate Boards are believed to represent fair compensation for services rendered in their communities and should be observed by every Realtor." NAR's bylaws also provided that each member board shall adopt the code of ethics of NAR as part of its code of ethics. Finally, NAR had participated in activities developing a national schedule of commissions which were influential in shaping the fee schedule of the Washington association. The Supreme Court held that while it might have interpreted the facts differently, it could not overturn the factual finding of the district court since it was not clearly erroneous.

Realtor associations continued fixing commissions, despite *U.S. v. NAREB*, for the next twenty-eight years.

San Diego area Realtor associations adopted and adhered to a standard five percent commission rate until 1955 when it was raised to six percent by agreement reached during joint meetings of the major local associations. Advisory schedules were published, disseminated, and members were urged to comply.[98] Realtor associations across the United States maintained minimum fee schedules until the U.S. Dept. of Justice filed a cluster of price fixing suits in 1970-1974 against Realtor associations in Atlanta,[99] Cleveland,[100] Long Island,[101] Los Angeles,[102] Memphis,[103] New

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[97] The case was also brought as a criminal case, which was tried first. The district court entered a judgment of acquittal which appears not to have been appealed. The civil case judgment was also for the defendants, based upon the district court's legal ruling that the activities of defendants involved only their labor and not involving any "trade," i.e., capital or physical goods. The Supreme Court reversed, holding that the word "trade" in the Sherman Act encompassed services rendered by independent businesses such as real estate brokers. It is therefore likely that the legal error by the district court lead to the criminal acquittal and the finding that NAR had not conspired with the Washington Board.

[98] *People v. National Assn. of Realtors*, 120 Cal.App.3d 459, 479 (1981) (*People v. NAR I), later proceedings at* 155 Cal.App.3d 578 (*People v. NAR II).*

[99] *United States v. Atlanta Real Estate Board*, 1972 U.S. Dist. Lexis 15226 (N.D. Ga. 1972). Complaint filed February 17, 1971. Judgment enjoining price fixing filed Feb. 4, 1972.

[100] *United States v. Cleveland Real Estate Board*, 1972 U.S. Dist. LEXIS 12727 (N.D. Ohio 1972). Complaint filed July 29, 1970. Judgment enjoining price fixing filed July 17, 1972.

York,[104] Portland,[105] Pittsburg,[106] Rochester,[107] St. Louis,[108] and eastern Virginia,[109] obtaining injunctions against further price fixing in every case.

NAR eventually adopted a "hands off" policy regarding recommended commission rates in November 1971,[110] but only after the Dept. of Justice filed suits in July, November, and December 1970, and another in February 1971.[111] All of the cases just cited involved settlements where the Realtor associations agreed to consent degrees. None of the cases settled until after NAR adopted its hands-off policy.

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[101] *United States v. Long Island Board of Realtors, Inc.*, 1972 U.S. Dist. LEXIS 12505 (E.D. N.Y. 1972). Complaint filed November 17, 1970. Judgment enjoining price fixing and requiring open MLS filed August 1, 1972.

[102] *United States v. Los Angeles Realty Board*, 1973 U.S. Dist. LEXIS 14441 (C.D. Calif. 1973). Complaint filed December 18, 1970. Judgment enjoining price fixing filed March 19, 1973.

[103] *United States v. Memphis Board of Realtors*, 1972 U.S. Dist. LEXIS 12579 (D.C. Tenn. 1972). Complaint filed June 27, 1972. Judgment enjoining price fixing and requiring reasonable board entry requirements filed July 27, 1972.

[104] *United States v. The Real Estate Board of New York, Inc.,* 1974 U.S. Dist. LEXIS 5746 (S.D. N.Y. 1974). Complaint filed June 19, 1973. Judgment enjoining price fixing filed Dec. 18, 1974.

[105] *United States v. Multiple Listing Service*, 1972 U.S. Dist. LEXIS 10849 (D. Oregon 1972) Complaint filed January 26, 1972. Judgment enjoining price fixing and requiring MLS "admit to membership any person duly licensed as a real estate broker under the laws of the State of Oregon" and enjoining such MLS from "[r]efusing to accept for membership any real estate broker because said broker is not a member of any local, state or national realty board or association" filed December 5, 1972.

[106] *United States v. Greater Pittsburgh Board of Realtors*, 1973 U.S. Dist. LEXIS 13556 (W.D. Pa. 1973). May 21, 1973. Complaint filed June 21, 1972. Judgment enjoining price fixing and requiring reasonable board entry requirements filed July 27, 1972.

[107] *United States v. Real Estate Board of Rochester, N.Y., Inc.* 1974 U.S. Dist. LEXIS 5721 (W.D. N.Y.). Complaint filed 1974. Judgment enjoining price fixing filed November 19, 1974.

[108] *United States v. Real Estate Board of Metropolitan St. Louis,* 1973 U.S. Dist. LEXIS 10966 (E.D. Mo. 1973). Complaint filed December 22, 1972. Judgment enjoining price fixing and requiring reasonable board entry requirements filed November 21, 1973.

[109] *United States v. Metro MLS, Inc.*, 1974 U.S. Dist. LEXIS 7299 (E.D. Va. 1974). Complaint filed May 21, 1973. Judgment enjoining price fixing filed August 5, 1974.

[110] *People v. NAR I*, 120 Cal.App.3d 459 (1981).

[111] See cited cases at footnotes 101-104.

The Dept. of Justice filed two criminal cases later that decade for fixing commission rates. *United States v. Foley* resulted in a conviction of six corporations and three individuals, and was affirmed on appeal.[112]

More intriguing is the case against the Syracuse Board of Realtors,[113] a case whose only appearance in the record is the denial of several motions by defendants at the start of the case. As of this writing, the facts and later history of the case are unknown. It is possible the case arose from a fee schedule adopted by a Realtor association. If so, it would be significant that the district court regarded the creation of a fee schedule by a Realtor association to be a basis for a criminal prosecution.

Price fixing: DR formula

Chapter five describes price fixing through the DR formula, adopted at NAR's national convention in Honolulu on Nov. 15, 1972. As the graphic chronology shows, and described above, the DR formula price fixing commenced only one year after NAR adopted the "hands off" policy regarding Realtor association recommended fee schedules. This one-year gap represents the only time since 1944 to the present when NAR was not centrally involved in price fixing.

MLS tie-ins

Chapter three describes the practice of requiring MLS users to purchase Realtor association memberships in order to receive MLS service. Several courts have ruled that tying Realtor membership to MLS usage is a legal violation. Several large MSLs have come to the same conclusion, and opened their MLSs to any licensed realty agent or appraiser. In several of the regions where court decisions have declared MLS tying to be illegal, Realtor associations have repeatedly evaded those rulings. To our knowledge, no one has returned to court to obtain a ruling forcing the Realtor associations to do as the courts previously ordered. The following are examples of the evasions.

Florida, Georgia, Alabama In the *Thompson* decision the 11th Circuit Court of Appeals, part of the federal system, declared that the Sherman Act required that MLS be open whenever the MLS had market power.[114] All MLSs in that region permit brokers to join their MLSs without being Realtor members, but nearly all of those MLSs will not sell the brokers lockboxes or comparable data

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[112] *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979).

[113] *United States v. Greater Syracuse Bd. of Realtors, Inc.,* 449 F. Supp. 887 (N.D. N.Y. 1978).

[114] *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991)

unless they are members of Realtor associations. A short legal analysis shows these new tie-ins are just as illegal as the original MLS tie-ins: (1) the tie is mandatory and it's between two separate products, (2) the MLS, as seller of the tying product has a 100% monopoly in the tying product (lock boxes or comparable data or both), (3) the seller of the tying product benefits from sales of the tied product, and (4) the tie-in produces some non-trivial impact on interstate commerce.

California Under the California Supreme Court decision in *Palsson,* all MLSs are required to be open.[115] San Francisco Assn. of Realtors operates an MLS, and sells MLS services, lockboxes, and comparable data to users whether or not they are members of Realtor associations. Open, right? Here's the catch: if an MLS user wants comparable for more than six months back, Realtor membership is required. This evasion of *Palsson* results in a join rate of 90%, whereas nationally the join rate in open jurisdictions is only 70%.

Pennsylvania Under the Pennsylvania Supreme Court decision in *Collins,* all MLSs are required to be open.[116] In Philadelphia, Trend MLS sells MLS services and comparable data to non-members of Realtor associations, but not comparable data.

Price fixing through punitive fee splits

A punitive fee split occurs when a full-price broker offers less of the seller-agent commission to discount brokers than full-price brokers. Consider a market where the prevailing commission is six percent and listing brokers universally offer half the commission to the agent bringing the buyer. Now, assume a discount broker starts listing homes at four percent, offering half to the agent bringing the buyer, i.e., two percent. In some markets full-price brokers responded to the appearance of discount brokers by offering to the discount broker only what their agents would make if they sold the discount broker's listings – two percent in this example.

Twin Palms Realty was the victim of a punitive fee split in San Diego between Nov. 14, 1974 (when the punitive fee splits began) and 1975, the impact of the punitive fee split caused Twin Palms to raise its prices to the levels of the brokers implementing the policy. As described in the appellate decision finding that the San Diego Board of Realtors had committed price fixing by its involvement in the punitive fee split program,[117] full-price brokers across the country were concerned about the rise if discount brokers. On Nov. 10, 1974, NAR adopted a policy providing a formal way to adopt a punitive fee split: a broker could write a letter

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[115] *Marin County Board of Realtors v. Palsson*, 16 Cal.3d 920 (1976).

[116] *Collins v. Main Line Board of Realtors*, 304 A.2d 493 (Pa. 1973)

[117] *People v.NAR*, 120 Cal.App.3d 459, 479-488 (1981).

in advance to the discount broker advising that a lower commission would be paid than advertised in the MLS.[118] Four days later, a San Diego broker – who was present at the NAR meeting adopting the policy – wrote a letter to Twin Palms advising it would be paid less than advertised. Other letters followed, some specifically saying the policy would remain in effect till Twin Palms raised its rates. The executive director of the San Diego Board had also been present when NAR adopted the policy and had voted for it. The *People v. NAR* court ordered that the punitive fee split policy was illegal and should be enjoined.

Punitive splits were also held to be capable of fostering price fixing in a federal appellate case arising from Minnesota.[119] The court recited the classic behavior of brokers in their response to a discount broker: refusal to deal with the broker on cooperative sales; refusing to show the discount properties (also called steering); advising sellers of the discount broker that other brokers would steer their clients away from such properties, because the commission offered to other brokers was less than what could be obtained on other properties. The conduct described in this case arose in December 1973, soon after the discount broker Penne applied for membership.

From the *Twin Palms* and *Penne* cases, it appears that punitive fee splits were practiced as early as December 1973, received NAR sanction in November 1974, and were condemned by *People v. NAR* and *Penne* in 1981 and 1979, respectively. I know of no punitive fees splitting practices since those years. I therefore indicate the range of dates for price fixing by punitive fee splits between Dec. 1973 and Sept. 1981, a span of about eight years.

Territorial divisions

NAR has always enacted and enforced territorial divisions of the marketplace by local and state Realtor associations.[120] On application, NAR will grant a charter to any group of real estate agents in any geographic area not already taken by some other local Realtor association. NAR has a similar practice regarding state associations of Realtors. Before 1994, NAR's rules required realty agents joining a Realtor association to join the local Realtor association where his or her office was physically located.

In approximately 1994 NAR and the local and state associations modified their rules to create the "board of choice" rule.

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[118] *People v.NAR*, 120 Cal.App.3d at 482.

[119] *Penne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143 (8th Cir. 1979). The court reversed summary judgment for defendants, holding that disputed issues precluded summary judgment for defendants.

[120] I have no evidence that NAR has done so since the founding of NAR, but the events surrounding the change to board of choice suggest that the territorial allocations before and after that event were of very long-standing duration.

Under that rule realty agents desiring to, or forced to, join a local Realtor association could join any association without regard to physical location.

A brand-new local Realtor association could rapidly draw many customers from older associations in the same area by competing on price and service. Many of the realty agents who are forced against their will to join and pay dues to local and state associations would join a competing local association offering a substantial price discount. However, under rules in existence for decades, a new local association can only come into existence by claiming territory not covered by a charter from NAR. Virtually all of the inhabited land in the United States is subject to an existing jurisdictional claim by one of the 1,453 local Realtor associations. As a practical matter, the only time local geographic territory is available is when a local association goes bankrupt. In that event, the territory of the bankrupt association is taken over by neighboring local associations.

Name restraints

NAR controls what Realtor associations call themselves. Disputes between local associations over proposed names are decided by extra-judicial hearings before NAR. The rules hinder upstart associations from using names that are overly competitive. That is, the San Diego Association of Realtors could not rename itself the Southern California Board of Realtors because it "suggest[s] or impl[ies] that the association serves a significantly larger geographic area than has been demonstrated." Likewise, the California Association of Realtors is not allowed to rename itself the Western Association of Realtors, and compete with all the other state associations west of the Rockies. Under NAR rules, a group of realty agents cannot form their own Western Association of Realtors and be recognized as a regional Realtor association. Such standards, created by agreement between competing trade associations, serve no purpose except to destroy competition between those trade associations and protect them within their historic boundaries.

The rules providing for extra-judicial determination of name disputes displace the trademark rules provided by Congress under the Lanham Act, and the states under their respective trademark laws. In their stead, NAR has substituted rules that are designed to destroy competition, remain beyond judicial control.

Membership restrictions

There was a period ending in the 1980s when Realtor associations created artificial barriers to membership in Realtor associations. At that time, the real estate community assumed that to get multiple listing services, Realtor association membership was required. It was only later that legal perceptions changed to view the MLS as a separate product deserving protection from tie-ins. The Realtor association restrictions included such things as requiring realty agents to have a "favorable business reputation." The problem with this requirement was that a new agent had no reputation whatsoever, and the requirement either delayed their entry into membership, or permanently barred them. Other restrictions included the requirement that an agent operate a full time office in the community. That requirement had the effect of keeping brokers from expanding into new areas because of the entry barrier of operating a full-time office. Further entry barriers included a ban on part-time activities and the requirement that new members purchase a membership/share in the board of realtors for an artificially high price. Courts came to condemn all such artificial barriers, ending their use. But the battle paused, then moved to tie-in litigation.

3-in-1 tying of local, state, and national Realtor memberships

A realty agent or appraiser who wants to buy a membership in a local association of Realtors is required to purchase two other products: membership in a state association of Realtors and membership in the National Association of Realtors. Using the same analysis as above, it is easy to demonstrate that this tie-in is illegal. The key feature to observe is that the local association of Realtors will always have market power in the local community. Those three associations are three separate products as courts that have held that Realtor associations are competitors.

Secret trials

Realtor associations operate "grievance hearings" to prosecute people who violate NAR's code of ethics. There is no central authority for interpreting and implementing code of ethics. Interpretation is left up to individual panel members of competitors of the charged individual. Appeals can be heard by the board of directors of the MLS, but appeals can go no further. These individuals

have unfettered discretion to interpret the rules adversely to real estate agents.

Minimum services, bans on rebates

Much has been written about the minimum service standards and anti-rebate statutes enacted by several states. Congress should ban anti-rebate rules, as being a direct interference with price competition. I urge Congress to take that step as part of a Real Estate Brokerage Reform Act proposed in the final chapter.

7. Conclusions and recommendations

Organized real estate is beset with illegality. Despite spending over a trillion dollars a year on homes, consumers don't get what they deserve. Agents are victimized by their trade association, the National Association of Realtors.

The Department of Justice should bring criminal charges against NAR for its 1972 price fixing conspiracy that created the DR formula. New Realtor associations spring up each year and NAR actively makes sure each one is part of the conspiracy. Thus, many criminal acts took place within the statute of limitations.[121]

The Department of Justice should amend its complaint against NAR to end the many violations described in this report. The problem with the current complaint is that it does not get to root causes of NAR's misbehavior. DOJ spent over a year studying the original internet data exchange rules that were obviously illegal. DOJ advised NAR to change the rules. NAR stalled while many of its associations implemented the rules. When DOJ finally filed suit, NAR switched the rules within hours. An amended complaint has been filed, but even if DOJ wins (as it deserves), NAR can halt the illegal practice and nothing permanent will have been accomplished.

There are root causes to NAR's buccaneering. They start with its extraordinary income from illegal acts: MLS tie-ins, the DR formula, and the 3-in-1 membership tie-in. DOJ should de-fund NAR by ending these illegal practices.

Another root cause: NAR's irrepressible drive to violate the law. DOJ should sue NAR for §2 violations and dissolve NAR. Half a century of price fixing and monopolization is enough.

The FTC should aid the Department of Justice in these efforts.

[121] Unlike other conspiracy statutes, the Sherman Act does not require overt acts for liability, only evidence of agreement with the common scheme.

I am willing to aid the Department of Justice and Federal Trade Commission in such efforts.

Billions have been stolen from realty agents by NAR and its Realtor associations. Thus, another root cause of NAR's lawlessness is its observation that no matter how much it steals (since the Sherman Act is a criminal statute, it's not hyperbolic to say NAR has *stolen* billions) NAR never has to pay it back. From a pragmatic point of view, is NAR's behavior irrational? If not, public prosecutors should make it rational for NAR to obey the law. They should bring parens patriae[122] actions to recover these billions.

Realty agents and appraisers who believe they have been victimized by any of these practices should contact antitrust lawyers in their state and show them this report. There is enough here to educate any antitrust practitioner. I would be happy to aid any antitrust lawyer in the United States with a civil suit to recover damages for past violations. Realty agents and appraisers should demand their right to practice their profession without being kidnapped into the Realtor organization.

A dozen trade associations of realty agents and appraisers have been trampled by NAR and its allies. Those dozen associations deserve a much larger voice in American real estate. NAR's tying violations cause more than financial injuries; they drown out the point of view of these associations. These associations should stand up to NAR's bullying. They should protect their members from being forced to pay dues to NAR. This report shows how.

The victimized public should demand an end to these practices. Consumer organizations can be very effective. They could use the tools offered in this report to protect their members. Courts recognize organizations as having standing to assert violations to their members. These organizations have standing to seek injunctions against these practices. These organizations should also contact their public prosecutors and demand action. They should contact their Congressional representatives – but more on that below.

Steering: a structural problem that litigation can't solve.

Steering is a problem even litigation can't solve. As a litigator, that's a hard concession, but it's a fact of life. As has been observed in many cases, the common pattern for lower commission brokers is that other realty agents won't show their properties be-

[122] Actions by the state to recover for damages to its citizens.

cause the commission offered to the buyer's agent is less than that offered by full-commission brokers.

Buyers are never aware they are being steered. The buyer agent makes a selection of homes to show, and since the public sources of homes never show the commission offered, buyers are never aware when their agents select out the homes with lower-priced commission offerings.

There's nothing illegal about steering. There is a bedrock principle in antitrust called the *Colgate* doctrine.[123] It stands for the proposition that you can choose who you want to deal with. If two merchants offer different propositions, you're not breaking any laws by dealing with the more lucrative offer. Thus, when a buyer agent offers to select and show homes to a buyer, the agent is free to ignore homes with lower commissions. Many agents proceed on exactly this basis, a phenomenon that has been well documented.

Of course, a buyer could object that steering prevents them from seeing all the homes on the market. The buyer could say there's a fiduciary duty on the part of the agent to show all homes. The buyer could say they feel deceived. Against those protests, in a lawsuit by a steered buyer against her erstwhile agent, the agent would probably win – for a variety of reasons, the *Colgate* doctrine being just one.

I'm not aware of the steering phenomenon existing in any other markets. I find it extraordinary that steering is allowed to exist, with all its pernicious effects. The reason that steering exists is that the agent for the buyer is paid through (usually) half the commission charged by the seller's agent.

There are very few markets that rely on this double-broker phenomenon. The only one that comes to mind is the stock brokerage market, but that market is heavily regulated to prevent such biased practices – a thought I'll return to in just a moment.

The double-broker split-commission situation creates the opportunity for buyer brokers to punish lower-priced seller brokers by steering away from their homes. Steering can be used to punish seller brokers for *any* kind of perceived infraction of local practices. Steering has also been used by racially bigoted agents to enforce discriminatory housing patters.

I offer the following: it is a fundamental structural flaw for any market to permit competitors to have the unilateral power to punish another competitor for competing aggressively. This, then, is the central answer to why brokerage markets are so non-competitive. The lack of brokerage competition is not entirely the violations of law described in earlier chapters. If every violation in

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[123] *United States v. Colgate & Co.,* 250 U.S. 300 (1919).

chapters one through five was cured, there would still be steering as a fundamental feature of this double-brokerage market.

It's time to end steering.

National MLS – the proposal

I propose a national MLS with the following fundamental features:

1. Every realty agent who takes a listing would be required to place the listing in the national MLS, unless the owner directed otherwise in writing.[124]

2. The MLS would be open to every listing of every kind, including by fsbos. I'm aware that advocating fsbo access to the MLS is high treason to every right-thinking realty agent, my clients included. But the fsbo war has already been lost; there are a million fsbo brokers who can readily put any fsbo in any MLS. So I say to realty agents, let's move on.

3. The information in the national MLS would be two-track: licensed agents would still have sole access to certain security information ("the key is under the mat") and a small set of highly confidential data. But beyond that, all information would be freely available to anyone with a browser.

4. Once the listing was placed in the national MLS, all information, including descriptions and photos, would be without copyright protection so that the listing could be freely dispersed throughout the real estate world.

5. Suitable rules enforcement would assure that listings, status changes, and final sale prices were all timely and accurately placed.

Real Estate Brokerage Reform Act – or state proposition

There is obviously much more to this idea than these five principles; I have a detailed specification in draft. However, these are enough to demonstrate that a national MLS would make brokerage markets truly competitive.

The public deserves a national MLS.

Congress has devoted extraordinary efforts to assure the integrity of our national securities markets. The public deserves the same integrity in real estate markets. As it stands now, our real estate markets lack integrity. They will never attain integrity so long as agents can steer without detection by their clients. Because litigation can never root out steering, and a national MLS can, Con-

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[124] Entry in additional MLSs would, of course, be permitted, so long as the national MLS was one of the ones used.

gress should take steps to implement a national MLS. At the same it time it can ban anti-rebate laws and cure other industry vices.

If Congress does not act on this suggestion, it can be started at a state level and spread to national adoption. About half the states have an initiative process. In California, where I live, we locals love the Propositions. Often, the most exciting things on the ballot are Propositions. Thus, one or several states could require licensed realty agents to place all listings in a certain central MLS with the features described above. The MLS could reside anywhere. As it stands now, the nation's largest MLS firm, FNIS, operates hundreds of MLSs out of a single facility near Kansas City. Another leader, Rappatoni, operates out of Los Angeles. There could be a single national MLS and all states could adopt it.

The costs of the national MLS would be low. There are many possible implementations, but I see a basic subscription fee of $10 per month, paid by credit card. Buyers, sellers, realty agents, and appraises would pay the same fee for unlimited use. Current MLSs also operate on an unlimited usage basis. As I see it, advertising revenues would add substantially to the national MLS which would lower user costs. By contrast, current retail MLSs user fees vary between $30 and $50 per month. Wholesale prices are only $5 to $8 per month. The difference between wholesale and retail prices is the cost of overhead for the Realtor association of broker-owned MLS organization. As many web giants have proved, specialized advertising is currently huge – so ad revenues should substantially reduce user fees.

National MLS – the benefits

Let's assume litigation has solved all the trade association abuses and the non-solicitation rule. Here is my projected impact of a national MLS, either enacted by Congress or started by a leading state.

The state and soon-to-be national MLS would render competing MLSs redundant.[125] The latter would disappear because a realty agent would get the entire state, not just a sliver of it, and its price would be a fraction of the price of the old system.

With commission information fully exposed, and powerful search and filter tools in the hands of buyers, steering would be detected much sooner. I predict it would disappear as a significant feature of the market.

[125] But there could be parallel MLSs sharing core data, with a superset of data specific to specialty markets, such as condos, residential income property, farmland, etc.

The horror all realty agents foresee would occur: buyers and sellers would find each other more often. But *what is not foreseen by realty agents* is that buyers and sellers know real estate is complicated and they want to buy consulting services by experienced real estate agents. So, instead of completely doing away with realty agents (a frequently voiced terror of realty agents), realty agents will be integral to the transaction, but in a greater variety of ways than they are now.

I talk to a lot of real estate agents. All of them share the same nightmare of real estate without realty agents, always triggered by an MLS open to fsbos. I also talk to a lot of buyers and sellers, and they don't see themselves walking through the process without professional help, even if they had an MLS open to fsbos. In other words, there is a total disconnect between these two visions. Buyers and sellers want realty agents, but agents don't know this.

But make no mistake: a national MLS involves many fewer realty agents. The market today has an amazing over-capacity. That will be cured with a national MLS. I do the math below.

Creating a national MLS would be trivial compared to maintaining the integrity of the securities markets. As I see it, overseeing the national MLS would be as uncomplicated as overseeing ICANN, the national body that assigns and governs the top-level domain names and the root server for the internet.[126] For the federal government, it's mostly a hands-off operation. The difference is that the folks who invented and run the internet don't have rap sheets. The security industry bans financial swindlers from the securities industry for life. So letting Realtor associations run an MLS is like letting banned-for-lifers run the New York Stock Exchange, or putting child molesters in charge of day care centers. Realtor associations had a fair chance to shape real estate markets and consistently abused the opportunity.

Who should run the national MLS? It's premature to answer the question. Better to reach a consensus as to the urgency for a national MLS, and its features. Oversight responsibility for the national MLS will naturally emerge from the leadership in forming it.

With a national MLS, I see real estate brokerage evolving to be more consulting-oriented. The following financial results are likely, in my view.

Let's start with the basics: it only takes 20 hours to represent a buyer in a transaction, and another 20 hours to represent the seller.[127] In 1982, the figures were 40 hours for sellers and 30

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126 Internet Corporation for Assigned Names and Numbers, icann.org.

127 2002 California Assn. of Realtors member survey.

hours for buyers.[128] The drop in time reflects a compound efficiency growth of 3.3% per year for twenty years.

5.1 million homes were sold in 2000. At 40 hours per transaction, that's 204 million hours. Let's assume the average productive person works 75% of their time on productive activities and 25% of the time is spend on overhead-type functions.[129] Assume also that realty agents can achieve the same levels. That means a realty agent working 2,000 hours a year (50 weeks a week, forty hours a week, just to keep the math simple) will have 1,500 productive hours. Dividing total hours required, 204 million, by 1,500 yields 136,000 agents necessary to do real estate in America.[130] Since it takes 40 hours per transaction, 1,500 hours of productive work means about 38 transactions per year – a huge jump from today's laughable productivity of six homes per year.

In 2000, there were 787,000 agents. Thus, in my forecast, the number of realty agents would drop to 17% of the current number – 83% of realty agents would become unnecessary and would move to other occupations. This is the central nightmare of many agents. But just as no one mourns the passing of slide rules and those who made them, the world will adjust to fewer realty agents.

Brokers currently earn a median $52,800 yearly.[131] In the transition to the new era, the surviving brokers will possess higher talent and efficiency than average. For their skills, I'd expect them to earn more, on average, than now. I assume a 30% income jump, on average, which would be $68,640. That's net, after expenses.

Let's assume total overhead expenses are 50% of total revenues, a not uncommon figure. Thus, our average broker of the future will need to gross $137,280 per year. To collect that, she will spread those billings over 38 transactions, or $3,613 per transaction. Since the median price of a home in 2000 was $139,000, that fee would be 2.6%. That's exactly half of what commissions are now.[132]

Our broker will offer consulting services billed hourly along with her usual contingent commission work. $137,280 per year

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[128] Calif. Assn. of Realtors member survey for approx. 1982.

[129] The folks I've tried this analysis on agree 75% productivity is not unreasonable for their own time. As I use it, productive time is time spent on doing the essential mission of the job. Unproductive time is time spent on such things as fixing the broken copy machine, looking for new business, and haggling with the landlord.

[130] We could add other types of real estate transacted: residential income properties, lots and land, commercial. Doing so has only a slight impact on the overall conclusions.

[131] 2004 NAR member survey.

[132] The GAO report states that the average commission is now is 5.1%.

gross for 1,500 hours work is $92 per hour. In my opinion, buyers and sellers would be willing to pay that and a lot more for the skills of an experienced real estate professional to guide them through life's biggest purchase.

In conclusion, my opinion is that eliminating trade association violations, the non-solicitation rule, and the realtor trademark, and creating a national MLS would halve commission rates, increase agent incomes by 30%, and create a real estate market characterized by integrity, efficiency, and competitiveness.

Respectfully submitted,

November 23, 2005 David Barry

Appendix to Nine Pillars of the Citadel

Realtor entry in Oxford English Dictionary, 1998 ed.

Realtor ('ri:əltə(r)). *U.S.* Also realtor. [f. REALT(Y[2] +-OR.] A proprietary term in, the U.S. for a real-estate agent or broker who belongs to the National Association of Realtors (formerly the National Association of Real Estate Boards). Also *gen.*, an estate agent.

1916 C. N. CHADBOURN in *Nat. Real Estate Jrnl. 15* Mar. III/2, I propose that the National Association adopt a professional title to be conferred upon its members which they shall use to distinguish them from outsiders. That this title be copyrighted and defended by the National Association against misuse…I therefore, propose that the National Association adopt and confer upon its members, dealers in realty, the title of *realtor* (accented on the first syllable). ***1922*** S. LEWIS *Babbitt* xiii. *157* We ought to insist that folks call us 'realtors' and not 'real-estate men'. Sounds more like a reg'lar profession. *1925* O.W. HOLMES *Let. 17* Dec. in *Holmes-Laski Lett.* (*1953*) *I. 807* These realtors, as they call themselves, I presume are influential. *1929 Sun* (Baltimore) *8* Jan. *26/3 (heading)* Realtors doubt plan for Fox Theater here. ***1931*** *Evening Standard 25* Apr. *15/2 (heading)* 'Realtor' recommends Surrey. *1934* E. POUND *Eleven New Cantos* xxxv. *23* His Wife now acts as his model and the Egeria Has, let us say, married a realtor. *1942 Amer. Speech* XVII. *209/2* The ambitious realtor's favorites, the over-worked [street names] Grand, Broadway, and Inspiration. *1948 Official Gaz. (U.S.* Patent Office) *14* Sept. *340/2* National Association of Real Estate Boards, Chicago, Ill…. Service Mark. *Realtors.* For services in connection with the brokerage of real estate.. . Claims use since Mar. *31, 1916*. ***1962*** R. BUCKMINSTER FULLER *Epic Poem on Industrialization 139* The organized religions The world's premier realtors. ***1969*** *Parade* (N.Y.) *14* Dec. *18/2* The realtor who sold most of the property to the hippies has had her office windows smashed. ***1970*** *Globe* & *Mail* (Toronto) *25* Sept. *40/2* (Advt.), Metro wide established realtor with country wide referral contacts. ***1973*** R. C. DENNIS *Sweat of Fear* ix. *59* The realtor said… 'Let me point out some of the features of this lovely, lovely home.' ***1979*** *Tucson Mag.* Apr. *33/3* Included are..bankers and lawyers; social and political activists; professors and artists, renovators and historians, journalists and realtors.

Table 1: NAR members, and agents; agents in labor force, and homes sold 1908 - 2005

	NAR Members	
Year	Total	Agents
1908	1,646	1,646
1909	1,646	1,646
1910	2,164	2,164
1911	3,000	3,000
1912	4,700	4,700
1913	6,000	6,000
1914	6,000	6,000
1915	6,000	6,000
1916	6,000	6,000
1917	6,417	6,417
1918	6,700	6,700
1919	7,500	7,500
1920	10,077	10,077
1921	15,262	15,262
1922	16,377	16,377
1923	17,504	17,504
1924	19,435	19,435
1925	20,729	20,729
1926	24,166	24,166
1927	23,148	23,148
1928	21,403	21,403
1929	20,174	20,174
1930	18,918	18,918
1931	16,798	16,798
1932	13,046	13,046
1933	12,769	12,769
1934	13,328	13,328
1935	10,513	10,513
1936	11,688	11,688
1937	12,724	12,724
1938	13,619	13,619
1939	13,824	13,824
1940	14,162	14,162
1941	14,859	14,859
1942	15,632	15,632
1943	18,069	18,069
1944	20,083	20,083
1945	26,797	26,797
1946	28,488	28,488
1947	35,241	35,241
1948	40,724	40,724
1949	43,534	43,534
1950	43,503	43,503
1951	44,520	44,520
1952	47,224	47,224
1953	49,678	49,678
1954	51,574	51,574

NAR Agent members: taken as 95% of NAR members beginning in 1967, 100% before.

			Unadjusted Realty agents in labor force	NAR agents as a percent of agents in US	Resale single-fam. homes sold	Homes sold per agent
1955	53,689	53,689				
1956	59,740	59,740				
1957	61,645	61,645				
1958	63,500	63,500				
1959	66,644	66,644				
1960	68,818	68,818				
1961	70,690	70,690				
1962	73,029	73,029				
1963	75,552	75,552				
1964	79,396	79,396				
1965	82,234	82,234				
1966	84,583	84,583				
1967	84,971	84,971				
1968	87,871	87,871				
1969	91,625	91,625				
1970	94,625	89,894			1,612,000	
1971	99,382	94,413			2,018,000	
1972	108,944	103,497	349,000	30%	2,252,000	6.5
1973	117,965	112,067	378,125	30%	2,334,000	6.2
1974	134,362	127,644	407,250	31%	2,272,000	5.6
1975	435,485	413,711	436,375	95%	2,476,000	5.7
1976	485,806	461,516	465,500	99%	3,064,000	6.6
1977	570,470	541,947	494,625	110%	3,650,000	7.4
1978	683,464	649,291	523,750	124%	3,986,000	7.6
1979	755,650	717,868	552,875	130%	3,827,000	6.9
1980	761,391	723,321	582,000	124%	2,973,000	5.1
1981	695,108	660,353	562,000	118%	2,419,000	4.3
1982	617,521	586,645	534,000	110%	1,990,000	3.7
1983	627,444	596,072	570,000	105%	2,697,000	4.7
1984	682,839	648,697	614,500	106%	2,829,000	4.6
1985	711,226	675,665	659,000	103%	3,134,000	4.8
1986	770,885	732,341	737,000	99%	3,474,000	4.7
1987	806,351	766,033	778,000	98%	3,436,000	4.4
1988	808,809	768,369	792,000	97%	3,513,000	4.4
1989	822,935	781,788	772,000	101%	3,325,000	4.3
1990	810,607	770,077	778,000	99%	3,219,000	4.1
1991	763,965	725,767	712,000	102%	3,186,000	4.5
1992	743,921	706,725	719,000	98%	3,479,000	4.8
1993	729,266	692,803	710,000	98%	3,786,000	5.3
1994	729,397	692,927	708,000	98%	3,916,000	5.5
1995	719,673	683,689	718,000	95%	3,888,000	5.4
1996	718,599	682,669	737,000	93%	4,196,000	5.7
1997	716,078	680,274	781,000	87%	4,382,000	5.6
1998	718,483	682,559	749,000	91%	4,970,000	6.6
1999	761,181	723,122	769,000	94%	5,205,000	6.8
2000	766,560	728,232	787,000	93%	5,113,000	6.5
2001	803,803	763,613	811,000	94%	5,296,000	6.5
2002	876,195	832,385	839,000	99%	5,566,000	6.6
2003	976,960	928,112	850,000	109%	6,100,000	7.2
2004	1,102,250	1,047,138				
2005	1,200,000	1,140,000				

The Realtors' Dues Formula-
A Fair Share

William D. North
Senior Vice President and General Counsel
NATIONAL ASSOCIATION OF REALTOR®S

The delegates to the 1972 Convention of the NATIONAL ASSOCIATION OF REALTORS®, meeting in Honolulu, Hawaii, overwhelmingly approved a new dues formula for computing the dues of REALTOR® Members. This dues formula called for assessment of REALTOR® dues computed on the basis of the size of the REALTOR®'s organization, i.e., on the number of individuals licensed with the REALTOR®.

The number of individuals licensed with the REALTOR® was selected as the most accurate and equitable method of assessing dues proportional to the membership benefits and services accruing to the REALTOR® and through the REALTOR® to all individuals licensed with the REALTOR® in the practice of real estate. Other possible methods of computing the REALTOR®'s dues that were considered included the sales volume of the REALTOR®'s firm, the number of offices, and other such measures. However, after extensive and careful deliberation, it was determined that the number of individuals licensed with the REALTOR® was the fairest measure of benefits accruing to the REALTOR® from his Membership, and this was selected as the foundation for Membership dues in the Association.

At the same time, two contingent provisions were adopted and approved as a part of the REALTOR® dues formula.

First, it was recognized that if some or all of the individuals licensed with the REALTOR® also held REALTOR® or REALTOR-ASSOCIATE® Membership, and paid dues for such Membership, it would not be equitable to also charge the REALTOR® in respect to such persons; so a credit setoff against the REALTOR®'s dues obligation was provided for each individual licensed with the REALTOR® who voluntarily held REALTOR® or REALTOR-ASSOCIATE® Membership as a matter of personal option and election.

Secondly, in respect to any given firm comprised of more than one REALTOR® principal, it was specified that only one (1) of the principals designated by the firm would be charged on the basis of the size formula. All other principals of the firm would be charged only a base amount of dues as determined and not charged any dues in respect to the number of individuals licensed with the firm.

Inasmuch as only on REALTOR® principal designated by the firm was obligated to pay dues based on the size of the firm, the formula adopted has also been referred to as the "designated REALTOR® dues formula.: Since the designated REALTOR® is given a credit against his dues obligation for each individual licensed with him who holds REALTOR® or REALTOR-ASSOCIATE® Membership, his dues are then ultimately computed on the basis of

(1) A base amount as determined by the local Board
(2) A further amount as determined times the number of individuals licensed with the REALTOR® who do not hold Membership in the Board.

Thus, in the final analysis, the designated REALTOR® pays dues (his own personal dues) for Membership benefits and services received by the REALTOR® which are proportional to the number of such persons affiliated with the REALTOR® who benefit from his REALTOR® Membership and its benefits and services, but do not personally hold Membership and pay no dues.

It must be clearly understood that the designated REALTOR® is not paying dues for individual affiliated with him who elect not to be Board Members. They are not Board Members and therefore have no dues payable to the Board. Any benefits or Board services that such licensees realize accrue to the solely through their relationship with the designated REALTOR® and are not provided to them directly by the Board. Rather, the REALTOR® pays his dues (his own and not the dues paid for others) as computed on the number of individuals licensed with him, but who are not Members of the Board.

It should be pointed out that this formula was adopted by the National Association in 1972 for REALTOR® Membership in the National Association and retained as the basis for REALTOR® Membership in the National Association until November 1978, when the National Association revised its Bylaws in respect to Membership dues. In November, 1978, the National Association revised Article II of its Bylaws to require payment of dues only by Member Boards.

The Bylaws as revised do not provide for any dues payable directly by REALTORS® and REALTOR-ASSOCIATE®s to the National Association. Rather, when a Member Board has paid its Member Board dues, the REALTOR® and REATOR-ASSOCIATE® Members of the Board as reported by the Board are automatically deemed to be REALTORS® and REALTOR-ASSOCIATE®s of the National Association. (It is recommended to State Associations that they have similar dues requirements of Member Boards only, but this is a determination of the State Association and is determined as stated by their respective Bylaws.)

However, even though the National Association revised its Bylaws in 1978 to require dues of Member Boards only, the dues obligation of Member Boards is computed upon "…the number of REALTOR® Members of the Board and the number of individuals licensed with REALTOR® Members by the Board who are not themselves REALOR® Members" includes both REALTOR-ASSOCIATE®s and those individuals licensed with REALTOR® Members of ht Board who are not Board Members. In other words, the Member Board dues obligation remains based upon the premise that the benefits and services which flow from the National Association to REALTORS® and those affiliated with them is most equitably measured by size of the REALTOR®'s organization (number of individuals licensed with the REALTOR®).

In turn, most Member Boards have adopted and utilized the designated REALTOR® dues formula (i.e., the size formula) on the local level and look to the designated REALTOR® for payment of dues calculated on the number licensees who hold Board Membership. The dues provision of the Board Bylaws is applicable, of course, only to those individuals licensed with the REALTOR® in any real estate firm in which the REALTOR® holds an ownership interest, provided that such dues obligation does not duplicate dues paid by another principal (designated REALTOR®) of any such firm.

To identify clearly the intent of the National Association Bylaws with respect to the dues obligation of the Member Board, and in turn to clarify the basis upon which the Member Board might appropriately establish its dues provisions for designated REALTOR® Members of the Board, the National Association amended Article II, Section 1 (B) of the Bylaws of the National Association to contain the following provision:

"An individual shall be deemed to be licensed with a REALTOR® __________ the license of the individual is held by a REALTOR® or by an entity in which the REALTOR® has a direct or indirect ownership interest and which is engaged in soliciting and/or referring clients or customers to the REALTOR® for consideration on a substantially exclusive basis, provided that such licensee is now otherwise included in the computation of dues payable by the principal, partner, or corporate officer of the entity."

"Member Boards are advised that with respect to "direct ownership interest" specified above, this should be self-explanatory. It is ownership in whole or in part, by the REALTOR® as the principal or a principal of a real estate firm. The term, "indirect ownership" would include ownership held through a "holding company," a "trust," or other legal device which may provide effective ownership control.

The dues obligation does not apply to situations in which there is no ownership relation, direct or indirect, even though a beneficial interest or benefit may exist.

If a question should arise as to the application and enforcement of the local Board dues with respect to the dues obligation of a designated REALTOR® as related to a real estate firm, the following is recommended:

(1) Invite the REALTOR® to attend a meeting of the Membership Committee, and in a friendly, constructive atmosphere, ask the REALTOR® to explain his relationship to any real estate firm about which the question has arisen.

(2) After a firsthand discussion with the REALTOR®, determine and explain the REALTOR®'s dues obligation. If he agrees, the question is resolved. If he does not agree, the matter should be reviewed by Board Legal Counsel prior to recommendation of the Membership Committee to the Board of Directors. Board Legal Counsel should specifically review the dues provision of the Board Bylaws to ensure that they support any recommendation to be made to the Directors.

If it appears that the REALTOR® may challenge the recommendation of the Membership Committee, and may litigate against the Board, the Member Policy Division of the National Association should be informed immediately and no final action should be taken prior to a complete review by the State and National Association.

From NAR's Code of Ethics

Article 16
REALTORS shall not engage in any practice or lake any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS have with clients. *(Amended 1/04)*

Standard of Practice 16-1
Article 16 is not intended to prohibit aggressive or innovative business practices which are otherwise ethical and does not prohibit disagreements with other REALTORS involving commission, fees, compensation or other forms of payment or expenses. *(Adopted 1/93, Amended 1/95)*

Standard of Practice 16-2
Article 16 does not preclude REALTORS m making general announcements to prospects describing their services and the terms of heir availability even though some recipients may have entered into agency agreements or other exclusive relationships with another REALTOR. A general telephone canvass, general mailing or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed "general" for purposes of this standard. *(Amended 1/04)*

Article 16 is intended to recognize as unethical two basic types of solicitations:

First, telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively Listed their property with another REALTORS; and

Second, mail or other forms of written solicitations of prospects whose properties are exclusively listed with another REALTOR when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, "for sale" or "for rent" signs, or other sources of information required by Article 3 and Multiple Listing Service rules to be made available to other REALTORS under offers of subagency or cooperation. *(Amended 1/04)*

Standard of Practice 16-3
Article 16 does not preclude REALTORS from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements. However, information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other REALTORS to whom such offers to provide services may be made. *(Amended 1/04)*

Standard of Practice 16-4
REALTORS shall not solicit a listing which is currently listed exclusively with another broker. However, if the listing broker, when asked by the REALTOR refuses to disclose the expiration date and nature of such listing; i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client, the REALTOR may contact the owner to secure such information and may discuss the terms upon which the REALTOR might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing. *(Amended 1/94)*

Case #16-2: Respect for Agency (Revised Case #21-6 May, 1988. Transferred to Article 16 November, 1994.)

Client A gave a 180-day exclusive right to sell listing of a commercial property to REALTOR B, specifying that no "for sale" sign was to be placed on the property. REALTOR B and his sales associates started an intensive sales effort which after three months, had produced no offer to buy. But it had called attention to the fact that Client A's property was for sale. When REALTOR C heard of it, he called on Client A, saying that he understood that his property was**,** or soon would be, for sale, and that if Client A would list the property with him exclusively he felt confident that he could provide prompt action. Client A said the property was exclusively listed with REALTOR B under a contract that still had about 90 days to run.

"In that case," said REALTOR C, "you are bound for the next 90 days to REALTOR B. I have a really outstanding organization, constantly in touch with active buyers interested in this class of property. I am in a position to render you an exceptional service, and I will plan to call you again in 90 days or so."

The property remained unsold during the term of REALTOR B's listing contract. REALTOR **C** called again on Client A, and obtained his assurance that he would sign an exclusive listing of the property upon expiration of the listing contract.

When REALTOR B called on Client A on the last day of the listing contract to seek its renewal, Client A told him of REALTOR C's two visits. 'I was impressed by REALTOR C's assurance of superior service" Client A told REALTOR B, "and in view of the fact that my listing with you produced no definite offer in the 180-day period, I have decided to give REALTOR C a listing tomorrow."

REALTOR B filed a complaint with the Grievance Committee of the Board, outlined the facts, and charged that REALTOR C's conduct had been inconsistent with Article 16 of the Code of Ethics.

The Grievance Committee referred the matter to the Professional Standards Committee.

At the conclusion of the hearing, the panel found that REALTOR C had violated Article 16 by failing to respect the exclusive agency of REALTOR B. The panel's decision advised that REALTOR C's original contact with Client A, made at a time when he had no knowledge of REALTOR B's exclu-

sive listing, was not in itself unethical, but that as soon as he learned of REALTOR B's status as the client's exclusive agent he should have taken an attitude of respect for the agency of another REALTOR, and refrained from any effort to get the listing until after the expiration date of the original contract.

REALTOR C's attitude of regarding the client's relationship with REALTOR B as a kind of misfortune, of presenting his own service as superior to REALTOR B's, and of suggesting to the client that, having a better capacity to serve him, he could wait until REALTOR B's listing had expired, was, the panel said, contrary to the respect for another REALTOR'S exclusive agency required by Article 16.

The Hearing Panel's decision further advised REALTOR C that he would have conducted himself in accord with Article 16 if, upon learning of REALTOR B's status as exclusive agent, he had expressed his willingness to cooperate with REALTOR B in the sale of Client A's property.

Three open MLS cases currently being prosecuted

Barry & Associates is currently prosecuting three cases aimed at allowing realty agents and appraisers to purchase MLS services without being forced to purchase Realtor memberships. These cases also seek to end enforcement of the non-solicitation rule.

The cases and their status are indicated below.

Buyer's Corner Realty v. Northern Kentucky Multiple Listing Service, No. 04-37-WOB, is now pending in the U.S. District Court for the Eastern District of Kentucky, assigned to the Honorable William O. Bertelsman. This case, filed Feb. 20, 2004, now has cross-motions for summary judgment scheduled for argument on Dec. 1, 2005.

Prencipe v. Spokane Association of Realtors, No. 2:04-cv-00319-LRS, is now pending in the U.S. District Court for the Eastern District of Washington, assigned to the Honorable Lonny R. Suko. Summary judgment motions are to be filed by February 15, 2005. Class certification is to be determined following motions for summary judgment. Trial is scheduled for July 10, 2006.

Reifert v. South Central Wisconsin MLS Corporation, No. 04-C-0969-S, is now pending before the Seventh Circuit Court of Appeals. In this case, filed originally in the U.S. District Court for the Western District of Wisconsin, the Honorable John C. Shabaz entered summary judgment for all defendants on the sole ground that the National Association of Realtors did not compete with any of the dozen trade associations of realty agents or appraisers. Judge Shabaz reasoned that since NAR had no competitors, the MLS tie-in could harm no competition in the tied product market. Plaintiff Reifert has filed his opening brief and defendants have filed their response brief. Reifert's reply brief is due Dec. 5, 2005. Oral argument before the Seven Circuit is projected for spring 2006.

Calculations

Table 1: Estimate of Realtor dues coerced through MLS tie-ins							
		Average Dues per Member				Total Dues in	Coerced dues
Year	Realtors	Local	State	National	Total	$ Millions	$ Millions
2000	766,560	150	110	79	339	260	65
2001	803,803	150	110	79	339	272	68
2002	876,195	160	117	84	361	316	79
2003	976,960	160	117	84	361	353	88
2004	1,102,250	160	117	84	361	398	99
2005	1,248,251	160	117	84	361	450	112
Totals --						$2,049	$510

Notes

Because most of California, Washington, Alaska, and Massachusetts have open MLSs, total Realtor dues are multiplied by 83%. The involuntary portion of these dues are multiplied by 30% to reflect the observed non-join rate.

2005 dues were compiled in 12 open and 46 closed MLS jurisdictions.

Dues for 2000 - 2004 were assumed to follow the pattern for NAR dues, i.e., dues for 2000 and 2001 were at 94% of later years.

Table 2: Computation of Population Residing in Four Mostly-Open MLS States		
Populations, in thousands		
US		290,810
Alaska	649	
California	35,484	
Massachusetts	6,433	
Washington	6,131	
Total of states with mostly open MLSs	48,697	48,697
Percentage of US population in states with mostly open MLSs		17%
Source: 2005 Statistical Abstract of the United States, Table 17		

Table 3: Trade association shares, six major professions, 1997 data				
Field	Association	Members	Universe	Share of Universe
Architecture	American Institute of Architects	65,000	160,000	41%
Mech'l engineering	American Soc. of Mechanical Engineers	100,000	350,000	29%
Medicine	American Medical Association	296,000	667,000	44%
Life insurance sales	National Assn. of Life Underwriters	103,000	625,000	16%
Law	American Bar Association	385,000	880,000	44%
Realty sales	National Assn. of Realtors	680274	781000	87%

2005 Realtor assn. dues in 12 open and 46 closed regions

The following are 2005 Realtor association dues as reported by personnel at the respective Realtor associations, or posted on web sites of the Realtor associations. The regions are reported at the county level, and the Realtor associations are the ones whose jurisdictions correspond to those counties.

Open MLS Regions			**Local**	**State**	**NAR**	**Total**	**Contact**
Jefferson County	Birmingham	Alabama	113	134	84	331	Susan Nguyen
Anchorage Municipality	Anchorage	Alaska	150	185	84	419	internet
Pima County	Tucson	Arizona	90	150	84	324	Kelly
Fresno County	Fresno	California	80	135	84	299	Kirstie
Los Angeles County	Los Angeles	California	150	135	84	369	Chris
Sacramento County	Sacramento	California	180	135	84	399	Betty
Sonoma County	Santa Rosa	California	260	135	84	479	Marnie Pointdexter
Denver County	Denver	Colorado	184	110	84	378	Joyce
Suffolk County	Boston	Massachusetts	28	138	84	250	Arlene
Virginia Beach City	Virginia Beach	Virginia	179	100	84	363	Cindy
Pierce County	Tacoma	Washington	159	122	84	365	Keisha
King County	Seattle	Washington	144	122	84	350	Scott/accounting
12 Open MLS regions							

Closed MLS Regions	**Major City**	**State**	**Local**	**State**	**NAR**	**Total**	**Contact**
Mobile County	Mobile	Alabama	150	134	84	368	Tommi
Pulaski County	Little Rock	Arkansas	150	100	84	334	Melissa
Maricopa County	Phoenix	Arizona	95	150	84	329	Dennis
Miami-Dade County	Miami	Florida	105	140	84	329	Louis
Fulton County	Atlanta	Georgia	188	58	84	330	internet
Marion County	Indianapolis	Indiana	220	120	84	424	internet
Polk County	Des Moines	Iowa	156	90	84	330	Aveen
Cook County	Chicago	Illinois	130	99	84	313	Alex
Honolulu County	Honolulu	Hawaii	189	161	84	434	Terri
Sedgwick County	Wichita	Kansas	155	165	84	404	internet
Fayette County	Lexington	Kentucky	800	98	84	982	internet
Orleans Parish	New Orleans	Louisiana	74	100	84	258	internet
Baltimore County	Baltimore	Maryland	264	124	84	472	Pat
Kent County	Grand Rapids	Michigan	300	86	84	470	Sheila
Wayne County	Detroit	Michigan	150	86	84	320	Sharon
Anoka County	St. Paul	Minnesota	127	97	84	308	Linda Smith
Hennepin County	Minneapolis	Minnesota	99	97	84	280	internet
Hinds County	Jackson	Mississippi	121	125	84	330	Doris
Jackson County	Kansas City	Missouri	110	120	84	314	internet
St. Louis County	St. Louis	Missouri	97	128	84	309	Judy
Douglas County	Omaha	Nebraska	165	159	84	408	Brenda
Lancaster County	Lincoln	Nebraska	195	159	84	438	Holly Goodrich
Clark County	Las Vegas	Nevada	100	112	84	296	Avia
Essex County	Newark	New Jersey	95	69	84	248	Sheryl Pearson
Hudson County	Jersey City	New Jersey	87	69	84	240	Peggy

Bernalillo County	Albuquerque	New Mexico	194	175	84	453	Shanna Martinez
Guilford County	Greensboro	North Carolina	290	95	84	469	Rachel
Mecklenburg County	Charlotte	North Carolina	109	95	84	288	Liz Hughes
Wake County	Raleigh	North Carolina	171	95	84	350	Lisa
Cuyahoga County	Cleveland	Ohio	165	100	84	349	Dennis
Franklin County	Columbus	Ohio	167	100	84	351	Peggy Austerburg
Lucas County	Toledo	Ohio	137	100	84	321	Ryan Tahatoch
Montgomery County	Dayton	Ohio	164	100	84	348	Kathleen Pitchel
Hamilton County	Cincinnati	Ohio	119	100	84	303	Kathy
Oklahoma County	Oklahoma City	Oklahoma	125	95	84	304	Nicky Fitch
Tulsa County	Tulsa	Oklahoma	106	95	84	285	Gloria Waddle
Multnomah County	Portland	Oregon	109	116	84	309	Linda
Davidson County	Nashville	Tennessee	246	70	84	400	Stephanie
Shelby County	Memphis	Tennessee	160	70	84	314	Sharon
Dallas County	Dallas	Texas	135	92	84	311	Chris Sconce
Harris County	Houston	Texas	132	92	84	308	Susan Nguyen
Travis County	Austin	Texas	125	92	84	301	Heather
Norfolk City	Norfolk	Virginia	179	100	84	363	internet
Spokane County	Spokane	Washington	129	122	84	335	Brenda
Dane County	Madison	Wisconsin	142	203	84	429	Deposition
Milwaukee County	Milwaukee	Wisconsin	139	203	84	426	Alberta Dhillon
46 closed MLS regions							

Average of all, open and closed:	**160**	**117**	**84**	**361**

NAR market shares, realty agent and appraiser associations

Market Shares of Realty Agent Trade Assns

Association	Price	Members	Share	Revenues	Share
AREAA	100	1,200	0.12%	120,000	0.1%
CEBAA	100	1,000	0.10%	100,000	0.1%
CREAA	30	1,000	0.10%	30,000	0.0%
CAREPA	100	1,000	0.10%	100,000	0.1%
MABA	125	64	0.01%	8,000	0.0%
NAEBA	91	650	0.07%	195,000	0.2%
NAHREP	99	15,000	1.52%	1,485,000	1.8%
NAIREB	79	1,000	0.10%	79,000	0.1%
NAR	84	955,496	97.11%	80,261,643	96.6%
NAREB	100	7,500	0.76%	750,000	0.9%
Totals		**983,910**	**100%**	**83,128,643**	**100%**

Market Shares of Appraiser Trade Associations

Association	Price	Members	Share	Revenues	Share
NAREA	215	5,000	6%	1,075,000	5%
NAIFA	400	3,000	4%	1,200,000	6%
AI	740	19,436	25%	14,382,640	69%
NAR	84	50,289	65%	4,224,297	20%
Totals		**77,725**	100%	**20,881,937**	100%

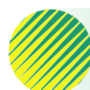
David Barry graduated from Harvey Mudd College in 1971 with a degree in mathematics, and training in the sciences, engineering, and economics. He graduated from Boston University School of Law in 1976.

Barry holds four patents. He wrote a children's book, *The Rajah's Rice*, that was published by W.H. Freeman and Company – the publisher of the magazine *Scientific American*. *The Rajah's Rice* contains a mathematical lesson in story form, and was the best selling book in the Scientific American's Children's Book division. It has been republished many times, including in French and Spanish, and on CD.

Barry was admitted to the California State Bar in December of 1976. Barry has been admitted to all federal district courts in California, the Ninth Circuit and the United States Supreme Court, and in federal courts in other states. Barry is the author of several construction publications, including Mechanics Liens, Contractor-Owner Agreements, Private Judges, and California Construction Contracts. Barry was a corresponding member of the Task Force of the California Council of the American Institute of Architecture in 1988. Barry has been a judicial arbitrator for the San Francisco Superior Court since approximately 1990. Barry is a member of the San Francisco Bar Association, the American Bar Association, and the antitrust sections of the ABA and California State Bar. He has litigated antitrust cases against Realtor associations in Kentucky, Washington, and Wisconsin.

Barry holds an AV rating with Martindale-Hubbell. In over twenty-five years of practice he has tried over 100 cases in state and federal courts and arbitration tribunals, and has practiced before the United States Trademark Trial and Appeal Board. Barry has briefed and argued over a dozen appeals in state and federal courts. Barry founded Barry & Associates in 1979. The firm specializes in antitrust and commercial litigation.

Because of his litigation against trade restraints by Realtor associations, Barry was named as one of the 100 Most Influential Real Estate People by Inman News, the premier source of real estate information in America. It is likely that Barry has more antitrust experience relating to real estate MLSs than any attorney in the United States.



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