

## SECTION ONE

# SYNDICATED ADVERTISING

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**Learning Objective:** Upon completing this Section, licensees should have a better awareness of their need to know and understand their company's office policy concerning the release of their clients' property information to various media, including syndicated websites, and what a broker's duties are both to inform his/her owner-principal of advertising options and to monitor the accuracy of the property information displayed on various websites.

## BACKGROUND

Real estate advertising methods certainly have changed over the past 50 years. Technology growth and social media offer new ways for brokers and consumers to access information, revolutionizing the world of real estate advertising. In "the good old days," brokers basically were on their own to promote properties for sale or lease. Print advertising was the most effective means of marketing a property for sale. "Just listed" postcards, "Sold" announcements, open house invitations, flyers, newspaper ads and signage were some of the methods brokers employed not only to attract buyers, but to promote the broker's services and solicit customers or clients. In those days, most brokers focused on one or two neighborhoods, rather than an entire municipality or surrounding cities and towns.

However near the turn of the last century, a trade association was created for real estate brokers in which membership was totally voluntary. One of several purposes of such organizations was to facilitate the exchange of information among its members about available properties. In addition to providing a forum in which to market properties, another purpose of these cooperative exchanges was and is to create a venue through which members may invite other brokers to enter into cooperative agreements with them for the sale of their listings and to allow access to information necessary to facilitate that cooperation.

By the end of the twentieth century, many of these cooperative listing services allowed broker-members to submit information about their listings to the service and the service would print that property information in either looseleaf binders or catalogs that could be purchased only by members of that service. While each service was governed by its own rules, a frequent provision was that the information was intended for the broker's use only and the broker was *not* supposed to allow consumers unrestricted access to that information. While the broker might share certain information about various properties with the consumer, it was the *broker* who was to *manually* search through the available properties and select from the array those the broker thought best met the consumer's preferences. One could not screen or refine the search by inputting desired features so that only properties with those attributes appeared.

Then electronic sharing of information arrived on the scene in the 1990s. Anyone with an internet connection could readily and rapidly access multiple information sources and share data and files with the click of a mouse. Brokers wanted the accessibility, exposure and distribution ease afforded by this new technology. Not only did the trade association and various cooperative listing services perceive this need, but other independent marketing companies did as well, and began offering brokers access to internet advertising. Today, there are myriad options for online advertising. This Section will review some of those choices and *the need for associated brokers to understand the decisions that have been made on behalf of the company so they can adequately explain those advertising options to owners when seeking the client's knowing and informed consent to the advertising of his/her property.* However, before discussing syndicated advertising, we will *briefly* review advertising requirements imposed by License Law and Commission rules.

## LICENSE LAW & RULE A.0105

The statutory prohibitions are fairly straightforward. Pursuant to **General Statute 93A-6(a)**, the Commission may suspend, revoke, reprimand, or censure any licensee, if the Commission adjudges the licensee to be guilty of:

(1) Making any willful or negligent *misrepresentation* or any willful or negligent *omission of material fact.*

AND/OR

(3) Pursuing a course of *misrepresentation or making of false promises* through agents, advertising or otherwise.

***In other words, don't lie, mislead, distort or fail to disclose material facts whatever you are doing.***

Is there a rule that provides some guidance as to advertising requirements? Yes. **Rule A.0105** addresses advertising by real estate licensees and states:

**(a) Authority to Advertise**

(1) A provisional broker shall not advertise any brokerage service or the sale, purchase, exchange, rent or lease of real estate for another or others without the consent of his or her broker-in-charge and without *including in the advertisement* the name of the broker or firm with whom the provisional broker is associated.

(2) A broker shall not advertise or display a "for sale" or "for rent" sign on any real estate without the *written* consent of the owner or the owner's authorized agent.

**(b) Blind Ads.** A broker shall not advertise the sale, purchase, exchange, rent or lease of real estate, *for another or others*, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the broker's principal only. Every such advertisement shall *conspicuously indicate* that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, street address, internet web address, or e-mail address.

[Italics added.]

Subparagraph (c) requires limited nonresident commercial brokers to clearly and conspicuously disclose their *license status* as limited nonresident commercial brokers (rather than unrestricted full brokers) in all advertising in this State.

### **Summary of Rule A.0105**

As can be seen from the foregoing, the rule doesn't really dictate the *content* of ads; its requirements are minimal and may be summarized as follows:

- *provisional brokers* may not advertise without the *consent of their broker-in-charge* and may not advertise in their name only; the ad must *clearly identify the real estate company or broker-in-charge with whom the provisional broker is associated*.
- all licensees must have the *written consent* of the owner before advertising a property for sale or lease.
- the advertising must *clearly indicate* that it is the advertisement of a broker or brokerage company, i.e., no blind ads.

The two primary components of the rule regarding broker advertising for others is that the ad clearly indicate that it is the ad of a broker or brokerage company and that the licensee has the written consent of the owner prior to advertising (in addition to avoiding misrepresentation or false promises per state law). *The overriding intent of the rule is that the public is aware that it is contacting a real estate broker when it responds to the advertising.* Must I include a phone number? A physical address? An email address? It's up to the licensee, absent office policy on the subject.

Company policy may dictate whether the company's name must appear in all advertising and on any signage placed by any of its affiliated brokers not on provisional status. (Note, this is *not optional* with provisional brokers *unless* the name of the broker-in-charge appears in lieu of the company's name.) If it is clear from the name of the company that it is engaged in real estate brokerage, then the term "broker" need not appear after the company name, e.g., Smith Realty Company or Carolina Real Estate LLC. If only an individual broker's name appears in the ad, then the word "broker" must follow the licensee's name to alert the public to the fact that it is contacting a licensee. (Again, this applies only to non-provisional brokers.)

While there are numerous federal and state laws regulating advertising content, they are beyond the scope of these materials. Various advertising forums also may have their own rules and requirements that must be followed if one chooses to utilize that medium, but such forums or markets are not subject to regulation by the Real Estate Commission. *The purpose of this*

*Section is to discuss syndicated advertising, a broker's duty to inform his/her principal of the full extent and possible consequences of various advertising methods when seeking permission to advertise, and the broker's duty to correct inaccurate or misleading information.*

## **KEY TERMS**

Before delving into the various syndication options, let us define a few key terms to assist in understanding this discussion. These include: syndication, links, SEO, IDX, web syndication, and re-syndication.

***Syndication*** has been used in radio, print and television media for decades. It allows a content producer to reach a much larger audience by selling or providing that content to others to display through their source. It includes both websites providing information (content producer) and websites receiving and displaying it. Purchasing content from another site benefits the receiving site (the subscriber or distribution outlet) by allowing it to display much more information than it could create, making it more attractive to users, and updating that information with varying frequency. The transmitting site, i.e., the content producer or syndicator, benefits from increased exposure across numerous online platforms as its customer base increases. This exposure generates new traffic for the transmitting site — making syndication a relatively inexpensive and easy form of self-promotion.

***Domain name*** is equivalent to the internet address for that website. For example, the North Carolina Real Estate Commission's domain name is [www.ncrec.gov](http://www.ncrec.gov).

***Links or Metatags*** are keywords embedded in web content to assist Internet search engines (e.g., Google, Yahoo, Bing, etc.) to find that website when a consumer searches the Internet using any of those descriptive words or phrases. However, in determining the popularity or visibility of a website, search engines now often make that determination based on volume (number of hits on the website) versus the number of embedded links or keywords.

***Search Engine Optimization (SEO)*** is the process of attempting to generate consumer traffic to your website by having a search engine display your website in response to a consumer inquiry. The end goal is to have your website show up on the first page of the search results. SEO can be a very complicated matter; there are companies that specialize in nothing but SEO.

***IDX*** stands for Internet Data Exchange. It often is only available to members of a cooperative listing service and allows members to display not only their listing information on the Internet, but also permits users to advertise listings held by other companies on each other's websites. IDX does *not* apply to property information that is printed, or displayed on syndicated websites, or posted on various social media. *IDX rules may prohibit brokers from changing any of the content and require that the data displayed be refreshed periodically with a minimum frequency.*

***Web syndication*** is a form of syndication in which website material is made available to multiple other websites through a partnership between the content producer and a distribution outlet. These partners may be hand-picked by the content producer or the producer may allow other user sites to “opt in” for permission to carry or display the content with varying degrees of screening of these opt-in users provided by the automated system.

**Re-syndication** is the redistribution of data received by a primary distribution partner/subscriber/user to other users or websites pursuant to an agreement between the primary subscriber and the secondary user. Note that the primary subscriber/re-syndicator may not need or have the original content producer's permission to pass along the content the primary subscriber receives to others.

Understand as well that there are at least two methods of distributing information. Apparently in the industry, true "**resyndication**" means the *transmission of information from one database to another database*; this transfer of information may allow the receiving database to save, store, copy, alter or redistribute the information further. Alternatively, the database that has the information may agree to "power" other websites. In the "**powered by**" method, when consumers enter their search criteria, the secondary website retrieves the search results by *accessing the information as displayed on the primary publisher's website, but the secondary site never receives the information into its database.*

**Aggregate** means to collect or gather; thus, an aggregator is one who gathers or collects web feeds from multiple content producers and allows others to access those multiple feeds through one source or site. The aggregator periodically updates its information with newly added content.

## INTERNET ADVERTISING OPTIONS

### Cooperative Listing Services

One of many decisions confronting a real estate company is whether the company chooses to participate in a cooperative listing service. Typically each cooperative listing service is separately owned and operated in accordance with its rules and bylaws by which all members agree to be bound. Each service provides a forum where member companies may input information and display all available properties for sale or lease within a geographic area listed with that company and all other member companies and their affiliated agents can access these listings through the company's membership. The Real Estate Commission has no jurisdiction over either these cooperative services nor membership therein. While the rules and procedures for each cooperative listing service may vary, common elements among most, if not all, such services include that the real estate company is the participant and usually will be asked to designate one person (often the broker-in-charge) to make advertising elections on behalf of the Company that will then bind all of the company's associated agents.

If a company decides to join a cooperative listing service, it must then decide if it will limit release of its property information to just the listing service and not authorize any feeds to any other websites. In this case only broker members/participants could access the property information, but *not the public*. To allow consumers access to the property information, the company may elect to authorize publication not only within the listing service, but also to authorize release to local newspaper websites, member IDXs, or other "public-facing" websites if the listing service facilitates delivery to those sites. While consumers could then view the property information on a rather limited number of websites, no syndicator would be involved, other than the listing service. *Consumers generally will not have online access to property information listed within any cooperative service unless the listing company authorizes release of that information to some other "public-facing" websites.*

If the company wants its listings posted on some of the major national websites, such as Trulia, Zillow and Yahoo Homes, for example, then it must either authorize the listing service (if a member) to release property information to selected sites through a syndicator, or, if the company doesn't participate in a cooperative listing service, the company might open an account either with each desired website or with a listing syndicator. Once the company has established any necessary accounts and selected its approved sites, then any listing information submitted by any affiliated agent should be released only to the authorized sites selected by the company. Typically, affiliated agents don't have the ability to modify those selections when they enter property information. However, many cooperative services allow a broker to opt-out of the normal pre-authorized distribution scheme if a broker-associate has a property owner who refuses *any* internet advertising or exposure.

### **Syndication Service Providers**

Several companies provide real estate listing syndication services, including, among others, ListHub, Point2Agent and Lead Galaxy. ListHub is operated by Move, Inc. and claims to have over 450 Multiple Listing Services in its national network, including 22 MLSs in North Carolina, as of September/October 2013. According to ListHub, it will only accept property listing information directly from cooperative listing services or feeds from brokerage franchises supported by ListHub; thus, a company that doesn't participate in a cooperative service or isn't part of a supported franchise network will not be able to open an independent account with ListHub.

All brokers should be aware how quickly distribution can mushroom. For example, as of Fall 2013, ListHub claimed current partnerships with over **60 national publisher partners** including such familiar websites as Zillow, Trulia, Yahoo Homes, AOL Real Estate, RealtyTrac, Homes, Vast, RealtyStore, Apartment List, and ElookyLoo, among many others. ListHub appears to resyndicate information to its national publisher partners who in turn typically have agreed to "power" other users downline, spawning the comment on ListHub's network page that the **60 national publisher partner sites** "*...and the sites that they power total more than 900 real estate search Web sites!*" A complete list of ListHub publisher partners and information about its services can be obtained at [www.listhub.com](http://www.listhub.com).

### **Whose "Terms of Use"?**

A real estate company may decide to restrict release of its listing information to just three or four major websites, whether through an account with a listing syndicator or separate accounts with each of the four separate websites. Each brokerage company must decide as a matter of policy whether it will engage in syndication and if so, what sites it will authorize. When a broker consents to send information to a chosen site, *the broker generally is consenting to that site using the information according to that site's terms of use.* **However**, a company that authorizes the provision of information to individual websites through a listing syndicator may gain some protection if the syndicator seeks to impose by contract limitations on the primary partners' use of the property information. Some listing syndicators have their own specific terms of use or contracts to which other websites must agree if they wish to be a primary recipient or publisher partner in the syndicator's network.

For example, ListHub informed the Commission that its *contracts with its primary publisher partners supersede the individual partner's terms of use*, thereby affording greater protection of the property data. Some of the ListHub contract provisions designed to protect the

property data include the following:

- resyndication is prohibited, but “powering” other sites is permitted;
- listing data may only be used for consumer display;
- restrictions on the use of the property data for derivative works or non-display uses;
- listing data may not be used once the property is off the market; and
- express reservation of intellectual property rights to the content owner.

### **Website Terms of Use**

*Absent an overriding contract between a syndicator and a partnering website, brokers should understand that if the company authorizes information to be sent to any given website, the broker/ company is consenting to **that site using the information according to that site’s terms of use**. An example of common language is the following verbatim excerpt from Zillow’s Terms of Use as posted on its website as of May 2013: (emphasis added)*

**3. Materials You Provide; Account Use; Privacy; Third Party Web Sites.** For materials you post or otherwise provide to Zillow in connection with the Services (your "Submission"), **you grant Zillow an irrevocable, perpetual, royalty-free worldwide license to (a)** use, copy, distribute, transmit, publicly display, publicly perform, reproduce, *edit, modify, prepare derivative works of or incorporate into other works*, and translate your Submission, in connection with the Services or in any other media, and *(b) sublicense these rights, to the maximum extent permitted by applicable law*. Zillow will not pay you for your Submission or to exercise any rights related to your Submission set forth in the preceding sentence. Zillow may remove or modify your Submission at any time. For each Submission, you agree to provide accurate and complete information and represent that you have all rights necessary to grant Zillow the rights in this paragraph and that the Submission complies with Section 2(a) above. You are solely responsible for all Submissions made through your Zillow user account or that you otherwise make available through the Services.

Zillow will not use client contact information that is uploaded by agents into Zillow's Agent Hub portal for any purpose.

You may not share your Zillow user account with others. You are responsible for all actions taken via your account. Zillow will treat your use of the Services in accordance with its Privacy Policy. Certain Zillow functionalities may involve the ***distribution of your Submission to third party Web sites over which Zillow has no control***. *Zillow is not responsible for and makes no warranties or representations pertaining to these third party Web sites, including but not limited to the content, availability, or functionality of such Web sites. You are responsible for ensuring that your Submission complies with the terms of use associated with any such third party Web site and you understand that your Submission and your use of a third party Web site will be treated in accordance with that third party Web site's own privacy policy.*

12. NO WARRANTY. ZILLOW PROVIDES THE SERVICES "AS IS," "WITH ALL FAULTS" AND "AS AVAILABLE," AND THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT IS WITH YOU.

Thus, by authorizing release to Zillow, the *broker/company consents not only to Zillow’s terms of use, but also to the terms of use of any third party website to which Zillow feeds the information*. Per Zillow’s terms of use, it disclaims any control over that third party website receiving Zillow’s feed and states that ***the broker*** is responsible for the accuracy of the information on these third party websites that are not identified. (How does one monitor content

on an unknown website? Yet by authorizing release to Zillow or Trulia or any number of sites, the broker impliedly consents to the information being released to other undisclosed websites pursuant to the authorized site's Terms of Use.) Note too that the *broker has consented to Zillow altering the content of the information transmitted* to it by the broker.

Companies that open an account directly with Zillow or any other website will be bound only by that website's terms of use. Companies that permit their listing information to be distributed to various websites through a syndicator should discover whether the syndicator's agreements with its publisher partners have any restrictions or limitations on what the publisher partner may do with the property information.

## **BROKER'S OBLIGATIONS**

It is incumbent upon each brokerage company to decide as a matter of policy what advertising media it will permit its associates to use, whether it will engage in syndicating its listing information and, if so, what sites it will authorize. Factors a broker-in-charge should consider in determining the company's internet advertising policy will be discussed in more detail in the *2013-2014 Broker-in-Charge Annual Review*. To eliminate confusion, *the company's advertising policy should be in writing and should be clearly explained to and periodically reviewed with all licensees affiliated with the company. Affiliated brokers should clearly understand at least the following points so they may knowledgeably explain the company's general advertising policy and answer property owners' questions.*

1. A cooperative listing service can only protect the broker's property data so long as it stays within the service, but the information is only visible to other member brokers. The moment the company authorizes release of its listing information to others, the broker no longer has complete control over how that listing data is displayed nor is the use of that information governed by the cooperative service's rules. Rather, the terms of use of each website will control *unless* the website's use is restricted by its contractual arrangements with a syndicator.
2. Brokers should be aware that *the property information may appear differently on a website so they can alert the property owner to this possibility when seeking the owner's consent to advertise electronically*. The property information might be altered for several reasons. Some of the most common changes include the following.
  - The receiving site may not have the same data fields as the original site, so all of the original information may not appear. For example, one popular website has no field for half-baths; thus, even though the broker clearly states 3 full baths and 2 half-baths in the property information, this particular website will indicate the property has 3 baths with no mention of the half-baths. (Other sites may inflate it to 5 bathrooms to reference the half-baths.)
  - Some sites will search public records, such as tax records and recent sales, and alter the property information submitted by the broker to reflect a different square footage or, despite the listed sales or rental price, may interject the site's own "estimate of value" for the property, based on the site's review of information gathered from undisclosed sources.

- Some sites will invite public comments and provide a field where others may insert their remarks about the property, whatever those remarks might be.
3. Sites update the property information with varying frequency, some being more prompt than others. Brokers should be aware and warn their owners that listings may show as “active” on some sites, even though the broker has changed the status to “under contract,” and *some sites will not remove the property from the “active” category even after notification that it has sold*, as volume of listings impacts the site’s allure to consumers.
  4. Lastly, be aware that the name of the listing company, agent and contact information may no longer appear with the property information. On several major websites, when a consumer clicks on the property, there will be no reference to the listing company; instead, the names and contact information for 2-4 brokers will appear who may not be affiliated with the listing company at all; rather, the small print above the broker information states that the listed brokers would be happy to act as *buyer agents* for the consumer. Consumers may not understand this subtlety and might easily get the impression that the depicted brokers are with the listing company.

As mentioned earlier, some listing syndicators attempt to avoid some of the foregoing issues via contractual requirements with the syndicator’s primary publishers or partners, if they wish to remain primary publishers/partners.

## RECOMMENDED PRACTICES

Brokers clearly are ***responsible for all information that they create for any form of advertising or distribution of property information, regardless of the medium.*** They further have a duty to *promptly update the property information as it changes*, whether due to newly discovered information or a change in the status of the listing, *in any forums/media in which the broker directly placed the information.*

*A broker who seeks an owner-client’s permission to publish property information on the internet should fully disclose the various options available to the client based on the company’s advertising policies.* The broker should explain that entering the property information into a cooperative listing service (if an option) will only permit access by member brokers and that the general public will *not* be able to find or view the property information online unless release is authorized to at least one website, even though the property may be promoted in print materials or other media. This limited exposure may negatively affect the marketability of the property.

*A broker-in-charge should review the Terms of Use of any and all websites to which s/he may authorize the direct release of property information to learn what that site will do with the information and, if possible, discover:*

- to how many additional websites will that site release the property information;
- how frequently will the chosen site update its property information and feed the update to its subscribers;
- how promptly will the site remove the property from active listings once the property is sold; and
- to what extent does the site typically alter the information submitted or allow comments.

**All of this information should be relayed to the firm's broker-associates** and might be included in a discussion or explanation of the company's internet advertising policies in the office policy manual to assist broker-associates in explaining these policies to an owner-principal to facilitate the owner making an informed decision. It is also *strongly recommended* that *if a company chooses to allow property information to be sent to a website that allows public comment by others and/or that interjects its own opinion of value, that the broker specifically mention these aspects to the owner and confirm the owner's consent to that website receiving the owner's property information.*

### **Google Alerts**

To assist brokers in monitoring the accuracy of their property information, **a broker may wish to create a "Google Alert" or some similar mechanism through a different search engine.** You establish the alert through a chosen search engine by selecting a query, whether the property address or MLS number for the listing, and will receive an email update periodically (whether instantly, daily, or weekly) whenever the search engine identifies that listing information on any Internet site. If a company repeatedly experiences problems with a particular website, the company should seriously consider withdrawing permission for information to be released to the offending website.

### **Relevant Factors**

As always, the Commission will hold a company responsible for the property information it provides to authorized sites or other advertising media. Brokers are obligated both by License Law and Commission rules to disclose material facts to consumers, in addition to their fiduciary obligation to share any information that may influence their principals' decision; this includes providing enough information to a seller-owner for the owner to make an informed choice about where and how the property should be advertised. In the event of a complaint, the Commission will examine each case based on its particular facts and surrounding circumstances. Factors influencing that assessment might include:

- to what extent the company investigated the website and its practices and the criteria or rationale underlying the company's office policy in choosing various websites over others;
- a broker's attempts to monitor the accuracy of the information wherever published;
- the significance of any incorrect information advertised;
- whether the information appears on a site directly authorized by the Company or re-syndicated to another site (the more remote the site, the less responsibility the broker bears);
- the ease or difficulty in correcting any false information and the reasonableness of the broker's efforts to do so; and
- the extent to which the broker advised his/her owner-client of the benefits and consequences of internet advertising in seeking the owner's consent.