

## **Mandatory Cooperation: Strengthening Real Estate Transparency and Collaboration**

*By Art Carter, CEO, California Regional MLS*

**I believe in facts—in life, and in real estate.**

**So, let me be upfront: this article is long. But it is full of facts. Facts that I believe most people are not paying enough attention to and truth about my thoughts on the Clear Cooperation Policy . CRMLS, like most larger MLSs around the country, is under pressure to change our stance regarding the Clear Cooperation Policy. However, to understand this pressure campaign, the industry deserves to know both about what behind-the-scenes demands have been made and about why CRMLS rejects those demands to stand firmly behind the intent of the policy.**

Trust has always been a cornerstone of the real estate industry. Building lasting and meaningful relationships with clients, transacting in good faith with other brokers, offering clear and accurate portrayals of a property – to succeed in real estate requires an essential level of transparency. In today’s everchanging real estate landscape, marked by shifting housing supply, high interest rates, and evolving insurance practices, agents and brokers must continue to operate within a system where all parties have access to accurate data they can rely upon.

We at California Regional MLS (CRMLS) have carefully considered the pros and cons of the Clear Cooperation Policy (CCP), as created by the National Association of Realtors’ (NAR), as the needs of the industry and our users change. To that end, CRMLS wholly supports the CCP because it fosters cooperation, transparency and trust, values we firmly stand behind.

### **Creating a Level Playing Field**

To begin, what exactly does the Clear Cooperation Policy do?

It requires that all publicly marketed properties be listed on the MLS. By ensuring that all agents and their clients have the same insight to the correct information, the MLS enables them to make informed, equitable decisions. Whether representing the buyer or the seller, having access to accurate data benefits everyone involved and strengthens every relationship.

What does the CCP prevent? It acts as a safeguard against select brokerages keeping information exclusive and hidden.

If a listing circulates only within one brokerage, the days on market (DOM) could be misleading, and other buyers are denied the chance to compete for the property. But when that listing is posted on the MLS, agents gain valuable insights such as accurate pricing, feedback on the property, and potential buyers. Moreover, if a listing is never on the MLS, sellers lose the opportunity for a wider pool of buyers and potential bidding wars.

At its most basic, the CCP upholds the integrity of the MLS, which, considering the MLS serves as a broker cooperative, is necessary to foster collaboration and ensure that all parties have access to a transparent and fair marketplace—all critical for maintaining trust in the real estate community.

Simply put, properties and their data belong on the MLS for everyone to see to ensure equal cooperation among brokers. Of course, in rare cases, sellers may prefer privacy and wish to keep their property off the MLS. For these situations, CRMLS rules permit properties subject to non-exclusive listing agreements to be publicly marketed without being placed into the MLS, which provides the solution for a seller's desire for discretion while maintaining the integrity of cooperation. But to do away with the CCP in its entirety just because of certain situations like these is shortsighted and would create an unfair advantage and undermine CRMLS's core mission: cooperation among brokers.

I strongly encourage brokers to stay informed about how the CCP may impact the future of their business and the trust they've built with their clients.

**As this debate about Mandatory Cooperation continues, CRMLS has been asked to:**

- 1) Terminate Mandatory Cooperation by revoking the NAR Clear Cooperation Policy;**
- 2) Establish a new status that conceals relevant property information from buyers; and**
- 3) Create a private listing network that would withhold available properties from unrepresented consumers, but make those listings only accessible by CRMLS subscribers.**

CRMLS rejected each of these demands, and I believe now is the time for us to share our positions and concerns with the real estate industry. The following points outline in detail why CRMLS has denied these requests and why we fully support the MLS's rules on Mandatory Cooperation:

- 1. CRMLS is not a listing platform; it is a Broker Cooperative.** As a broker cooperative, CRMLS has the right to develop business practices that support brokers and their clients, including implementing policies, rules, and processes that benefit buyers, buyer agents, sellers, and listing agents. Unlike a listing platform, which functions solely as an advertising tool for sellers, a broker cooperative needs to provide meaningful services to all of its subscribers, their clients and other stakeholders. While listing platforms are valuable and some of our best customers, they do not establish rules, policies, or systems to facilitate cooperation between agents. Instead, they focus on advertising properties for sale and offer historical information.

CRMLS, as a Broker Cooperative, operates in a much broader and more dynamic space, addressing diverse interests and needs far beyond those of a simple advertising listing platform. As a Broker Cooperative, CRMLS must establish rules that all firms adhere to in order to ensure that everyone

benefits equally from the services offered. Allowing certain firms to "free-ride" on the efforts of others is not sustainable.

- 2. Sellers who choose to hire a real estate agent and market their property without using the MLS are fully permitted to do so under current CRMLS Rules.** Any CRMLS subscriber who enters into a non-exclusive (aka Open) listing agreement with such a seller is not subject to the CCP rules mandating submission of the listing to the MLS for cooperation or dissemination.

CRMLS Rule 7.9, Mandatory Submission upon Marketing, applies only to properties that are "subject to any exclusive right to sell or seller reserved listing agreement". During CRMLS webinars held in Spring of 2020 for CCP training and implementation, we consistently addressed hypothetical scenarios, such as extremely-high-value property that might not benefit from broad MLS exposure because only a small handful of agents had buyers capable of affording such a property. CRMLS specifically instructed agents in these scenarios that they could market such properties publicly and, in any manner desired by the seller and listing agent, including signage on the property, Facebook posts, website marketing, flyers or individual conversations with other brokerage firms that represented the types of buyers that could acquire such a high-priced home by simply using a non-exclusive listing agreement.

Exclusive listing agreements are critical to protecting the interests of listing firms when a property is placed in the multiple listing service and made available for cooperation with competing brokerage firms. These agreements ensure the listing firm will get paid, even if the listing firm does not directly bring in the eventual buyer. This incentive to share the listing broadly by the listing firm directly benefits the seller.

Outside the MLS, where mandatory cooperation does not apply, sellers receive minimal, to no benefits, from an exclusive listing agreement. In fact, such agreements can be detrimental to the seller, as they give the listing firm complete control over the property's information and access, potentially excluding other brokers who may have qualified buyers. Listing brokerage firms, leveraging their superior knowledge, experience and salesmanship can easily convince sellers to sign an exclusive agreement, guaranteeing the firms top line commission even if the listing firm refuses to cooperate with other brokers or provides minimal or no service in the event of a sale.

Any competent listing agent can effectively use the terms of a non-exclusive listing agreement to meet the needs of a seller who prefers not to have their property widely disseminated through the MLS and its corresponding IDX distribution systems. This approach is particularly relevant for high-value properties, where it is common for showings to require signed non-disclosure agreements (NDA) to ensure privacy and facilitate the exchange of proof of funds between buyers and sellers. NDAs can easily include provisions to protect the listing firm's commission rights by preventing a buyer broker from bypassing the listing firm and negotiating directly with the seller.

Additionally, non-exclusive listing agreements can be structured to include two separate and distinct fee components:

**1. Buyer Introduction Fee:** A fee charged only if the listing firm's efforts resulted in the buyer making

an offer on the property. This fee would not apply if the buyer came to the transaction without any involvement from the listing firm.

**2. Brokerage Service Fee:** A fee for the professional services provided by the listing firm, such as list price recommendations, analyzing offers, negotiating contracts, preparing disclosures and due diligence documents, coordinating property inspections and appraisals, and managing all closing documentation.

By separating the fees into two distinct components, the listing firm ensures they are compensated for the services rendered, regardless of whether they find a buyer. The only financial risk to the listing firm in using a non-exclusive agreement is forgoing the fee for introducing a buyer if they are not the ones who brought the buyer to the transaction. Most rational, knowledgeable sellers that may not want to place their home on the MLS would select this type of a listing arrangement over an exclusive listing agreement given a fair choice.

A basic understanding of real estate contract law, combined with the ability to address the specific needs of sellers that may not require their property to be listed in the MLS, is fully supported under the existing CRMLS rules, policies, and available technology.

In summary, CRMLS rules already permit any seller to hire any CRMLS agent using a non-exclusive listing agreement and still retain the flexibility to publicly market their property while keeping that property off the MLS.

- 3. CRMLS will not be a participant in any agreement, plan, or scheme to intentionally misrepresent or withhold critical information about a property's listing history and number of days it has been available for sale,** as these brokers have requested. If showings are permitted for a Coming Soon listing, what would distinguish the Coming Soon status from an Active status? This request would likely result in misrepresentations of the actual number of days it took for a listing agent to sell a property.

In addition, agreeing to this request could subject an MLS to significant liability, as the listing firm's potential misrepresentations could harm buyers who might overpay for properties with inaccurately reported Days on Market (DOM). It could also mislead sellers into hiring listing agents who claim to have shorter average marketing times, by them quoting only the time the property is active in the MLS, as opposed to the actual number of days it took to market and find a buyer for the property.

- 4. CRMLS will not support, nor participate in an agreement, plan or scheme to hide available properties that are for sale from potential buyers who choose not to hire a real estate agent,** as these brokers have requested. The long-established rules governing the IDX policy were established as part of a settlement agreement reached between NAR and the Department of Justice, which emphasized the importance of ensuring consumers have the same access and knowledge to available property listings as subscribing agents have in the MLS.

Requests made by market-influencing brokers to exclude their properties from IDX feeds, thereby withholding them from unrepresented buyers, could expose CRMLS to potential litigation from

consumer advocacy groups and plaintiffs' attorneys. A buyer who decides not to pay the costs or fees associated with hiring a buyer's agent is entitled to full and fair access to every property available for sale, across the same platforms, and websites that are accessible to represented buyers.

CRMLS recognizes the motivation behind a market-impacting brokerage firm seeking to force buyers to find properties exclusively on that broker's own website. Such a strategy would also benefit the brokerage by pressuring buyer agents from competing firms to leave their current brokerages and join the firm controlling the hidden inventory. However, CRMLS will not implement rules that favor a particular business model at the expense of others, especially when it causes direct harm to potential buyers, as well as sellers whose properties languish on the market longer than necessary. Adopting such rules could subject CRMLS to potentially significant antitrust liability, compromising the principles of fairness and competition that guide our operations.

CRMLS is guided by the principles of fairness, equal access to accurate information, and the spirit of competition between brokerage firms. Moreover, CRMLS is business model agnostic and will not implement rules which favor one business model over others. These guiding ideals ensure that CRMLS implements policies and rules that support fair competition in the provisioning of brokerage services, rather than favoring any specific business model or a market-impacting brokerage firm.

Brokers should compete for clients based on the level of their skill, experience, pricing, services and successful results in the representation of buyers and sellers. Buyers, and their agents, should not be forced to join only the largest brokerage firms simply because those firms withhold available properties from the general marketplace. Brokerage firms should have confidence in their skills, abilities and service levels without relying on exclusive control of listings to force others to use their services.

As those in the real estate community evaluate the attacks on Mandatory Cooperation, we should all ask why certain brokerage firms are afraid to compete in an open marketplace where all consumers, and the brokers they choose to hire, have fair and full access to all properties?

- 5. CRMLS will not establish a Private Listing Network that is only accessible to CRMLS subscribers**, as these brokers have requested. Such a system would clearly disadvantage consumers who choose to not work with a real estate agent, as they would have no access to the listed inventory. The only way for these buyers to view available for sale properties would be to hire a CRMLS subscriber real estate agent. The case of an MLS making rules that force consumers to use a real estate agent to see properties that are for sale will be extensively litigated, and implementing such a policy could expose CRMLS to significant antitrust liability.

Some brokers have threatened to sue CRMLS, and other entities that do not capitulate to their demands to remove Mandatory Cooperation so that they can profit from this hidden inventory.

Regarding litigation, one of CRMLS's significant concerns is the liability exposure created if CRMLS, or NAR were to remove the Mandatory Cooperation rules, as suggested. Permitting properties with exclusive listing agreements to bypass Mandatory Cooperation raises numerous antitrust concerns. In

fact, there is a far greater risk of potential liability from buyers bringing claims against CRMLS, the brokers demanding the removal of CCP, and the other co-conspirators who might be alleged to be involved in such a scheme, since the demanded policy changes effectively deny buyers the right to choose their own real estate agent.

An exclusive listing agreement grants the listing agent sole: access to the seller, ability to share information about the property, terms of sale, property access, and to present offers.

A buyer who wishes to hire their own representative is denied that opportunity when exclusively listed properties are not subject to Mandatory Cooperation. For instance, if a buyer's agent attempts to contact the listing agent to schedule a showing or submit an offer and the listing agent refuses to cooperate or respond, the buyer is left with no choice but to abandon their chosen agent and approach the exclusive listing agent directly instead—even if that is not the buyer's preference. This arrangement effectively removes the buyer's ability to select their own agent for representation.

Sellers who prefer not to list their property on the MLS still have the option to market their property publicly by using a non-exclusive listing agreement. Such agreements avoid creating the exclusive restrictions and exclusions for the buyer and their agents. If the buyer agent receives no cooperation from the non-exclusive listing agent, then the buyer's agent is free to go directly to the seller with the opportunity presented by the represented buyer. This approach benefits all parties by preserving the buyer's right to representation while accommodating the seller's preferences. This also protects a seller from an unscrupulous listing agent that is using the home as a tool to get more business, rather than working to get the home sold.

In addition to buyer suits, a viable claim could also be brought by individual agents who choose to work with a brokerage firm that uphold principles of fairness and ensure all buyers have access to all properties. If CRMLS were to agree to these market influencing broker demands, agents at such firms would be denied the opportunity to represent buyers who might be interested in and capable of purchasing exclusively listed off-MLS properties. By removing access to these properties, buyer agents would be forced to make the business decision to join a firm that engages in these anti-consumer, self-serving practices. Without doing so, they would lack access to sufficient inventory to sustain their buyer representation business. These buyer agents would have strong grounds to pursue legal claims against the brokerage firms conspiring to implement these anti-consumer practices, accusing them of collusion and forming agreements to pressure CRMLS and NAR into removing policies and rules related to Mandatory Cooperation.

Sellers harmed by the off-MLS practices demanded by these few firms would also have a strong basis for legal claims. Extensive evidence demonstrates wide exposure through a multiple listing service results in the highest price and quickest sale for sellers. If Mandatory Cooperation is eliminated, self-serving brokerage firms could use exclusive listing agreements to prevent other buyer agents from approaching the seller. This practice effectively turns the property into a marketing tool or "billboard" to attract additional buyers to the firm, rather than getting the property sold.

This issue is not simply about double-ending transactions, as CRMLS data make clear. It is about redirecting buyers away from their chosen agents and forcing them to work with the exclusive listing agent, who controls all information and access to the property. Once engaged, the exclusive listing agent

often converts these buyers into their own clients, showing them to properties – ironically, properties listing in the MLS that are available for cooperation. The notion that these large, market impacting firms would leverage their market position to divert buyer customers from competing brokerage firms by withholding available properties and then representing those same buyers to purchase MLS-listed properties is both unethical and unacceptable. It is fundamentally unfair for these firms to benefit from MLS cooperation while openly refusing to cooperate themselves.

For sellers who end up in this exclusive off-MLS strategy, the consequence is often a longer time on market than if their property had just been listed in the MLS from the beginning. CRMLS data indicates that the vast majority of properties initially kept off the MLS at the insistence of a listing agent are eventually input into CRMLS in order to secure a sale. The time spent off-MLS is simply used as an advertising tool for the listing firm, exploiting the seller's property as a “billboard” to generate more money for the firm. Sellers who later realize they were misled into a marketing program that prioritized the listing firm's interests over their own, to their disadvantage and financial detriment, are likely to pursue legal action.

Now that I've addressed the requests made to CRMLS and explained why we cannot comply, I'd like to shift focus to why we fully support the Clear Cooperation Policy.

### **Limiting Data Access Limits Competition**

Critics of the CCP often claim that it limits a seller's choices when it comes to matters of discretion. However, non-exclusive agreements offer a flexible solution so that sellers can maintain privacy while preserving the cooperative structure of the MLS.

Some have also argued that displaying listing data, such as Days on Market (DOM) or price drops, can harm a listing. At CRMLS, we believe in transparency of every data point, full stop. We believe that hiding data goes against everything we stand for and that providing as complete a picture of a property as possible benefits buyers, sellers, and agents alike.

Let's unpack DOM and price drops to show how that information is still vital to share.

### **Days on Market (DOM)**

**For Buyers:** DOM helps buyers assess the property's appeal and negotiate pricing. If a property has been on the market for an extended period, it might suggest the seller's list price is too high and may be more willing to lower the asking price. Additionally, long DOM can indicate that the property may need updating or repairs.

**For Sellers:** DOM helps with pricing strategy and positioning in the market. If a property has been on the market for a long time, it may be priced too high or not marketed effectively. If many properties have high DOM, it could be an indication to wait for market conditions to improve.

In short, DOM transparency helps both buyers and sellers make informed decisions, whether it's related to pricing, negotiations, or market trends.

### **Price Drops**

- **For Buyers:** Price drops indicate flexibility and can enhance value perception. A reduced price might make buyers feel more comfortable submitting offers, especially if they were initially hesitant due to the listing's original price.
- **For Sellers:** Price drops increase visibility and signal market realism. They help re-engage buyers who may have been previously turned off by the price. A drop in price also indicates that the seller is motivated and willing to negotiate, showing flexibility and responsiveness to market conditions.

Maintaining transparency regarding price drops can revitalize the listing, generate urgency, and signal the seller's motivation, all of which ultimately lead to more competitive offers. Accurately depicting the Days on Market and price adjustments is also the right thing to do! Hiding relevant information from decision makers is antithetical to professionalism and a shameful practice that the industry as a whole is responsible to stop.

### **A Fair Market for All Brokers and Agents**

It's a common refrain from critics to argue that the CCP imposes unnecessary restrictions on brokerage and agent practices. However, the reality is that the policy is both rooted in and necessary to maintain fairness. Without it, anti-competitive practices could proliferate. If listings were all to remain hidden within select brokerages, we'd be creating an uneven playing field that limits consumer choice, distorts market fairness, and could benefit large players in the market to the detriment of smaller businesses.

### **Potential Criticisms of the CCP**

While CRMLS fully supports the CCP, we recognize that no policy is perfect down to every possible detail.

A common complaint from our brokerage community is that the compliance requirements of the policy can be administratively burdensome, particularly for smaller brokerages.

Additionally, while the policy works for most properties, there may be instances—particularly with high-value homes—where MLS exposure does not align with the seller's needs. However, that's why we have solutions like the aforementioned non-exclusive agreements, and we are continuously refining them to better serve sellers in these unique situations.

Let me be clear that while I fully support the CCP, I also advocate for continuous improvements and amendments to address any limitations that may arise.



## **Nurturing Trust in the Real Estate Community**

Trust is the backbone of every successful real estate transaction and professional relationship. Despite any potential downsides, the CCP remains critical to industry cooperation. Without it, the industry risks becoming fragmented. If select brokers have privileged access to critical data, the market would fragment, eroding trust, reducing consumer choice, and exposing the industry to unnecessary regulatory scrutiny.

As the industry evolves, we must stay focused on the core principles of cooperation, transparency, and fairness. Mandatory Cooperation Rules, like the CCP, reflect these principles and provide a strong foundation for the future. CRMLS will continue to align our rules, policies and practices with these values through our unwavering support.

### **In summary**

CRMLS remains a steadfast industry leader in ethical practices and long-term industry health. We will continue to advocate for a consistent and uniform framework to eliminate inequities and strive towards a more fair and competitive market. In the end, it is always about doing what's right for the agent, broker, and most importantly, the consumer.

*Art Carter is the CEO of California Regional MLS (CRMLS), the nation's most recognized multiple listing service, and is committed to creating a maintaining a more equitable real estate industry.*