



March 2010

This month we discuss one of many “hot issues” that are of current concern — pre-listing marketing activities in the form of “Coming Soon” signs.

### **“COMING SOON” SIGNS**

#### ***The Market***

Reports indicate that a majority of the transactions in the current California real estate market are short sale listings and REOs (bank owned foreclosed properties). This situation has caused significant changes in the way brokers and agents are establishing representation of owners, listing properties, marketing properties, and processing transactions.

The high number of foreclosure properties has resulted in a “shadow inventory.” Some lenders hold their REO properties, rather than immediately listing them for sale. Some of the reasons for holding properties off the market include:

- To avoid flooding the market and causing lower prices
- To make repairs to the property necessitated by damage done by former owners
- To deal with tenant issues
- To take advantage of rising prices

During these holding periods, the lender has various responsibilities, including registering the property if required by local ordinance, maintaining the landscaping, draining or cleaning and securing a swimming pool, repairing any dangerous conditions, securing the property to protect against squatters and vandalism, and posting notices on the property with emergency contact information. Lenders often retain a real estate licensee to handle these tasks and manage the property until the lender is ready to sell it. The terms of these management agreements between brokers and lenders are established by the lenders and usually include a multiple property inventory list. A property may be on the list covered by the broker-lender agreement without an actual listing agreement being executed until many months later.

#### ***The Problem***

A common requirement in such agreements is that during the management period prior to giving authority to sell the property, the agent’s contact information must be posted on the property. These “Coming Soon” signs are believed by some agents to be prohibited pre-listing marketing.

The signs generate calls from other agents or potential buyers before the property is listed in the Multiple Listing Service (MLS) before a listing agreement has been executed giving the broker authority to accept offers. Some agents fail to accept or return calls from potential cooperating buyer's agents, but potential buyers who call are asked for contact information and added to an "interest list" to be used when the lender indicates the property is ready for sale. The potential buyers can be contacted and offers accepted and the property is immediately listed as "Sold" in the MLS. This provides the listing agent with an advantage over other potential buyer's agents and an opportunity to represent both the buyer and seller. The compensation terms in the lender's agreement with the manager agent may take this potential dual agency into consideration and provide some incentives for managing agents to generate offers prior to listing the properties.

The potential problems that may result include confusion regarding submitting offers, conflicting claims regarding procuring cause and right to commissions, claims for damages, and a negative impacts on the public's opinion of agents and the real estate industry. Cooperating brokers are concerned that this practice is inconsistent with the Code of Ethics requirement that brokers cooperate with one another.

### ***The Rules***

REALTORS® have legal and ethical obligations to follow the National Association of REALTORS® (NAR) Code of Ethics, the MLS Rules, and California law.

The NAR Code of Ethics Standard of Practice 12-4 provides that a REALTOR® must have the owner's authority to advertise a property and to avoid false or misleading advertising by presenting a true picture. Article 12 of the Code of Ethics requires presentation of "a true picture in ... advertising and representations to the public ..."

The MLS Rules prohibit false and misleading advertising, require presentation of a true picture in advertising and representations to the public, and require an executed listing agreement before the property is placed in the MLS. The MLS Rules also provide that only the "For Sale" sign of the listing broker may be posted on the property. The Rules are violated if the agent does not have a listing agreement and places a sign advertising sale of the property. That would be a misrepresentation, misleading, and inaccurate.

Under California Business and Professional Code section 17500, a person may be liable for fraud, intentional misrepresentation, or negligent misrepresentation for omitting material facts or making material false statements in advertising. Under Business and Professional Code section 10177(c) a real estate licensee can be disciplined by the Department of Real Estate.

Advertising a property without authority is false advertising and unlawful. The authority to advertise is typically the executed listing agreement, but permission can be given verbally or in some other writing. However, even though an agency relationship can be created without a written agreement, under California Statute of Frauds (Civil Code section 1624(5)), the agent has no right to be paid without a written agreement.

If the seller has given permission, it is legally and ethically permissible and not a violation of the MLS Rules to post a sign on the property before executing a listing agreement and placing the listing in the MLS. The content of the sign determines whether the agent is in violation of the law, the MLS Rules, or the Code of Ethics. However, the sign content must not be misleading, and must be clear that the property is not listed or for sale, but is “Coming Soon.”

### ***Solutions***

Agents should understand and follow the law, the MLS Rules and the Code of Ethics (both in rule and in spirit). The pre-listing marketing issue was addressed during the January C.A.R. meetings. An Issues Briefing Paper was presented by the MLS/Computer and Business Technology Committee that suggested several options for local Associations to address pre-listing marketing activities, including:

- Additional education about the agent’s obligations to present a true picture in advertising
- Commitment to investigate complaints of misleading advertising
- Enforcing the MLS Rules and Code of Ethics

A C.A.R. Task Force has been formed to create guidelines for pre-listing marketing.

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