

Great Plains REALTORS® MLS

New policy regarding the timely processing of MLS listings

The number of properties listed for sale that are not being processed timely in the MLS system, is increasing. Concerns about ethics, license law and civil liability should not to be taken lightly.

A “coming soon” or “off-MLS” property is usually listed for sale by an MLS Participant using a valid listing agreement, but cooperation is not offered; in other words, the information about the listing is not made available to other MLS Participants in a timely manner.

The most common problem with the “coming soon” practice occurs when a cooperating MLS agent is contacted by a potential buyer who references a property being promoted by the listing agent (usually with a yard sign, but often via email or a website) as a “coming soon” listing. The cooperating agent is subsequently unable to locate information about the property from the MLS system, or is otherwise not allowed access to show the property to the potential buyer. This, of course, reflects poorly on the cooperating MLS agent’s ability to service the potential buyer and in some cases, the problem is aggravated when the listing agent or other “inside” agents show the property before being shared via the MLS.

It is also reported that the sellers of some “coming soon” listings are uninformed, or are otherwise unclear as to the actual status of their property. Many sellers do not completely understand the mechanics of the local real estate market, nor do they understand how information is distributed via the MLS system between cooperating agents. Often sellers confuse MLS processing with consumer marketing via the Internet.

Most troublesome are cases where sellers do not understand the narrow scope of the market to which their home was exposed. In some cases sellers may be unaware that the likelihood of other potential buyers for their property was high, but since cooperation was not offered timely, and the listing information was not shared, those potential buyers never surfaced.

This “coming soon” practice may result in sellers receiving a lower offer, perhaps thousands of dollars lower, than if the property were exposed to the full market. The practice can also result in the seller being placed in the awkward position of having to make a large financial decision on an early offer before the property is properly made available to all buyers the market area.

THE CODE OF ETHICS

These consumer-service problems bring ethical concerns for the listing agent and the broker. **The National Association of REALTORS® Code of Ethics** makes several points to be considered. The **Preamble** of the Code sets the stage with an aspirational statement of how REALTORS® work in concert with each other:

“...Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, REALTORS® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where REALTORS® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain...”

Article 1 of the Code of Ethics makes it clear that a REALTOR®'s primary obligation is to their client:

"...REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly..."

"When entering into listing contracts, REALTORS® must advise sellers/landlords of... the REALTOR®'s company policies regarding cooperation and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities..."

(Standard of Practice 1-12.1)

Article 3 articulates an even higher standard for cooperation with other REALTORS®:

REALTORS® shall cooperate with other brokers except when cooperation is not in the client's best interest. The obligation to cooperate does not include the obligation to share commissions, fees, or to otherwise compensate another broker.

REALTORS® shall not misrepresent the availability of access to show or inspect a listed property. (Standard of Practice 3-8)

The duty to cooperate established in Article 3 relates to the obligation to share information on listed property, and to make property available to other brokers for showing to prospective purchasers/tenants when it is in the best interests of sellers/landlords. (Standard of Practice 3-10)

To clarify, the **NAR Code of Ethics and Arbitration Manual** defines cooperation:

The obligation to cooperate, established in Article 3 of the Code of Ethics, relates to a REALTOR®'s obligation to share information on listed property and to make property available to other brokers for showing to prospective purchasers when it is in the best interest of the seller. An offer of cooperation does not necessarily include an offer to compensate a cooperating broker. Compensation in a cooperative transaction results from either a blanket offer of subagency made through MLS or otherwise, or offers to compensate buyer agents, or, alternatively, individual offers made to subagents or to buyer agents, or other arrangements as negotiated between listing and cooperating brokers prior to the time an offer to purchase is submitted.

The NAR Antitrust Compliance Guide states that the listing agent of a "coming soon" property being promoted without cooperation has the burden on his or her shoulders to defend their practice of non-cooperation. Specifically it states:

"...If an Article 3 complaint is filed, the burden is on the REALTOR® withholding cooperation to explain his conduct by showing that cooperation under the circumstances was not in the client's best interests."

CONSUMER CONCERNs

The interest of the MLS Board of Directors was heightened recently with an article written by consumer advocate, Doug Miller. Miller is Executive Director of the Consumer Advocates in American Real Estate (CAARE), a non-profit dedicated to consumerism in the real estate brokerage industry. Below, he writes for Inman News a rather scathing piece on the practice of coming soon listings, which he refers to as pocket listings:

"Pocket listings exclude the brokerage community by refusing to share commissions. That's bad for consumers and REALTORS®.

In a hot market, pocket listings will almost always generate offers. That is not "test marketing" to gauge demand or pricing. Worse, when that offer comes in, the seller is placed in the undesirable situation of either accepting an offer generated by a semiclosed marketplace or rejecting that offer and putting the house on the MLS. The result is to place the seller in a decision clouded by duress. No fiduciary should ever put their clients in such a situation. And no fiduciary (broker or agent) who is financially biased with a double fee should ever "advise" their clients in this situation; as such advice would certainly be construed to be self-serving.

Pocket listings exist to generate a double fee. That's it. Every argument in favor of pocket listings is little more than self-serving rationalizations that do not survive logical analysis... We believe that advisers who suggest these arrangements to their clients fall into the category known as "predatory fiduciaries."

LICENSE LAW OFFICIALS

The Association of Real Estate License Law Officials (ARELLO) has also drawn focus to the practice of coming soon listings. The July, 2014, *ARELLO Boundaries* publication stated:

"The upswing in the use of 'Coming Soon' signs has prompted some ARELLO member jurisdictions to advise licensees that certain aspects of the practice may raise licensing law concerns. Examples include... whether there is a duty to disclose potential risks that 'pre-MLS' marketing may present for sellers, days-on-market representations in MLS data and broker advertising that do not account for the period of time that the property was promoted as 'coming soon.' And, depending on the circumstances and applicable licensing laws, 'coming soon' marketing that is employed simply to enable a listing broker to 'double-end' a transaction by also procuring a buyer, thereby earning the entire available brokerage commission, may implicate agency/brokerage relationship duties."

Real estate regulators are also evaluating "coming soon" listings in light of fair housing laws. Being considered is the possibility that a real estate licensee who uses "coming soon" listings, by limiting broad exposure of the property to the entire market place, can restrict the marketing of the property to only a small group of selected buyers of the listing agent or the small network of sales associates given preferred access to the listing information by the listing agent. By making such information available only to a small, select group of potential buyers, regulators are concerned that real estate licensees are attempting to skirt fair housing laws by making the property available only to their pre-selected, favored buyers. Fair housing violations falling under federal, state or local laws can be difficult to defend and very costly.

The Director of the Nebraska Real Estate Commission in the summer 2014 edition of the *Commission Comment* states that licensees who get into "big trouble" often have breached their fiduciary duty and have put their own interests ahead of their client's by promoting a transaction that has more benefit to the agent.

REALTOR® LEGAL COUNSEL

Katherine Johnson, Senior Vice President and General Counsel of the National Association of REALTORS® recently weighed in on the practice of "Coming Soon." In an article featured on REALTOR.org, Johnson stated:

"...a broker's decision to market a seller's property as "coming soon" must always be made based on the client's informed determination of what best serves the client's interests... The first important step in advising a seller-client on whether to advertise a property as "coming soon" is to identify the client's best

interests, as defined by the client. Failing to act in the client's best interest and failing to disclose the pros and cons of a limited marketing plan, such as "coming soon" advertising, can violate state real estate license laws and regulations, MLS policies, and the REALTOR® Code of Ethics.

For most sellers, getting the highest possible price on the best terms is their "best interest," and maximizing exposure of their property to potential buyers advances that interest. Multiple Listing Services promote the interests of sellers by compiling property information in an orderly manner and distributing that information to MLS participants who have buyer-clients actively seeking to purchase property in the location served by the MLS. Restricting the marketing of a seller's property to only small networks, private clubs, or even to national websites without also making it available to other area brokers and agents and their buyer-clients through the MLS results in the property not being exposed to the widest group of potential willing and able buyers, and may not provide the seller the best opportunity to attract offers at the highest price."

Johnson clarified that an unsatisfied seller could allege that an agent breached his or her duties if the client did not understand that the restrictive "coming soon" marketing of the property might not achieve the highest price.

Johnson also summarized her concerns regarding ethical practices by REALTORS® stating:

"...adherence to the NAR Code of Ethics is an important consideration for brokers when advising clients on whether or not to advertise properties as "coming soon." REALTORS® must remember to promote and protect the interest of the clients; present a true picture in their advertising, marketing, and other representations; and make property available to other brokers for showing to prospective purchasers when it is in the best interest of the sellers. Failing to do so harms the reputation of the broker... and may result in disciplinary action."

NEW MLS POLICY AND RULES

The GPRMLS Board of Directors has concluded that "off-MLS" promotions, such as "coming soon" advertising, are generally not beneficial market practices and possibly harm sellers looking to obtain the highest price for their property. The lack of cooperation and the lack of full exposure to the market can very rarely be justified when an informed decision is made by a seller.

Both cooperating agents and principal brokers have encouraged the GPRMLS Board of Directors to establish policies that promote ethical practices, the effectiveness of the market, and the best interests of consumers. Recognizing the burden on a listing agent to show good reason as to why cooperation is NOT in the client's best interest, and to have the client make an informed decision when authorizing off-MLS marketing, the GPRMLS Board of Directors took action to clarify and amplify its existing rules and policies. Effective November 19, 2014:

1. Section 1 of the MLS Rules, regarding timely submission of listing information into the MLS system, will be strictly enforced with an automatic fine assessed to the listing agent of \$100 per violation, plus a fine of \$100 for each additional day beyond the deadline for timely submission.

Note: The GPRMLS Board of Directors reminds all MLS subscribers that Nebraska License Law requires a written listing agreement with the seller to advertise or promote a property for sale in any way.

2. MLS Rules, Section 1.1 has been clarified to read:

LISTING SUBJECT TO RULES AND REGULATIONS OF THE SERVICE: Any listing taken on a contract to be filed with the MLS is subject to the rules and regulations of the MLS upon signature of the seller(s). Unless disclosed otherwise in the Listing information, the listing agent represents that

the listing agreement conforms to Nebraska license law requirements, NAR requirements and authorizes some form of access to the real estate by cooperating agents, related industry professionals, and potential purchasers.

Note: A valid listing agreement must be signed by all parties with an interest in the property. Incomplete listings should never be filed with the system, promoted or advertised in any way.

3. A new status, "Active, No Show" is added to the MLS database.
4. Unless the "Active, No Show" status is indicated, Active listings must be available for showing by cooperating agents.
5. Listings not available for showing when input in the MLS system shall be entered with the "Active, No Show" status.
6. Active listings, which become unavailable for showing for a period that extends beyond 48 hours, must be updated to the "Active, No Show" status.
7. MLS Rules, Section 2.5 is amended:

REPORTING SALES TO THE MLS: Status changes, including final closing of sales, shall be reported to the MLS by the listing broker within 48 hours after they have occurred. If the status "Active, No Show" is indicated in the MLS, the status must be changed to "Active" before access is granted for the purpose of showing the property to prospective purchasers. If negotiations were carried on under Section 2(a) or (b) hereof, the cooperating broker shall report accepted offers to the listing broker within 24 hours after occurrence and the listing broker shall report them to the MLS within 24 hours after receiving notice from the cooperating broker.

8. Failure to accurately indicate an "Active" status on a property that is currently accessible for showing, will result in an automatic fine being assessed to the listing agent of \$100 per violation, plus a fine of \$100 for each additional day the status remains incorrect.

Note: It is a violation of MLS Rules, Section 2.5 to show a listing, or allow it to be shown, if "Active, No Show" status is indicated in the MLS.

The GPRMLS Board of Directors cautions that the showing of an "Active, No Show"-status listing, or an off-MLS listing that is being represented as not available for showings, may be considered as evidence in a Professional Standards matter against the listing agent for violation of the REALTOR® Code of Ethics, Article 3. (Specifically, Standard of Practice 3.8 states, "REALTORS® shall not misrepresent the availability of access to show or inspect a listed property.") In addition, final sales of "Active, No Show" listings may be audited by GPRMLS for compliance.

9. A new field "Available to Show Date" is added to the MLS database.
10. On listings with "Active, No Show" status, the listing agent must accurately maintain the "Available to Show Date" field at all times, indicating the date the property is expected to be available for showing.
11. Failure to accurately indicate an "Active, No Show" status on a property that is currently not accessible for showing, will result in an automatic fine being assessed to the listing agent of \$100 per violation, plus a fine of \$100 for each additional day the status remains incorrect.
12. "Active, No Show" status listings will be excluded from data feeds for public Internet display.
13. When dissemination of listing information in the MLS system is not approved by a seller, the executed listing agreement shall be filed with the MLS Office either electronically, in person, or must be

postmarked if sent by U.S. Mail, within 48 hours and must include an acknowledgement, waiving MLS service, signed by the seller(s), the listing agent and the broker or office manager.

14. MLS Rules, Section 1.3 is amended, and now reads:

EXEMPTED LISTINGS: If the seller specifies that the listing is not to be disseminated by the MLS, such listing agreement shall be filed with the MLS Office, but not disseminated to the Participants. The listing agreement must include an acknowledgement that explains the benefits of MLS and enables the seller to make an informed decision about the use of MLS. Specifically, the acknowledgement must explain to the seller that sharing information with other agents through the MLS exposes the property to the widest group of potential willing and able buyers, and provides the seller the best opportunity to attract offers at the highest price.

15. Nothing in the policy above relieves the listing agent of his or her fiduciary responsibilities to the seller, obligations under the license laws and the rules and regulations of the Nebraska Real Estate Commission, or responsibilities under the REALTOR® Code of Ethics to cooperate and share information with other agents, unless it can be demonstrated why cooperation is not in the best interests of the seller.

NEW FORM: SELLER ACKNOWLEDGEMENT – WAIVER OF MLS BENEFITS

The GPRMLS Board approved the following form, which may be updated from time to time, for use with sellers making a determination, to not allow their agent to share information via the MLS system.

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