CALIFORNIA ASSOCIATION OF REALTORS®

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REO related sharp practices

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REO RELATED SHARP PRACTICES: DON'T FORGET CODE OF ETHICS AND MLS RULES OBLIGATIONS

The plethora of distressed and REO properties on the market has brought with it an increase in sharp practices by certain brokers. Some of these actions have challenged the core of REALTOR® professionalism. Certain conduct often associated with REO properties has generated many complaints by REALTORS®. A number of these behaviors and the Code of Ethics and MLS Rules they implicate are outlined herein.

1. Pre-Listing Marketing Activities

In many areas of the State, especially those with a high percentage of REO listings, some brokers have begun to market properties prior to receiving executed listing agreements from the sellers. This phenomenon is a byproduct of institutional lenders desiring to quickly sell their REO inventory. The most typical form of pre-listing marketing is the placement of "Coming Soon" or other types of signs on the property in question, presumably under the direction or with the consent of the lender owner which has foreclosed upon the property. Because there is no listing agreement yet in place, the listing has not been submitted to the MLS, and the agent posting the sign may not be formally empowered to act (i.e. accept offers, etc) on behalf of the seller. Nonetheless, the agent's sign advertises him as the point of contact on the property while interest on the part of the public and amongst potential cooperating agents is being generated.

Some of the dynamics in play resemble those arising with pocket listings where the listing agent works the listing outside of the MLS – although a key difference exists, and that is that in the pre-listing arena, the pre-listing agent may or may not have legal authority to further represent the seller or may choose not to exercise any of it until a listing agreement is secured. This disconnect creates additional dilemmas for submitting offers on the property, commissions, and possible damage (or perceived damage) to the spirit of cooperation.

A REALTOR® may not advertise property without authority (NAR Code of Ethics ("COE") Standard of Practice ("SOP") 12-4 and 16-9). That means, a REALTOR® may not advertise a property unless the owner gives his/her permission. Advertising a property without the owner's permission would also be unlawful false advertising on a number of bases such as implying a relationship that does not exist between the owner and the agent, and in some cases, representing that the property is on the market or to be sold when that is not the case. (More on false advertising is discussed below). While it is highly recommended that an owner's permission to advertise be in writing, it is not mandated. An agency relationship can be created without a written agreement. However, under

California's Statute of Frauds (Civil Code § 1624(5), in order to be paid, the listing agent must have a written listing agreement with the seller. The MLS Rules also require the existence of a signed written listing agreement before a listing is eligible and required to be submitted to the MLS. Similarly, the COE, Article 9, requires that all agreements related to real estate, including listing agreements, be in writing.

The bottom line is that even though a signed written agreement is highly recommended and required to enforce payment of a commission, assuming the seller has consented, it is legally and ethically permissible to place a pre-listing sign on the property, and MLS Rules are not violated for failing to submit the listing because no listing agreement yet exists. As discussed below, analysis of whether a violation of the law, COE or MLS Rules has occurred rests on the content of the sign.

Real estate licensees have legal, MLS and ethical obligations to be truthful when advertising property or services. Legally, licensees may be held liable for fraud, intentional misrepresentation, or negligent misrepresentation if they make material false statements or material omissions in any medium of advertising. (Cal. Bus. & Prof. Code § 17500.) In addition, licensees may face discipline from the DRE. (Cal. Bus. & Prof. Code § 10177(c).) Similarly, REALTORS® have an ethical duty under the NAR Code of Ethics to avoid false advertising. For example, Article 12 states, "REALTORS® shall be careful at all times to present a true picture in their advertising and representations to the public. . . ."

Model MLS Rule 12.10 prohibits false or misleading advertising and requires participants and subscribers to present a true picture in their advertising and representations to the public. Model MLS Rule 16.6 provides that only the "For Sale" sign of the "listing broker" be placed on the property. Accordingly, a Participant who has posted a "For Sale" sign without having a signed written listing agreement in place conveys the picture that the agent placing the sign has actually secured the listing, and since that is not the case, the representation violates the MLS Rules by being misleading, inaccurate and inconsistent with the MLS's "For Sale" sign requirement. If, however, the same Participant's sign were to convey a different message such as "Coming Soon," it would be permissible as long as a seller gave permission to the agent to place such a sign and as long as the overall representation wasn't misleading. Whatever the message conveyed on the sign, the test will be whether it presents a true picture or whether it is false or misleading.

Thus, with the consent of the property owner, it is permissible for a REALTOR® to post a pre-listing sign that presents a true picture and is not misleading. However, certain related practices that some pre-listing brokers (or even listing brokers) engage in do potentially violate existing Code of Ethics or MLS Rules.

2. Refusal to Cooperate

Some potential cooperating agents complain that their calls to the pre-listing agent are not returned and their client's offer is not presented, yet suddenly the just-submitted listing will show up as "sold" in the MLS. Surely, refusing to cooperate with a buyer's broker about the property is a violation of the COE, Article 3 obligation for REALTORS® to cooperate with other brokers, except when cooperation is not in their client's best interest. It is quite possible that a refusal to cooperate in this situation is more in the interest of the listing broker than the seller.

3. Interference with Exclusive Agency

Buyers' brokers also complain that when they contact a pre-listing broker about their client's interest in a property, they are told that no listing has been signed yet, so there is no asking price and no buyer can see the property. Mysteriously, however, when those same pre-listing brokers are contacted directly by the potential cooperating broker's client, the pre-listing broker is more that happy to tell the potential buyer about the property and even to write an offer on their behalf. If a listing broker undertakes to represent a potential buyer, that broker has obligations under the COE,

Article 16. SOP 16-9 states that REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to determine whether the prospect is subject to a current valid exclusive agreement to provide the same type of real estate service. (This is where Buyer Broker Agreements come in handy). Further, under SOP 16-6, even when a communication is initiated by the client of another REALTOR® regarding the same type of service, the listing broker may only discuss the terms of a future agreement or enter into an agreement that becomes effective upon the expiration of any existing exclusive agreement.

4. Failing to Submit Offers

In addition to the Article 3 and 16 COE pre-listing breaches outlined above, another frequent complaint heard in this REO-driven market pertains to listing brokers failing to submit offers. Assuming a listing agreement is already in place, MLS Rule 9.4, Presentation of Offers requires the listing broker to present an offer as soon as possible"or give the cooperating broker a satisfactory reason for not doing so." The listing broker and the seller still have the right to make alternative arrangements for when offers will be presented which would be a satisfactory reason for not presenting them as soon as possible. However, it is likely that a listing broker's total failure to present the offer and respond to all inquiries about presenting the offer could amount to a breach of MLS Rule 9.4's requirement to provide the cooperating broker a satisfactory reason for not doing so.

5. Enforcement

Much of the activity chronicled above occurs during the course of dealings between REALTORS® or MLS participants/subscribers. For example, listing broker never responds to inquiries about the property; cooperating broker contacts lender for instructions on submitting an offer and is told that yes, lender wants offers to be presented; cooperating broker then asserts listing broker violated COE Article 3 and/or MLS Rule 9.4; listing broker states cooperating broker talked to the wrong person in the bank, and the asset manager that listing broker deals with wants all offers postponed to XX date, so he was acting at seller's instruction and no violation occurred.

Determining whether a violation occurred will depend on the facts and circumstances and evidence presented. Instances where such a determination needs to be made do not easily lend themselves to imposition of a unilateral citation by an AOR/MLS and likely necessitate a hearing. This means REALTORS® have to file grievances. While some may be reluctant to do so, nonetheless, the COE and MLS Rules do provide remedies for many bad acts REALTORS® encounter. Perhaps if more REALTORS® challenge those who violate them, it would have an overall deterrent effect against violations and raise the bar in the process.

To help streamline the prosecution of Code of Ethics violations, the Citation Policy for violation of the Code of Ethics was adopted by C.A.R. in January 2009. It is an optional mechanism that local associations can adopt. The purpose is to provide an expedited procedure for prosecution of REALTORS® who have violated the Code of Ethics. If a citation is issued to a violator, the entire process is completed in thirty (30) days or less, unless the violator contests the citation, in which case a full due process ethics hearing is conducted in the traditional way. Complete details can be found on car.org and in the *California Professional Standards Reference Manual*.

Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney.