

THE GIARDINELLI LAW GROUP, APC

Courtside Newsletter

Informing Real Estate Brokers, Association members, and local Businesses for over thirty years.

Post Less to Make More

BY: J NISWONGER
RIVERSIDE COUNTY OFFICE



According to statistics compiled by the California Association of REALTORS® (C.A.R.), short sales comprised 19% of all California home sales in April, and bank-owned, foreclosed properties (REOs) comprised 28% of sales (see www.car.org/marketdata/data/distressedsales/). Thus, 47% of all sales in April involved distressed properties (down from 51% in March 2011). In marketing such properties, some REALTORS® and sellers, including banks, have instituted the practice of setting an artificially low price on the MLS in the hope of encouraging a bidding war among multiple potential buyers. Their goal, of course, is to benefit their clients by selling the property at the maximum possible price.

Lest anyone think that nobody is harmed by this, or that the benefit to the client outweighs the minor moral and ethical implications of telling such a "little white lie," it should be noted that husband and wife brokers in the State of Washington face a 10-year license suspension for just such a practice. (See www.inman.com/news/2011/06/10/washington-short-sale-brokers-could-lose-licenses/.) Among the findings in the Washington case is that the brokers engaged in a "pattern and practice" of listing homes at artificially reduced prices that didn't accurately reflect what the owner was willing to accept, in the hopes of generating multiple offers. While the 10-year license suspension is based on multiple claims of wrong-doing, the Washington Department of Licensing suggested that listing homes at artificially low prices was a serious enough violation that it, alone, might have resulted in a 10-year revocation.

In an effort to help REALTORS® avoid the entanglements faced by the Washington brokers, this month's newsletter addresses the violations of the Code of Ethics, Multiple Listing Service (MLS) rules and applicable California laws that are implicated when a REALTOR® lists a home for substantially less than its value in order to garner more offers.

CODE OF ETHICS

As all REALTORS® should know, Article 1 of the Code of Ethics requires them "to protect and promote the interests of their client." In doing so, however, REALTORS® must "treat all parties honestly." Deliberately listing a property in the MLS

for an artificially low price arguably violates the requirement of dealing honestly with all parties.

Article 2 of Code of Ethics requires REALTORS® to "avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction." Listing an artificially low price constitutes an exaggeration or misrepresentation. Standard of Practice 2-4 prohibits REALTORS® from "naming a false consideration in any document." Listing a price that is substantially lower than what the seller is willing to accept would constitute "false consideration."

Article 3 requires REALTORS® to cooperate. Standard of Practice 3-10 relates the duty to cooperate with "the obligation to share information on listed property." Listing a price on the MLS that is lower than a seller will accept does not fulfill the obligation to share information.

Code of Ethics, Article 11 requires Realtors® to "conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage." Standard of Practice 11-4 establishes that the required competency necessarily involves complying with duties imposed by the Code of Ethics, which require treating all parties honestly (see Article 1).

Article 12 states that "REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations." Standard of Practice 12-4 requires that REALTORS® "not quote a price different from that agreed upon with the seller." By listing a property for significantly less than what the seller will agree to accept in an effort to create a bidding war, REALTORS® could be found in violation of this standard. Additionally, Standard of Practice 12-8 references "the obligation to present a true picture in representations to the public. . . ." Thus, representations of price communicated to the public must be accurate.

These ethical requirements raise issues for a REALTOR® when the seller refuses to list the property at or near its actual value. In such a situation, a REALTOR® may have no choice but to withdraw from representing a seller in order to

RECENT DEVELOPMENTS

- The Giardinelli Law Group, APC won a bench trial in which our client, the Plaintiff, was granted quiet title to his property in San Bernardino after Defendant forged a grant deed.
- TGLG successfully represented several clients regarding commercial leases. Two are tenants relocating to new office space. One is the landlord who negotiated a favorable extension of an existing lease of a large office space. Another client was counseled regarding its rights and obligations as a tenant under a commercial lease and provided strategies to resolve problems and renegotiate unfavorable lease provisions.

CALENDAR

MLS Rules & Regulations / Data Integrity (Traffic School)

Date: July 29, 2011
Time: 9:00 a.m. – 11:30 a.m.
Location: The Pacific West
Association of
REALTORS®

Please contact the Pacific West
Association of REALTORS® to sign up!

Brown Bag - Seminar

Date: September 7, 2011
Time: 11:30 a.m. – 1:00 p.m.
Location: Southwest Riverside
County Association of
REALTORS®

Please contact the Southwest Riverside
County Association of REALTORS® to
sign up!

Important Dates

June 19 Father's Day
July 4 Independence Day

Continued...

avoid violating the Code of Ethics.

MLS RULES

MLS Rule 8.3 requires the listing broker to only input accurate information into the MLS computer database and specifically states that a listing broker "shall not submit or input information which the listing broker knows to be inaccurate." An artificially low listing price is not accurate if it misrepresents what the seller is willing to accept for the property.

MLS Rule 10.5 states, "[I]f the seller(s) of any listed property filed with the MLS refuses to accept a written offer satisfying the terms and conditions stated in the listing, such fact must be transmitted immediately to the MLS and to all participants. This Rule creates a risk to REALTORS® of being reported if a low price is listed and an offer at that price is not accepted. It should be noted that the Washington brokers mentioned above were the subject of numerous complaints regarding pricing to the Northwest Multiple Listing Service where the properties were listed.

MLS Rule 12.10 states that participants and subscribers may not engage in false or misleading advertising. A deflated listing price for the purpose of creating a bidding war is misleading in that it leads potential sellers into believing that they can purchase a home at below-market levels. While the purpose of Rule 12 and its subparts specifically targets publishing MLS data on the internet, as drafted it could be interpreted to include listing prices below what a seller would accept.

APPLICABLE LAW

The duty of honesty is also codified in California Business and Professions Code § 10176, which makes a real estate license subject to suspension if a licensee makes "substantial misrepresentations" (subdivision a), "false promises" (subdivision b), or engages in "any other conduct . . . which constitutes fraud or dishonest dealing" (subdivision i). Additionally, Civil Code § 1088 makes a real estate licensee

liable for the truth of any information placed in the MLS. The fact of the misrepresentation or dishonest dealing itself is enough for disciplinary proceedings, irrespective of whether anyone was harmed.

California's Unfair Competition Law (Business and Professions Code § 17200, et seq.) prohibits unfair and deceptive business practices. Further, Business and Professions Code § 17500, et seq. prohibits false advertising. As interpreted by the California Supreme Court, Business and Professions Code § 17500 "prohibits advertising property or services with untrue or misleading statements or with the intent not to sell at the advertised price." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 52.)

Violation of Business and Professions Code § 17500 is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two-thousand, five-hundred dollars (\$2,500), or by both. Furthermore, in order to recover under § 17500, it is necessary to show only that members of the public are likely to be deceived. Actual deception or confusion is not required, nor is actual harm. The court may order relief without individualized proof of deception, reliance, and injury if it determines that the remedy is necessary to prevent the unfair practice. *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119; see also *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 52.

While it may seem innocent enough to list property at a significantly below-market price on the MLS, REALTORS® potentially face severe consequences for doing so. Even if "everyone is doing it," or everyone expects to pay more than the listed price, the fact remains that is dishonest to list a price lower than what a seller is willing to accept. This "little white lie" could cost a REALTOR® his or her license, could result in criminal penalties, and could result in civil liability.

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BUSINESS CORNER

We want to help



BUSINESSTIPS

STAGING TO COVER UP

According to statistics presented by HomeGain.com, home staging has the second highest return-on-investment in the Top Twelve Home Improvements for Sellers. However, while home staging can create a space where prospective buyers feel they belong, it can oftentimes be used to deceive buyers into believing a defect does not exist when in fact it does.

In a recent article in REALTOR® Magazine, Barb Schwartz points out that "51 percent... [of home buyers] noted that staged homes often cover up real defects including structural damage." To avoid potential liability when staging a home, Schwartz recommends these five tips for REALTORS® and real estate agents:

1. Obtain a copy of the property disclosure statements from the sellers and keep them in your files for each house.
2. Be sure to note any defect that you find that is not listed on the property disclosure statements. Always notify the sellers and their agent in writing and have them sign the notification.
3. When representing a seller, never cover up a defect in a home. If you find a defect, recommend to the seller that they fix it. Even if they choose not to fix the defect, potential buyers have a right to know exactly what they are purchasing so don't cover it up when staging.
4. If you notify the seller of the defect and they choose to fix it, make a note of both the defect and how/when it was fixed on the disclosure statements.
5. While sellers are responsible to inform buyers of any defects in the property, it is also the agent's responsibility to inform their clients. If the agent sees a defect and does not report it, a problem arises and the agent could be held liable for the defect, as well as the seller.

Please note that the above-tips are Schwartz's opinions on how to avoid liability when staging. To make sure you're in compliance with this and other areas of home-selling, please contact an attorney.

To view the full article, "When Staging, Full Disclosure of Property Defects is Essential," go to www.realtor.org.

www.glawgroupapc.com
(951) 244-1856 • (714) 978-2060

LIABILITY & HOME INSPECTIONS

In this wave of short sales and foreclosures, home inspections are vital. However, it is also important to know that if a home inspector misses or fails to disclose a defect, there are two key ways in which a real estate agent or REALTOR® can potentially be held liable:

1. **Recommendations.** According to Barry Stone's recent article in Inman News, "Is real estate agent liable for inspector's mistake?" both who to recommend and how an agent recommends a home inspector is important. If the inspector is not up to par and fails to disclose a defect, the agent who referred the inspector can be liable for a "negligent referral."

Tip: Keep a list of well-qualified, well-known, and experienced home inspectors from which to refer clients. If you aren't sure, ask other agents, but be sure to still do your research on the inspectors they recommend.

2. **Litigation.** Unfortunately, agents can also be named in a lawsuit even when they do nothing wrong. In order to best represent their clients' interests, attorneys may name anyone implicated in the transaction in a lawsuit, should one arise.

Tip: Be proactive when it comes to issues about disclosure. If a question arises about disclosing an issue or not, you should almost always err on the side of caution. If you aren't sure what to do, you can always consult an attorney to find out what the best course of action.

To view the full article, "Is real estate agent liable for inspector's mistakes?" go to www.inman.com.

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