POCKET LISTINGS: DO THE RISKS OUTWEIGH THE BENEFITS?

A pocket listing is one which is held by the listing agent, and not advertised through public channels such as the MLS. While they are more frequently found in commercial transactions (some brokerages specifically advertise for principals only on Loopnet or other commercial sites), they are becoming more common in residential transactions.

Pockets are often marketed through word of mouth, direct mail, or on the broker’s own websites. Why would a seller agree to a pocket listing, when it obviously does not expose the property to the universe of buyers. Explanations include sellers who do not wish to have unqualified buyers come through their homes, clients who are wealthy and/or celebrities, or sellers who wish to keep the sale confidential.

MLS rules require that listings be placed in the MLS (see Model MLS Rule 7.5 requiring submission within two days). These MLS rules allow pocket listings, but only when a certification signed by the seller is submitted. Many Association of Realtors provide forms such as the “Seller Instruction to Include Listing” put out by the California Association of Realtors.

THE RISKS OF POCKET LISTINGS

1. **Breach of Fiduciary Duty Resulting in Underpricing as to the Seller and Overpricing as to the Buyer.**

   The following real life examples demonstrate this risk. In one case an elderly widow advised her agent she did not want the property advertised in the MLS. The agent brought in an investor with whom she had worked before. After the sale of the seller’s children claimed the property was $300,000 underpriced and sued the agent. Hurting her defense, the agent failed to keep her comps which she gave to the seller.

   In another case a 90 year old owner of a commercial building debated whether to fix the building up and rent it, or sell it. His property manager had the building appraised for between $2.6 million “as is,” and $3.2 million fixed up. The property manager brought in a buyer (who was later learned to be his cousin) who offered $2.5 million. A week following the close of escrow the buyer flipped the property for $4.2 million. The agent was paid a fee by his cousin on the flip.

   In the first case the agent was alleged to be negligent in determining a price. In the second case the argument was made that there was a breach of the duty of loyalty in that the agent put his interests before that of the seller.
Potential risks arise also where an agent advertises the property but does not put it in the MLS, seeking only to sell to principals. In that situation, buyer’s agents lose the incentive to bring offers.

Buyers also can overpay for pocket listed properties if their agents do not value the property properly.

The lesson here is that it is the agent must explain in writing all of the consequence of a pocket listing, and obtain informed consent before marketing the property as a pocket. The agent should also keep all of his/her comps showing how the price was obtained.

1. **NAR Code of Ethics**

Pocket listings could result in violations of the NAR Code of Ethics. Article 1 requires that agents present all offers and counter offers objectively and quickly as possible to a seller. Further, Article 1 requires the Realtor® to “promote and protect the interests of the client.” Further, Article 3 requires cooperation between brokers (although it does not obligate listing agents to compensate other brokers). This includes a “duty to cooperate. . .,” i.e., the obligation to share information on a listed property.

2. **The Risk of Not Being Paid.**

If a property is not in the MLS, a buyer’s agent’s commission is not protected. A seller may accept the offer which is procured by a buyer’s agent, but if the buyer’s agent has no written agreement with the listing agent to be paid, the listing agent has no obligation to pay them. As such, the buyer’s agent either must enter into a Buyer’s Broker Agreement with the buyer, or a cooperating brokers agreement with a broker.

3. **Fair Housing Violations**

The most obvious would be if a seller says they want to keep the property off the MLS because they don’t want to sell to a particular group of people, such a people without families. More subtle however, are claims that the pocket listing has a “disparate impact.” This means that the practice has a “discriminatory effect” and “results in a disparate impact on a group of persons. . . or perpetuates segregated housing patterns. . .” 24 CFR §100.500. Examples include private arrangements with other agents to prevent the property to be marketed to particular ethnic groups, because all of the agents may be of a particular ethnic group themselves.

4. **Anti-Trust Violations**

Brokers now are creating private websites on which they list their properties to a select group of other brokers. If there are any type of minimum commission arrangements agreed upon this could be viewed as “price fixing” which is a violation of anti-trust laws. This would subject
all participants in said “private MLS” to potential exposure for this violation.
5. **Deterioration of Reported Information.**

MLS sales are reported to the public when they are dissimilated on other websites such as Trulia, Redfin, or Realtor.com. These sites then can create graphs showing trends in a particular market, and provide quality information for comparable sales. Engaging in pocket listings removes a certain number of properties from the market, which can deteriorate the information provided by these websites. This can have an adverse effect on the entire industry.

**CONCLUSION**

It seems that it is a rare occasion where a pocket listing would actually benefit a seller. Agents should be extremely cautious in dealing with pocket listings, and Associations of Realtors should consider creating advisories that agents can provide to sellers explaining all the risks of a pocket listing so that the agent can demonstrate that he obtained informed consent. Agents should be particularly careful when dealing with elderly sellers.