

“COMING SOON” – REVISITED

Hello, Michigan Realtors®. I’m Brian Westrin and welcome back to the “Letter of the Law.” Last summer, we took a look at the “coming soon” marketing method. At that time, we focused primarily on MLS requirements and avoiding restraint of trade challenges. It’s springtime, and the market is heating up. As such, we’re seeing an increase in marketing efforts done both in conjunction with the MLS and independent of it. We thought we would take this opportunity to revisit the “coming soon” model. We do not wish to either promote or discourage this marketing method, but simply to discuss various legal and ethical issues that must be addressed by Realtors® who are considering using this model.

In order to intelligently discuss the pros and cons of the “coming soon” marketing method, it is important to understand what it is. While there is no legal definition of the “coming soon” marketing method, it would appear to take one of two forms. Some “coming soon” advertising involves unlisted properties that may or will be listed in the near future, while others involve property that is currently listed but is temporarily not available for showing to MLS participants. In both instances, the property is temporarily withheld from the MLS.

MLS rules commonly require agents to place listings in the MLS within two days of receiving a signed agreement. Failure to do so can result in significant fines. Of course, sellers can always opt out from having the property listed in the MLS. Associations and MLSs who are considering the adoption of additional rules and regulations regarding “coming soon” listings are encouraged to revisit last July’s Letter of the Law segment. This current segment will be aimed at Realtors® who are considering such a marketing method.

Opponents and Proponents

Realtors® who object to the “coming soon” marketing method argue that it deprives the seller of the benefits of maximum exposure to the market. Critics also argue that the “coming soon” marketing method adversely affects the integrity of MLS aggregate data at least with respect to a determination of days on the market of a property.

On the other hand, proponents of the “coming soon” marketing method argue that the interest generated prior to listing using various targeted media results in more traffic when the listing is finally submitted to the MLS. Proponents argue further that upon completion of the “coming soon” marketing period, the property is listed in the MLS and is exposed to all of the participants of an MLS which ultimately results in obtaining fair market value. It is also argued that the aggregate data for the MLS is enhanced, not harmed through the use of the “coming soon” marketing method.

Informed Consent of the Seller

While there is much disagreement over the “coming soon” method, it appears undisputed that a Realtor® using a “coming soon” marketing method has a fiduciary duty and ethical obligation to obtain the informed consent of the seller. It is in the best interest of sellers to get the highest possible price for their property, and the usual assumption is that this is done through maximum exposure to potential buyers through the MLS. If a Realtor®’s strategy is to forego this exposure, he or she must do so based on a sincere belief that this marketing strategy will serve the seller-client’s best interests and make certain that the seller-client understands and agrees with such a marketing strategy.

Members who misuse the “coming soon” marketing method risk disciplinary action from DLARA as well as a breach of fiduciary duty claim from a disgruntled seller. Michigan license

law provides that a listing broker owes a duty of loyalty to the interest of the seller-client. A seller who is not fully informed of the benefits and risks of limiting exposure through the “coming soon” method may later allege that the listing broker breached this duty of loyalty.

Additionally, Michigan law requires a listing broker to market the seller’s property in the manner agreed upon in the listing agreement. For this reason, if a Realtor® and seller agree to use the “coming soon” method, the listing contract should be amended to specifically say so. Otherwise, a seller may later point to the MLS language in the standard listing contract form and argue that the listing broker did not market the property according to the terms of the listing contract.

Members who misuse the “coming soon” marketing method also risk having an ethics complaint filed against them. Article 3 of the Realtors® Code of Ethics provides that a Realtor® should cooperate with other brokers except when cooperation is not in the client’s best interest. Standard of Practice 3-10 provides that this duty to cooperate “relates to the obligation to share information on listed property and to make the property available to other brokers for showing to prospective purchasers when it is in the best interest of the seller.” Article 1 requires a Realtor® to promote and protect the interests of their clients, and Article 12 requires Realtors® to present a true picture in their advertising and marketing.

Obviously, the decision to use the “coming soon” marketing method must be made for the benefit of the seller and not for the benefit of the listing broker. Realtors® who use this method should be prepared to explain why the method was in this particular seller-client’s best interest and that they had the seller’s informed consent. This may be a harder argument to make if, during the “coming soon” period, the property was made available to the listing broker’s other clients and customers. Likewise, if offers are accepted during the “coming soon” period, the

assumption may be that the method was chosen for the benefit of the listing broker rather than the seller. Finally, the motives of a listing broker who regularly uses the “coming soon” model regardless of the location and nature of the property being sold, or the needs of the particular seller, may be questioned.

Done properly, “coming soon” can be a legitimate advertising technique generating interest in a property while at the same time allowing owners more time to prepare the property for showing or sale. A legitimate “coming soon” listing should truly be unavailable for purchase. Moreover, the listing agent should be able to show that the sellers understood that during the “coming soon” period, the property would have limited exposure.

As always, thank you for tuning in. If you enjoy the Letter of the Law format, please visit ondemand.mirealtors.com for legal continuing education opportunities. If you have any suggestions for future topics, please send those to the email below. Thanks again, and we’ll see you next time!