



Courtside *Newsletter*

Much Ado About “Coming Soon”



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With low inventory and decent economy (read: people looking to buy), the real estate market is currently a seller’s dream. However, as we’ve seen in the past, with that comes a host of other problems. The current thorn in many real estate practitioners’ sides are “Coming Soon” signs, and what they actually entail. As innocuous as they may seem, there are many legal ramifications to “Coming Soon” signs, both when done with the best intentions and with malintent.

The Basics

Part 1—Agency and Fiduciary Duty

Before we delve into why “Coming Soon” signs may be so malevolent, let’s first look at what creates an agency relationship between sellers and their real estate broker. It’s important to focus on the granular aspects of agency relationship in this instance since the relationship that ensues is considered a “special agency” versus a general agency. Under Civil Code § 2297, “an agent for a particular act or transaction is called a special agent. All others are general agents.” According to the California Bureau of Real Estate’s (CalBRE) reference book on Agency (which can be found online at www.dre.ca.gov), “the agency relationship between a real estate broker and his or her principal results in a special agency typically limiting the broker to soliciting and negotiating on behalf of the principal to the real property or real property secured transaction. (Business and Professions Code § 10131 et seq.; Civil Code § 2297).”

This special agency creates a fiduciary duty that real estate practitioners owe to their clients. Included in that duty are the duties of:

- Good faith
- Loyalty
- Confidentiality
- Fair and honest dealing
- Reasonable care and skill

According to CalBRE, “The courts have consistently equated the duty of an agent to a principal with the duty owed by a trustee to a beneficiary. The Probate Code provides that, in all matters connected with a trust, a trustee is bound to act in the highest good faith toward the trustee’s beneficiary, and the trustee may not obtain any advantage over the beneficiary by the slightest misrepresentation, concealment, duress or adverse pressure of any kind.” Fiduciary duty plays a key role in a real estate practitioner’s line of work. People come to real estate agents for help navigating the oftentimes confusing waters of purchasing or selling a property. These laypeople rely on the agent for the knowledge he or she possesses and therefore trust him or her implicitly with what may be the largest investment of their lives. It is not a duty to be taken lightly, and one never wants to be called into question for having potentially violated it.

Part 2—The Controversial Concept of Dual Agency

Dual agency is a legal, albeit controversial, practice in California. It occurs when an agent “double-ends” a transaction, meaning they represent both the buyer and the seller. This can arise when a listing agent procures an unrepresented buyer, and the agent thereafter represents both parties in a transaction. It can also occur when two agents at the same brokerage represent the buyer and the seller of the property. California has strict disclosure laws regarding dual agency, and representation cannot occur without both parties’ consent. Failure to obtain express (written) consent may lead to the broker losing his or her commission and/or rescission of the transaction.

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As you may have guessed, dual agency gets murky when you think about an agent's fiduciary duty. How can an agent represent both parties and still have both of their best interests in mind? It's a controversial question that does not necessarily have a clear answer. If an agent is truly an upstanding citizen, upholding the tenants of his profession, there should be no issue. However, at the end of the day, an agent makes a commission on the final purchase price of the home and the realities of human nature must also be contended with. Dual agency is an area in which unscrupulous agents may have an opportunity to take advantage of trusting individuals. Per CalBRE, "The conflict of interest which is inherent in dual agency has been recognized by other authorities. The reasons underlying the rules against dual agency are of ancient origin. 'No man may serve two masters; for either he will hate the one and love the other; or else he will hold to the one and despise the other...' (Gospel of Matthew, Chapter vi: 24 quoted in *Nahn-Beberer v. Schrader* (Mo. App. 1936) 89 S.W. 2d 142). Although dual agency is a common practice in California real property and real property secured transactions, a real estate broker who represents both parties must act with extreme care."

The Question About "Coming Soon"

With these three factors in mind—agency, fiduciary duty, and dual agency—we return to the issue at hand: "Coming Soon" signs. The issue with "Coming Soon" signs revolves around this special agency relationship and, more importantly, the fiduciary duty owed to clients. Many agents are expressing concern over whether the use of "Coming Soon" signs violates that fiduciary duty by keeping a listing off the multiple listing service (MLS) in an attempt to "double-end" a transaction. They are concerned that agents are acting in their own best interests, and not those of their clients. (If they double-end the transaction by listing it as "Coming Soon" and attracting a potential buyer, they make more money off the commission.)

On the other hand, there are some agents who argue the benefits of "Coming Soon" advertisements, such as creative marketing and generating interest in a property. While there may or may not be legitimate reasons for "Coming Soon" signs, it is important for all agents to be aware of the associated risks involved. The issues of the agency relationship, fiduciary duties, and dual agency are only a few of the topics for which agents need to be familiar.

How to Ethically List a Property as "Coming Soon"

That said, the "Coming Soon" sign can and does still present problems. Agents and brokers are advised to thoroughly research whether "Coming Soon" advertising is in the best interest of their clients. If it is, they must fully explain to the seller the benefits and risks of keeping a property off the MLS for any length of time, and they must do so to the extent that the fulfillment of their fiduciary duty is never brought into question.

In addition to complying with state license laws, an agent should also check with the rules of their local MLS as they relate to "Coming Soon" marketing and Days on Market calculation. For example, the California Regional MLS (CRMLS) has a new form entitled "CRMLS Seller's Instruction to Exclude Listing from MLS," which provides, in part, for an agent to advertise a property as "Coming Soon." The form allows the seller to instruct that the property will be marketed, but not listed with the MLS until a certain date. If a seller instructs that the property is not to be listed with the MLS until a certain date, the Days on Market will be the beginning date of the Listing Agreement (not the date it was submitted into the MLS). The form may also indicate that the property is to be excluded from the MLS and not marketed by the agent. If a seller instructs that the property is not to be listed with the MLS and not marketed, then the Days on Market will be the beginning date of marketing.

However, not all agents are members of CRMLS and not all MLS' have such a provision. As a result, the use of "Coming Soon" advertisements may create an issue related to the Days on Market calculation. REALTORS® should also note that the C.A.R. Form "Seller Instruction to Exclude Listing from the Multiple Listing Service" does not have a provision to exclude a property from the MLS for a certain amount of time. REALTORS® should be hyper-aware of their association's rules regarding the timeframe to submit listings to the MLS.

Should you have any questions regarding "Coming Soon" signs, dual agency, or any other real estate gray areas, we urge you to consult your local REALTOR® association or qualified legal counsel. Not only would a good intention gone awry not be worth the litigation fees, it could also harm your number one marketing tool: your good name.

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