

What's in *your* pocket?

'Pocket' listings are not illegal, but they do beg ethical and risk management questions.

By
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Recently, REALTORS® have reported a rise in the practice of taking “pocket listings,” especially in certain markets in New Hampshire. This article will briefly outline the legal and ethical issues related to pocket listings.

A pocket listing is a listing where the broker keeps the listing and does not place the listing on the New Hampshire statewide MLS, the Northern New England Real Estate Network (NNEREN). Instead, the property is marketed informally by the REALTOR® to members of that person's network and/or contacts. These pocket listings are also sometimes referred to as “office exclusive” listings.

There is no statutory prohibition in New Hampshire to a pocket listing. New Hampshire License Law, RSA Chapter 331-A, does not require listings to be placed on NNEREN. In fact, the second page of the standard Exclusive Listing Agreement requires the seller to affirmatively check the box “yes” to have their property placed on the NNEREN website.

Even though there is no legal prohibition against taking a pocket listing, there are ethical and risk management issues to consider. From the legal perspective, a listing agent in New Hampshire owes a fiduciary duty to the seller to act in the seller's best interest. Thus, failing to place the property on NNEREN, where it will be viewed by all real estate licensees who have access to NNEREN as well as the public, could be viewed as a breach of fiduciary duty because the property has not been marketed to its full extent possible.

It likewise may be a breach of the agent's fiduciary duty if the agent fails to fully inform the seller of the risks and benefits of pursuing a pocket listing versus a more traditional list-



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ing where the property is posted on NNEREN for view by all. There may be particular circumstances where a pocket listing is in the best interest of the seller and the seller can and does make an informed decision to utilize the pocket listing approach. However, the agent needs to make sure that the seller has been fully informed before they reach that decision.

I would further strongly encourage any agent who utilizes a pocket listing approach with the seller to have detailed documentation in their file substantiating the information provided to the seller and the rationale for

opting for a pocket listing instead of a more traditional listing.

In the end, a pocket listing is not illegal in New Hampshire but should be used with caution. If a pocket listing approach is to be taken, you need to make sure that this approach is being taken because it is in the best interest of the particular seller client and that the rationale for this decision is fully documented in your transaction file.

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