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## "Pocket" Listings Can Pick your Pocket

By Ronald Rossi

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Pickpocketing, one of the world's oldest and most common crimes, involves stealing money so cleverly that the victim doesn't notice he's been robbed until the pickpocket is long gone. This particular crime appeals to many thieves because it's safer than many other criminal pursuits. It has been said that someone skilled in the art of pickpocketing can steal as much money as an armed robber with much less risk of getting caught. Pickpockets depend on speed, sleight of hand, and clever tricks designed to distract a victim, directing attention away from the crime in progress.

In the real estate market, today's victims of pickpocketing are sellers of residential real estate who are letting their property be sold 15% under valuation. Unscrupulous agents playing pickpocket first gain sellers' trust and confidence and then advise them that it would be best to keep the property off the Multiple Listing Service ("MLS") to maintain privacy and avoid theft and all the hassle that goes with selling one's home. The best approach, such agents will assure clients, is to just list the property exclusively with those agents and their company.

What they do not tell sellers, however, is that exposing the property on the MLS puts it on the radar of over 14,500 members, all of whom then have the opportunity to work on their property.

Confidential statistics indicate that in 2012, in Santa Clara County alone, properties on the MLS sold for 12.9% higher than so-called "pocket" off-market listings.

Pickpocket listings tend to occur when the real estate market is hot, which is what is happening in our area today, because the agents, sniffing bigger commissions, want to minimize exposure in order to maximize their own profit.

Most, if not all, real estate attorneys will acknowledge that it is a breach of a listing agent's fiduciary duty to the seller to keep the property off the MLS unless the seller (not the agent) has a valid reason for not marketing the property to all real estate agents. It is rarely in a seller's best interest to avoid mass marketing a property, which encourages bidding wars and higher sale prices. Many sellers do not understand the benefits of putting their property on the MLS, so they agree to a pocket listing based on assurances from their agent that they will get either just as good a sale price or an even higher one by doing so.

Agents who operate this way breach their fiduciary duty of undivided loyalty to their clients. The law holds that real estate agents cannot use their position of agency to their own advantage in order to double-dip on a transaction and collect a 6% commission rather than having to split the commission with another real estate firm. Agents have the duty to exercise the utmost care, integrity, honesty, and loyalty with regard to their clients. This duty includes doing their best to get the highest possible price for the property and advising the seller of all consequences of choices made about marketing.

As the market began heating back up, exclusions from the MLS increased dramatically, doubling for the first quarter of 2013 compared to the same timeframe in past years. In 2012, properties not placed on the MLS amounted to 15% of the market, or \$3.4 billion in sales volume. Even at a conservative 10% reduction in fair market value, that would amount to \$340 million in lost seller proceeds, caused by greedy agents trying to avoid splitting commissions.

Valid reasons for avoiding marketing properties on the MLS are extremely rare. The MLS was designed to expose properties to as many agents as possible, as maximum exposure generally nets the seller a higher sale price. While there are some disadvantages, these can generally be overcome. One popular tactic used by pickpocketing agents is telling sellers that if they put their property on the MLS, they'll have to get a lock box and a "for sale" sign. In fact, neither is required. How the property is marketed and shown can be controlled whether the property is on the MLS or not.

Put yourself in the seller's position. You want the highest possible price. The most likely way to get that is to have as many potential buyers bidding on the property. Only mass marketing via the MLS is going to catch the attention of all the prospective buyers out there.

Because agents who want to profit from pocket listings present this approach in such a glowing light, sellers lured into these off-MLS listings often don't realize how much money they've lost once their property sells. As very few cases have been litigated against agents using this tactic, the public is generally unaware of this trend, so these agents are today's equivalent of the old-time cutpurses, deftly separating you and your wallet and vanishing with your money. When you decide you need an agent to sell your house, keep a firm grip on the common-sense fact that using the MLS nearly always works to your advantage, and no one will succeed in picking your pocket.



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Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

*Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology*

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*The California law firm of Rossi, Hamerslough, Reischl & Chuck provides legal representation to real estate and business clients throughout Silicon Valley and the San Francisco Bay Area including San Francisco, San Jose, Palo Alto, Los Altos, Los Gatos, Menlo Park, Gilroy, Hollister, Santa Cruz, Santa Clara, Aptos, Monterey, Carmel, Salinas, Morgan Hill, Saratoga, San Francisco County, Santa Clara County, Santa Cruz County, San Benito County, Alameda County, San Mateo County, Monterey County, and Contra Costa County.*

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