

Holding Yourself Out As A Short Sale Specialist?

Better Be S.A.F.E. Or You Will Be Sorry.

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Holding yourself out as a short-sale specialist? Lots of folks are these days and with good reason. Short-sales make up a disproportionately large number of all transactions and probably will continue to do so for some time.

However, there are important limits on how far a real estate agent can go in representing their seller when it comes to short-sales. The most far-reaching limitation is imposed by the Georgia Residential Mortgage Act (the "Act") which was modified recently to comply with the Secure and Fair Enforcement for Mortgage Licensing Act (the "S.A.F.E. Act") which is a key component of the Housing and Economic Recovery Act of 2008 ("HERA").

Pursuant to the Act, "it shall be prohibited for any person to engage in the activities of a mortgage loan originator without first obtaining and maintaining a mortgage loan origination license". A mortgage loan originator is defined as someone who takes a residential mortgage loan application or offers or negotiates terms of a residential mortgage loan. The term "mortgage loan" includes the renewal or refinancing of a loan".

The Act specifically exempts real estate brokers and agents from licensure, but only to the extent that they are performing real estate brokerage activities. Notably, real estate brokers and agents are not exempt to the extent that they "directly or indirectly negotiate, place or find a mortgage for others". In any of those events, they must be licensed as mortgage loan originators or mortgage brokers.

Normally, real estate brokers and agents do not get involved in negotiating the terms of loans for their clients and should not run afoul of the Act. However, what about in short-sale situations? If an agent contacts the seller's lender trying to negotiate terms for a short-sale, does this violate the Act? We do not have any definitive case law on this yet, but the answer certainly appears to be "yes".

So, what's an honest agent to do? In short, the agent should limit their role to that of information provider and have no hand in actual negotiations with the seller's lender.

It is okay for an real estate agent to gather information about the property, undertake a market analysis, create a BPO, suggest a list price for the property, assist in the negotiation of the terms of the sale to a buyer, and to generally do all the things agents normally do for non-short-sale sellers.

It is probably fine for an agent to provide all of the above information to the seller's lender and to provide the lender with any other information or documentation it may request.

However, it is not okay, and likely a violation of the Act, for the agent to negotiate with the lender on behalf of the seller. Let's look at the following example to see how this plays out.

Bob owns a house that, in today's market, is worth \$250,000. Bob purchased the house in 2004, paying \$400,000. Bob's current loan balance is \$375,000, meaning that he is \$125,000 "upside down". Last year Bob lost his job as a corporate manager. He finally found work 6 months later but for a significantly reduced salary (his new job description involves asking "do you want fries with that?"). Bob is 4 months behind on his mortgage and has received several letters from his lender threatening foreclosure. Bob has not been able to get in touch with his lender and called you because he saw your web-site in which you claim to be a "short-sale specialist".

Bob has not heard back from his lender's "work-out" group and his current job forces him to be away from the phone most of the day. Can you, or your assistant, contact his lender for him? Probably not, at least not in any meaningful way. It may be okay for your to call Bob's lender's main number to get a name and direct phone number of someone in the work-out department or to ask what information the lender needs as part of a short-sale application package. However, it is seemingly not permissible for you to get into any of the specifics related to Bob's loan.

You conduct your market analysis and suggest a list price of \$275,000 to allow some room for negotiation. Can you provide this information to Bob's lender? The answer appears to be yes. This is merely providing information and not negotiation.

The property sits on the market for a few months with no nibbles. Bob is worried that his lender will move forward with foreclosure. Can you contact the lender and tell it that you think offers will be coming in as spring approaches ask it to hold off on foreclosing for a few more months? This is a bit more tricky. It is likely okay to let the lender know that you hope to get some offers soon. However, requesting the lender to hold off foreclosure may possibly cross the line into negotiations.

Fast forward a while and you now have an offer on Bob's house. The offer is for \$225,000 "as-is". Can you forward the offer to Bob's lender? Yes. Again, this is merely the providing of information.

Can you include a letter to the lender, saying that you believe this is the best price obtainable for Bob's property and that you urge the lender to approve it quickly before

the buyer moves on to another property? It is probably okay for you to let the lender know that you think this is a good offer. However, have you crossed the line between providing information and stepped into negotiation when you urge the lender to accept the offer? Probably.

Bob's lender has approved the \$225,000 offer. However, Bob's lender says it will not allow Bob to pay you the 6% commission you negotiated with Bob. Rather, it will only allow a 4% broker's commission. Can you call Bob's lender and try to explain why the 6% commission is more than reasonable considering all the effort you put in to the deal? You might argue that you are merely negotiating on behalf of yourself, not Bob, so this should be okay. However, this could well be seen as an attempt to negotiate the overall terms of the short-sale approval, which is not permissible.

As can be seen from the above examples, the line between what is and is not permissible can be hard to draw. However, because violations of the Act constitute a felony and may also give rise to civil damages, the safest thing for real estate agents to do is error on the side of caution and avoid anything that could be construed as negotiating with the seller's lender.