

## **Use of Short Sale Negotiators**

Completing a successful short sale often requires time-consuming negotiations with the lender or lender's representative. Many agents or offices are inexperienced, unskilled, or just too busy to efficiently and effectively conduct such negotiations. They prefer to utilize the services of a third-party negotiator who often has an established relationship with a person in the lender's loss mitigation department. Use of such a third-party negotiator, particularly one who is not "in-house," may raise a multitude of legal and ethical issues, including questions relating to fiduciary and ethical duties, license requirements, contractual relationships, compensation, disclosure, confidentiality, compliance with MLS Rules and civil and criminal law, insurance coverage and liability. Some brokerages bring the negotiators in-house and under the umbrella of the supervision of the broker and the company's insurance coverage.

## **DRE License Required for Negotiators**

Real estate licensees who take short sale listings must ensure that the third party conducting the negotiations is properly licensed. The DRE has made it clear that a real estate broker or salesperson license is mandatory to represent the parties to a short sale, unless negotiations are conducted by an attorney or the party. If the negotiator is a licensee, then he or she must have a supervising broker. Careful consideration must be given to whom the fiduciary duty is owed. Is the negotiator an agent of the seller, a dual agent, or an employee/agent of the listing broker, the cooperating broker or both?

If the transaction involves a loan secured directly or collaterally by liens on real property, California Business and Professions Code section 10131(a) and (d) requires a person to be licensed who negotiates as a representative of another for the purchase, sale or exchange of real property, or who, for or in expectation of compensation, acts in a representative capacity for another to negotiate loans or perform services for borrowers or lenders. (Narrow exceptions exist for attorneys acting in the course and scope of their law practice and a person or entity acting solely on his or its own behalf). A license is required regardless of the title used by the negotiator. For example, none of the following are exempt from the license requirement: debt negotiator, debt resolution expert, loss mitigation practitioner, foreclosure rescue negotiator, short sale processor, short sale facilitator, short sale coordinator, or short sale expeditor. Persons who engage in short sale negotiations without a DRE license are in violation of California law and could be fined and/or imprisoned under section 10139 of the Business and Professions Code. Persons who knowingly hire them may also be in serious difficulty.

## **Obligations of Listing and Selling Brokers and Agents**

### ***Seller's Written Agreement and Disclosure***

The listing broker/agent must have the seller's written agreement for the negotiator to provide services. This is required for several reasons:

- (1) The listing broker/agent must disclose to the seller that the negotiator's services will be used.
- (2) The negotiator must have authority from the seller (borrower) to communicate on the seller's behalf with Lender.
- (3) The agreement of the seller is required regarding compensation to be paid to the negotiator.
- (4) Use of the negotiator must be disclosed to the buyer's agent.

These requirements may be met by completing the appropriate C.A.R. Form – Short Sale Addendum and providing the buyer's agent a copy of the form. In addition, it is this author's opinion that an agency disclosure form may often be required. If the licensed negotiator is acting on behalf of the seller (and/or buyer) in a principal/agency capacity, an Agency Disclosure form is mandatory.

### ***Relationships between Listing Broker or Agent and Negotiator and/or Outside Broker***

The listing agent generally has an independent contractor relationship with the listing broker. The negotiator may be an employee, an affiliated independent contractor, or an outside vendor of either the listing broker or the listing agent. **If the negotiator is not an affiliated licensee of the listing broker,**

he must himself be a broker or be affiliated with another “outside” broker. The listing broker/agent should have a clear written agreement establishing the relationship with the negotiator.

If the negotiator is affiliated with an outside broker, there should be a written agreement between the listing broker and the outside broker confirming that the outside broker will meet the fiduciary and legal duties to supervise the negotiator’s activities, not delegate tasks requiring a license to unlicensed persons, and provide insurance coverage for worker’s compensation and liability coverage for negligence or unintentional misrepresentations by the negotiator to the lender, buyer, seller or others. The agreement between the brokers should also establish their rights regarding commission splits and method for compensating the negotiator for his services. Providing for mediation or arbitration and attorney fees in the brokers’ agreement is also advisable.

Additional issues arise if the lender requires or designates a negotiator or if the listing broker/agent is also the buyer’s agent (dual agency) and uses a negotiator who is an employee or independent contractor of the lender. In a dual agency transaction, the agent has a fiduciary duty to the seller to negotiate the best terms for the seller, not obtain the highest price for the Lender.

All appropriate disclosures regarding affiliate business relationships and referrals must be made to comply with the Real Estate Settlement Procedures Act (“RESPA”).

### ***Compensation to Negotiator***

The negotiator must comply with all DRE regulations and California law for advance fees. Disclosure of all fees, including short sale negotiator compensation, must be made on the HUD 1 Statement. Payment to the negotiator must be made through escrow. Conditions for valid payment to a short sale negotiator include the following:

- Seller consent (written),
- Agency Disclosure,
- DRE license affiliated with licensed broker,
- Performance of licensed activities,
- Entitlement to compensation as an agreed commission split, a flat fee, or hourly rate as an independent contractor or employee of the listing agent, listing broker, or outside broker.

Will the fees still be due if the transaction fails to close or if the lender fails to grant approval?

### ***Listing Broker/Agent Liability***

Claims for breach of fiduciary duty, failure to disclose, or failure to supervise may be brought by a seller or buyer. DRE discipline and criminal and/or civil liability may attach even if the listing broker/agent is unaware that the negotiator is engaged in mortgage fraud.

### **IMPORTANT POINTS TO REMEMBER:**

- A real estate licensee’s fiduciary duty is to his client and CANNOT be signed away.
- A listing agent’s duties cannot be delegated to an unlicensed third party.
- A dual agency disclosure does not eliminate the listing agent’s duty to the seller which may conflict with getting the best price for the investor.
- A real estate licensee who is collecting an advance fee for performing the short sale MUST follow the federal law, DRE guidelines and California law for advance or other fees.
- Not getting the best offer for the seller may expose the seller to a higher potential deficiency judgment and a greater tax liability.