

Short Sales

What's a licensee to do?



Division of Real Estate

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What is a short sale?

- A short sale involves a real estate transaction where the net proceeds at closing will not satisfy the payoff amount of mortgages and other liens on the property. The deficiency in funds is because the seller is attempting to sell the home to the buyer for an amount less than the amount owed to the lender(s) and other lien holders (if any) .

What's an agent to do?

- This presentation will explore the duties of real estate agents under the Florida Statutes for a real estate agent handling a short sale transaction.

How is the short sale transaction different from the traditional sales transaction?

- The short sale transaction is the same as the traditional transaction in almost every way with *one exception*.
- The listing usually involves special language.
- The sales contract usually involves special language.
- The settlement terms may be different.
- The lender, while not a party, must approve the contract.

So what is the exception that makes short sale very much like traditional sales?

- Chapter 475 and Chapter 455 of the Florida Statutes places the same obligations on a real estate licensee handling a short sale as a real estate licensee handling a traditional sale.

Let's look at Chapter 475

- Section 475.01, Florida Statutes, defines broker services. Short sales involves real estate services. The real estate licensee is assisting in bringing together buyers and/or sellers to the real estate transaction.
- This is the case with both short sale and traditional transactions.

Initial contact with the customer/client: Agency duties

● Traditional

- Under Section 475.278, Florida Statutes, licensees are presumed to owe transaction broker duties unless some other disclosure is given.
- Which agency relationship to form is a decision for the broker and customer.
- Must use skill, care and diligence,

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Initial contact with the customer/client: Agency duties- Special Concerns

- **Section 475.278(2)(f), Florida Statutes, requires transaction brokers give:**

Limited confidentiality, *unless waived in writing by a party*. This limited confidentiality will prevent disclosure that the seller will accept a price less than the asking or listed price, that the buyer will pay a price greater than the price submitted in a written offer, of *the motivation of any party for selling* or buying property, that a seller or buyer will agree to financing terms other than those offered, or of any other information requested by a party to remain confidential;

Common problem- Unless waived in writing by the seller, disclosing the seller's motivation (i.e. avoid foreclosure, distressed, etc) could be a violation. Suggestion- write the instruction into the listing agreement.

Initial contact with the customer/client: Listings

- Traditional
- Section 475.25(1)(r), Florida Statutes, provides for a violation if the licensee has:

failed in any written listing agreement to include a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal(s); and has failed to give the principal(s) a legible, signed, true and correct copy of the listing agreement within 24 hours of obtaining the written listing agreement. The written listing agreement shall contain no provision requiring the person signing the listing to notify the broker of the intention to cancel the listing after such definite expiration date.

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Initial contact with the customer/client: Listings

- There are many legal and tax consequences for a seller in a short sale transaction. Tell the seller to call their *lawyer and/or tax professional*.
- There are also many alternatives to a short sale. Sellers should discuss these alternative with their *lawyer and/or tax professional*.
- Remember *skill, care and diligence* must be used according to Section 475.278, Florida Statutes.
- Pitfall with setting a list price- This is a common area of complaint. It is very difficult to know what list price to set since banks will not tell you how much of a loss they are willing to take. Make sure sellers understand this disadvantage.
- Section 475.25(1)(b), Florida Statutes, allows for discipline for a licensee to conduct a transaction in a manner that is *culpably negligent*.
- Danger! Section 455.227(3)(o), Florida Statutes, provides:
Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform.

Initial contact with the customer/client: Buyers

- Short sales are not for every buyer.
- Part of using skill, care, and diligence is making sure the buyer is a good candidate for a short sale. Remember manage expectations.
- Examples:
- *Good candidate*: Is the buyer looking for a good price on a cash investment property?
- *Not so good candidate*: Has your buyer recently accepted a job in Florida and plans to move here in five weeks after their lease is up in another state?

Contract time!

● Traditional

- The real estate licensee completes the terms of a contract form and selects addenda based on the type of transaction and needs of the customer(s).
- Add special contingencies such as buyer financing, inspections, repair limits, etc.
- Present all offers unless otherwise directed by seller in writing, usually specified in the listing.

● Short sale

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- Add special contingencies such as short sale addendums, lender approval, etc.
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Contract time!

Special Exception

- Presentation of offers- Section 475.278, Florida Statutes, requires as a part of agency duties that a licensee present all offers unless otherwise directed in writing by the seller.
- Failure to do so could result in discipline and/or harm to the seller.
- Most lenders require that ALL offers be presented, even after execution of the contract by the buyer and seller.
- Make sure buyers is informed that they may have a fully executed contract but the lender will likely accept a higher offer. Their legal questions about their rights under the contract should be addressed by their lawyer.
- If the seller is your customer, failure to convey that higher offer could result in higher tax liability or deficiency judgments against the seller. Remember skill, care, and diligence.

Time to close!

I want my full commission?

- Traditional
 - Section 475.278, Florida Statutes, prohibits “self dealing”.
 - Disputes over commission should never get in the way of the parties closing.
 - Real estate *brokers* are allowed to pursue legal options (or maybe arbitration) when commission is not paid as agreed.
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Time to close!

I want my full commission?

- Special circumstances
- Reduction of professional services fees is not uncommon by the lender.
- Remember short sales are not for all buyers and short sale transactions are not for all licensees.
- Do nothing to interfere with closing the deal. The rights and options for collecting commissions are no different than with the traditional transaction.

So what's the worst that could happen?

- In August 2009 a Florida Judge presided over a small claims case. It involved a sales associate being sued for the return of fees for a loan modification. This sales associate also provided the real estate business card. The “loan modification company” was run by the sales associate but run “separately” from the real estate business.
- There was no listing agreement and the house had already been foreclosed upon. This sales associate attempted a loan modification AFTER the foreclosure.
- The client of this “loan modification/short sale specialist” was evicted from the home.
- The Judge in the small claim action referred the matter to the Unlicensed Practice of Law section of the Florida Bar.
- The Florida Bar has referred the matter to the Division of Real Estate. The file is still private as both agency are still looking into the matter.

Moral of the story...

- The line between real estate services and legal services or financial advice in short sales and modifications is very thin.
- Engaging in these services exposes the licensee to allegations of unlicensed practice of law, complaints to the Florida Real Estate Commission, and civil liability.

Things to remember

- Manage the expectations early on:
 - Educate your client
 - Clearly define your role
- Taxes, deficiency judgments, bankruptcy are *related* topics but are not the responsibility of the licensee.
- Know your client- the lender participates in the transaction but the lender is not a party to the transactions (even though it seems so).
- Don't be afraid to limit the duties you will perform. Consider the involvement of other service providers such as lawyers, financial advisors, or mitigation professionals.
- Can vs. Should- Your license allows you to conduct short sales but should you.
 - Cardiologist don't usually do brain surgery
 - Bankruptcy attorneys don't usually try murder cases

KNOW YOUR LIMITATIONS AND MORE IMPORTANTLY MAKE SURE YOUR CUSTOMER KNOWS YOUR LIMITATIONS