

Short Sale Negotiators

Scam or Savior? **BY STELLA H. LING, ESQ.**

When REALTORS® realized a few years ago that short sales involved working many long hours on very thick files, a cottage industry of short sale negotiators was born. The idea was for a symbiotic relationship. The agent could focus on doing what listing agents do best—market and sell properties—and delegate the painstaking short sale processing to conscientious negotiators. In practice, however, hooking up with a savior rather than a scammer can be challenging on many fronts.

Licensing: You'll steer clear of a lot of the riff-raff by simply checking whether a short sale negotiator is properly licensed with the California Department of Real Estate (DRE) at www.dre.ca.gov. Scammers will make excuses. They'll claim they don't need a license to negotiate debt forgiveness,

or they'll say they're merely processing paperwork. Those arguments are as credible as the dog eating a kid's homework excuse, because the licensing laws involving mortgage loans are very broad. A license is generally required as long as someone, while acting for compensation, performs services for mortgage lenders or borrowers.

That a short sale negotiator performs licensed activity without a license is not the worst of it. What's worse is, if you or your client pays that unlicensed negotiator, you will be committing a crime, and as the agent, your real estate license may be suspended or revoked by the DRE.

Compensation: It also used to be easy to spot a scam because the person posing as a short sale negotiator would hit the seller up for money before performing any services. That scheme of collecting payment upfront isn't as popular lately (maybe too obvious). Nowadays, asking a buyer to pay for the short sale negotiator is all the rage.

Is that legal?

Yes, but with two important caveats. It's legal in the sense that, during contract negotiations, a seller can ask and a buyer can agree to pay for a short sale negotiator. Heck, the parties could legally agree for



the buyer to pay the seller's grocery bill. Tacky and weird perhaps, but not illegal. A buyer could obviously say "no" and go buy something else instead.

Now the caveats. First, if a listing agent is the mastermind trying to collect fees to pad his or her own pocket with no regard for the seller's best interest, such conduct would be a breach of the listing agent's fiduciary duty owed to the seller.

The second caveat is, if you're the buyer's agent, and someone asks your buyer to pay the short sale negotiator, you better get ready for the other shoe to drop. Regardless of whether it's legal for your buyer to pay for a short sale negotiator, you'll usually get a follow-up request for the buyer to make that payment outside of escrow. In this context, "outside of escrow" is just a fancy way of saying "in a dark alley." Not only would it be risky for your buyer to pay anyone "in a dark alley," but omitting from a HUD-1 Statement a settlement charge paid by the buyer is a RESPA violation. Furthermore, the reason for the dark alley is the short sale lender may not approve a payment to a third-party short sale negotiator. Anyone who conceals that payment from a federally-insured short sale lender may be committing loan fraud. Just to give you an idea, loan fraud is a federal crime punishable by 30 years imprisonment, *plus* a \$1 million fine.

MLS Issues: Sometimes a seller or listing agent requires the buyer's agent to cover the short sale negotiator fee. That may, however, run afoul of the rules for properties listed in the multiple listing service (MLS).

Under the California Model MLS Rules, the amount of MLS compensation "may not contain any provision that varies the amount of compensation offered based on conditions precedent or subsequent or on any performance, activity or event" (Rule 7.12). The listing broker could not, for instance, condition an MLS offer of compensation on the buyer's agent paying 1 percent of the purchase price to a short sale negotiator, especially if the follow-up request is, yet again, for the buyer's agent to pay the 1 percent in that "dark alley."

Track Records: Looking at a short sale negotiator's track record to ferret out scammers may not work. Some negotiators are legitimately good at getting deals down—putting packages together, hounding the lenders, and getting the numbers to



work. Yet scammers have a high success rate too. Seller has no hardship? They'll make one up, and prepare a hardship letter and supporting documentation to boot. Property has a tenant? They'll make the paperwork look like the seller is an owner-occupant to improve the chances of a lender's approval. Seller demands cash at close, which the short sale lender prohibits? They'll arrange for a sale of the seller's personal property to take place "in a dark alley." Without any legal or ethical boundaries, scammers can overcome many of the obstacles to closing short sale transactions.

Short Sale Flips: Some bad eggs use short sales to go for the big bucks. They arrange fraudulent AB-BC flips by duping a short sale lender into believing a property is worth a lot less than it is, using a straw buyer to buy at that artificially low price, reselling simultaneously at the higher market price, and pocketing the difference. As an example, a short sale negotiator may arrange for Seller A to sell the property to Buyer B, a straw buyer, for a short sale approved at \$300,000, but also arrange for Buyer B to sell the property to Buyer C for \$350,000. To accomplish that scheme, the negotiator often enlists the help of a real estate agent to list and market the property.

If you're that real estate agent and you're tempted to get involved, think again. Even if you doubt you'll get caught by the authorities, what's to stop Seller A from suing you as the listing agent for \$50,000 after close of escrow? Sure, it's the short sale negotiator, not you, who absconded with the \$50,000, but the negotiator will have skipped town by then, leaving you holding the bag. Plus, you can't delegate to the negotiator your own fiduciary duty as the listing agent to do whatever is in the seller's best interest. How are you going to explain that your client only deserved the \$300,000 buyer, not the \$350,000 buyer? You may be able to successfully argue, among other things, that the \$50,000 claim belongs to the short sale lender, not the seller. But that's like inviting the lender to sue you, too.



A Final Word: Too bad con artists don't wear alarms on their heads that light up and make loud noises when they misbehave. Almost as effective as an alarm, however, is having a good understanding of the ins and outs of short sale scams to ensure that you and your clients choose the right person as your short sale negotiator. ♦

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