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Do's and Don'ts For Real Estate Agents Short Sales Transactions

When an agent evaluates whether to list a property that is under water, the agent must realize that the seller is looking to the agent as more than simply a real estate advisor. This is a very emotional time for the seller, as the seller is losing the property against his/her will. Further, the seller may be in the midst of other financial problems and the short sale can affect the seller's overall financial situation in ways that are beyond the agent's expertise. In this article we summarize the Do's and Don'ts of a short sale transaction, based on problems, complaints and insurance claims that agents have been involved in.

Before Taking the Listing

Do: An agent must consider the likelihood that the transaction could be completed. For example, how quickly must the property be sold, how significant is the short fall that the lender must approve, and so forth.

Don't: An agent should not advise the seller whether a short sale is an appropriate solution for the seller's financial situation.

Do: An agent should recommend that the seller consult with an attorney and an accountant to assess alternatives to a short sale such as loan modification, deed in lieu, bankruptcy or refinancing. There may have been predatory lending involved in the procurement of the loan, which may have caused the seller to be in default. This should be analyzed by an attorney as a potential defense to keeping the house.

Don't: An agent should never tell a seller that a short sale is better than foreclosure, that the seller has nothing to worry about or that a short sale releases the seller from the loan. A short sale is not a foreclosure. It is not affected by the anti-deficiency laws that protect a homeowner from a deficiency judgment for the difference in value between the value of the home and the amount of the loan. This means that a lender can pursue the seller after the short sale for the deficiency.

Do: The agent should evaluate ahead of time whether the seller will refuse to sell the home unless the seller receives a release from the lender for the deficiency amount.

Don't: An agent should never attempt to review the loan documents and advise the seller whether the seller has a non-recourse loan or the loan has any other potential defenses or remedies.

Do: The agent should advise the seller to consult an accountant. There may be adverse tax consequences and the forgiven debt may be considered taxable income. There are tax reliefs to homeowners who are insolvent, but this analysis is beyond the expertise of the agent.

Don't: An agent should not give the seller advice regarding timing and process of foreclosure and he/she should not refer the homeowner to foreclosure websites for evaluating the law in this area. The loan documents may be subject to interpretation of individual State laws and information provided on these websites may be wrong.

Do: An agent must do the research to support the likelihood of a successful short sale. Check MLS rules on how to list the property and review comparable sales for values.

Don't: An agent should not suggest to a homeowner to default on the loan in order to get the lender's attention. This may cause long term affects that the agent and the seller may not anticipate.

Before Starting Negotiations

Do: The agent must evaluate the current title on the property. If the seller is not on the title or



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is not the only owner on title, proper approvals should be procured to list the property. The agent must also evaluate how many lien holders exist on the property. The seller must negotiate with all of them, and keep them all apprised with the status of the transaction.

Don't: An agent should not ignore any lien holders, even if they are not the ones negotiating for a short sale.

Do: An agent must keep all lien holders apprised of the status of all negotiations, offers and approvals and obtain extensions and payoff demands from all of them, as applicable.

Don't: An agent must not hold up negotiations due to the resolution of his/her own commission.

Approaching the Lenders

Do: The agent must get permission from the seller to communicate with the lenders directly, in order to expedite the process.

Don't: The agent should not be involved in the preparation of any financial statement that the lender may require, especially since it may significantly vary from the financial statement prepared by the homeowner when he/she applied for the loan. Any preparation of financial statements should be done by the homeowner with the assistance of his/her accountant.

Do: An agent must be accurate on the math and provide the same information to all lenders. The agent should consider all possible costs including, potential repairs, smoke detectors and water heater bracing, HOA dues and moving expenses, if necessary.

Don't: An agent should not get involved in making any representations to the lender about the borrower, as they may contradict prior information provided by the borrower to the lender. There may have been misrepresentations made by the homeowner, possibly even inadvertently, on issues such as, owner-occupied, assets, or citizenship. This is especially true where the original loan was stated income.

During the Transaction

Do: The agent should be careful in representing the seller's interests. The agent should put in the counter-offer that it is subject to lender's approval and at seller's discretion. The lenders may demand harsh conditions from the seller, including a promissory note, in order to agree to the sale price. A seller should have the option of rejecting the lender's terms.

Don't: The agent should be cautious about using middle men who sell themselves as negotiators and completely avoid using unlicensed negotiators. Those middle men may demand to be compensated by the buyers. Forcing the buyer to pay a commission may affect the agent's fiduciary duties to the seller. Also, when the listing agent has a relationship with the negotiator, and the buyer is paying for the negotiator, an agency relationship may be created between the buyer, negotiator and listing agent, which may expand the listing agent's duties to the buyer.

Do: An agent should properly document the short sale negotiations to avoid any misunderstanding and protect the agent in case of a claim.

Don't: An agent should beware of a buyer who is trying to be creative, as he/she may be doing something illegal or unethical. Some investors may attempt to purchase the property by transferring title to themselves or obtaining power of attorney from the seller and then doing the short sale. The investor may violate the Home Sales Equity Law, which requires certain notices to be given to the seller when a Notice of Default has been recorded. The agent may also have a conflict of interest representing both the investor and the seller, who have different interests.

Do: An agent, title and escrow company should strictly adhere to all lender instructions and not allow any monies to be paid outside of escrow. This duty also extends to payments made after escrow had closed, that were not specifically stated on the HUD-1. Knowledge of fraud may subject the agent to liability for the entire deficiency amount, even if no duty was owed. An escrow company owes a duty to the lender, even if the lender is not a party to escrow.



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Don't: An agent should be aware of sellers attempting to "sell" their property to friends or family members and may even solicit other potential buyers to make a low offer, so that the seller's relative's offer will be accepted.

Do: In case any negotiators or other third parties are involved and there are referral fees or commissions, the agent must assure that these payments are specifically disclosed, paid through escrow, and payable to the broker of record.

Don't: An agent should never allow for two different "final" HUD-1 to be created: one for the parties and one for the lenders.

Do: The agent should be familiar with all the available State mandated forms and use them as applicable. Attach a short sale listing addendum to the listing agreement and a short sale sale-addendum to the sale agreement.

Don't: The agent must beware of red flags and not ignore them. If a buyer is not allowed to communicate with the lenders that suggests fraud on the lenders.

Do: An agent should explain to the escrow agent that the transaction is a short sale, and ask the escrow agent to constantly date-down the file so that any new recordings can be discovered by escrow and properly addressed by the parties.

Don't: An agent shall not assist the seller or investor to de-value the property if he/she is asked to provide a broker price opinion. The agent should not consult an investor or seller to destroy a property in order to reduce its value.

Do: The agent should properly explain and submit subsequent offers and obtain instructions from the seller and lender as to how they want subsequent offers handled.

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