

## Short Sale Tips For REALTORS®

find the article at: "<http://www.car.org/legal/legal-questions-answers/2010-qa/short-sale-tips/>"

### Member Legal Services

Tel (213) 739-8282

Fax (213) 480-7724

March 16, 2010

As a REALTOR® involved in short sales, you want to be at the top of your game. Whether you're the listing agent or buyer's agent, a short sale transaction may take a huge investment of time and effort. If things don't pan out, however, that translates into a huge waste of time and effort. To help stack the odds in your favor, here are some good tips and recommendations for REALTORS® in short sale situations:

- **Pre-Screen Short Sale Listings:** Before taking a short sale listing, carefully consider the likelihood that the transaction will close escrow successfully. Consider, for example, how much of a shortfall the lender must approve. Other considerations include, but are not limited to, the nature of the seller's hardship, the time you have to sell before the homeowner potentially loses the property through foreclosure, the number of liens against the property, and market conditions.
- **Assess Homeowner's Considerations Upfront:** A short sale transaction may have significant tax, credit, personal liability, and other consequences for a homeowner. As a listing agent, encourage your seller to seek upfront the advice of an attorney, accountant, or other professional regarding those consequences. Before you take a listing, carefully assess whether the seller has come to terms with the possible consequences of a short sale. Assess, for example, whether the seller will proceed with a short sale in the event that the lender agrees to release its lien against the property, but reserves its rights to pursue the seller for the shortfall. Also assess whether the seller has adequately considered the alternatives to a short sale, such as refinancing, loan modification, foreclosure, deed-in-lieu of foreclosure, and bankruptcy. Consider whether the seller has sought legal and tax advice. When you're involved in a long, arduous short sale process, the lender's refusal to release the seller from personal liability or the seller's decision to file bankruptcy to wipe out tax liability are not surprises you want right before close of escrow.
- **Do Your Research:** Whether you're a listing agent or buyer's agent, gather and review as much information about a short sale transaction as you can upfront. Check your local Multiple Listing Service (MLS) rules and regulations to make sure you properly enter the short sale listing into the MLS. Obtain information from public records, comparable sales, title searches, other real estate agents, and other sources to determine the likelihood your short sale will succeed. If a property is in foreclosure, you may want to continually monitor that process to make sure the seller does not lose the property through foreclosure before close of escrow. Short sale negotiations with a lender do not automatically stop that lender's foreclosure process.
- **Use C.A.R.'s Transactional Tools:** As a member benefit for REALTORS®, C.A.R. offers many standard forms, legal articles, and other tools to help you with your short sale transactions. To address the issues unique to short sales, properly complete and attach C.A.R.'s standard form Short Sale Listing Addendum (SSL) to your listing agreement and C.A.R.'s Short Sale Addendum (SSA) to a sales agreement. Among other things, these forms make a sales agreement contingent upon the

short sale lenders' approval, address timing issues, and advise the seller to consult with an attorney, accountant, or other expert regarding the potential consequences of a short sale. As another transactional tool, C.A.R. has many legal articles addressing short sales, including their tax and credit consequences. You may download these articles at <http://qa.car.org> to give to your clients, but keep their acknowledgment of receipt in your files.

- **Submit a Complete Short Sale Package:** An agent's proficiency in putting together a short sale package may improve the likelihood that the short sale will not only get approved, but get approved quickly. Documentation for a typical short sale package includes, but is not limited to, a hardship letter, financial statements, paycheck stubs, income tax returns, sales comparables, property condition including repair estimates and pictures, estimated HUD-1 Settlement Statement, listing and sales agreements, and C.A.R.'s standard form Authorization to Release and Convey Information (ARC). Do not be cavalier about the short sale approval process just because the seller isn't realizing a profit. A short sale lender may want you, as the listing agent, to demonstrate that you have actively marketed the property for sale, and that you have aggressively negotiated for the best possible price and terms.
- **Take a Proactive Approach:** Good short sale agents often attribute their success to their own tenacity, perseverance, and resourcefulness. Start the short sale approval process as soon as you can. Monitor its progress frequently. Ask questions. Carefully document your conversations with the short sale lender and others. An ability to get things done will serve you well in short sale transactions.
- **Watch Out For Multiple Investors:** When it comes to investors involved a short sale approval, one is one and two is ten. A transaction where only one lender must approve the short sale is usually much less problematic than a transaction where both senior and junior lenders and other investors, creditors, and insurers must approve the short sale. If, for example, you're handling a short sale with multiple liens, make sure you submit a short sale request to all the lenders and creditors as soon as possible. Furthermore, some short sale lenders may be loan servicers, but the underlying loans have been insured (e.g. PMI), securitized, or sold in the secondary mortgage market to Freddie Mac, Fannie Mae, or other investors. You may want to make sure as soon as possible that these other interested parties will approve the short sale.
- **Do the Math:** Help ensure a successful close by checking upfront whether there will be enough money to go around. As the listing agent, take into account that in a down market, the ultimate sales price may be less than the initial listing price. As either the listing or buyer's agent, make sure that all transaction costs are included in the estimated HUD-1 Settlement Statement submitted to the short sale lender, such as buyer-required repairs, smoke detectors and water heater bracing, property taxes, HOA dues, and a moving allowance for the seller if appropriate. Also encourage your client to have a back-up plan in case the lender doesn't approve these expenditures.
- **Properly Handle Subsequent Offers:** As a listing agent, you may be waiting for the lender to approve a short sale to Buyer 1 when you receive a better offer from Buyer 2. Present the second offer to the seller, so the seller can decide what to do. One alternative, among others, is for the seller to enter into a backup contract with Buyer 2 using paragraph 1 of C.A.R.'s Purchase Agreement Addendum (Form PAA) and submit the backup contract to the short sale lender in accordance with paragraph E of the Short Sale Addendum (Form SSA). Another alternative is for the seller and listing agent to ask Buyer 1 to increase the price to match that of Buyer 2 or sign mutual cancellation instructions to allow the seller to proceed with Buyer 2 instead. After all, the short sale lender may ultimately reject Buyer 1 anyway in favor of Buyer 2's better offer.
- **Stay Away From Loan Fraud:** Oftentimes you may know certain things that the short sale lender doesn't know. Let's say, for example, a junior lienholder wants your client to secretly pay \$9,000 outside of escrow because the senior lienholder only authorized \$3,000 for the junior lienholder. What do you do? The prudent course of action is: "When in doubt, disclose." In this case, disclose the \$9,000 payment to the senior lienholder and obtain its approval of the proposed arrangement in

writing. You and your client do not want to risk committing loan fraud, which is very broadly defined under federal law to include anyone who knowingly makes a false statement for the purpose of influencing a federally-insured mortgage lender. The punishment for loan fraud is, among other things, 30 years imprisonment plus a \$1 million fine.

- **Beware of Unlicensed Negotiators:** Stay away from unlicensed or unscrupulous short sale negotiators. Someone who charges a fee to act on a homeowner's behalf in negotiating a loan must generally be licensed with the California Department of Real Estate (DRE). An unlicensed person who practices real estate is committing a crime. Also, if you pay that unlicensed person for conducting licensed activity, you too may be committing a crime.

This legal article is just one of the many legal publications and services offered by C.A.R. to its members. For a complete listing of C.A.R.'s legal products and services, please visit [car.org](http://car.org).

Readers who require specific advice should consult an attorney. C.A.R. members requiring legal assistance may contact C.A.R.'s Member Legal Hotline at (213) 739-8282, Monday through Friday, 9 a.m. to 6 p.m. and Saturday, 10 a.m. to 2 p.m. C.A.R. members who are broker-owners, office managers, or Designated REALTORS® may contact the Member Legal Hotline at (213) 739-8350 to receive expedited service. Members may also submit online requests to speak with an attorney on the Member Legal Hotline by going to <http://www.car.org/legal/legal-hotline-access/>. Written correspondence should be addressed to:

CALIFORNIA ASSOCIATION OF REALTORS®  
Member Legal Services  
525 South Virgil Avenue  
Los Angeles, CA 90020

---

Copyright© 2010 CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.). Permission is granted to C.A.R. members only to reprint and use this material for non-commercial purposes provided credit is given to the C.A.R. Legal Department. Other reproduction or use is strictly prohibited without the express written permission of the C.A.R. Legal Department. All rights reserved.

The information contained herein is believed accurate as of March 16, 2010. It is intended to provide general answers to general questions and is not intended as a substitute for individual legal advice. Advice in specific situations may differ depending upon a wide variety of factors. Therefore, readers with specific legal questions should seek the advice of an attorney. Written by Stella H. Ling, Esq.