

## BARBARA P. BURKE, PhD, Esq.

Barbara P. Burke is the creator and owner of the Real Estate Law Series® company that produces online and in-person training for professionals in the title, legal, real estate, and mortgage industries, and is editor of *The Real Estate Law Series® Report* - an e-newsletter about current real estate topics. Ms. Burke, who also has a PhD in Communications, has been a licensed Florida Bar attorney for over twenty years, in private practice and inhouse as underwriting and claims counsel for title insurance companies. No longer practicing law, she stays busy as a member of the Florida Bar's Ethics Committee following six years on the Unlicensed Practice of Law Committee, and volunteering for Rotary and the Adult Literacy League.

Learn more about this topic by taking the "Ethics and the Unauthorized Practice of Law" online class, found at <http://learn.realestatelawseries.com>, along with many other online classes that provide CE credit.

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<sup>1</sup> See Keyes Co. v. Dade County Bar Ass'n, 46 So.2d 605 (Fla. 1950), in which the Florida Supreme Court refers to Fla. Stat. 475.01's definition of "broker" as "a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor . . . agrees to . . . negotiate the sale, exchange, purchase, or rental of . . . any real property or any interest in or concerning the same . . . or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of . . . the real property of another, or leases, or interest therein . . . or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof."

<sup>2</sup>The Florida Bar v. McPhee, et al, 195 So.2d 552 (Fla. 1967)

<sup>3</sup>See Fla. Stat. 494.001(14) and Fla. Stat. 494.00296

<sup>4</sup>Fla. Stat. 501.1377 (enacted in 2008)

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Presented as an informational guideline  
to title professionals  
by  
Affinity Insurance Agency, Inc.

May I Negotiate  
Short Sales? . . .  
Maybe . . .

**THIS is the guideline you should use when  
trying to decide if you are authorized to do  
something:**

*Is the action one of your licensed activities?*

by  
Barbara P. Burke, PhD, Esq.  
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# May I Negotiate Short Sales? . . . Maybe . . .

by

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**Quick Answer:** *Does your license allow you to do the activity you are considering?*

**Longer Answer:** In general, "representing" another person might be considered the practice of law if the services involve legal rights or documents. For example, I think everyone would agree that a real estate purchase and sale contract is a legal document - there are tons of important legal rights described in the contract and major decisions that impact both parties. However, a Florida licensed real estate broker is specifically authorized to prepare such a contract by the Florida Supreme Court!<sup>1</sup> Why? Because the Court found that the real estate broker's job was to bring the seller and buyer together, so the preparation of the document that does so - the contract - is part of the broker's job.

**THIS is the guideline you should use when trying to decide if you are authorized to do something:  
Is the action one of your licensed activities?**

Real estate brokers are NOT allowed to prepare other documents that finalize the transfer of real estate, such as deeds or mortgages. Licensed Florida title agents ARE authorized to prepare such documents, if they are "such documents as may be necessary to fulfill the conditions described in a commitment."<sup>2</sup>

Negotiating a seller's loan modification is NEITHER a real estate broker's job NOR a title agent's job. IT IS a loan originator's job, if the loan originator is working on financing for the seller. OR it is the seller's attorney's job, if the negotiation is part of the attorney's representation.<sup>3</sup>

In many short sales situations, third parties obtain authorization from the seller to communicate with his or her lender - is that okay for a real estate broker or title agent? Well, answer this question - would the title agent normally obtain authorization from the seller to communicate with the

seller's lender? Yes, but only to obtain payoff information, not to negotiate the payoff amount. Would the seller's real estate broker normally obtain authorization from the seller to communicate with the seller's lender? Hmm . . . We'd better look at Florida's foreclosure rescue law<sup>4</sup> that says only certain persons are allowed to work with homeowners to "stop, avoid, or delay foreclosure proceedings, or cure or address a default or failure to timely pay a residential mortgage loan obligation." Guess who is NOT included in the authorized persons list? Real estate brokers and title agents!

You have to be careful what you are doing when you are communicating with the seller's lender. Is it okay to "negotiate" short sales? The answer is: It depends! It depends on what you mean by "negotiating!" If you mean negotiating the terms of a sale between the seller and a buyer, that is a real estate broker's job but not a title agent's job. If you mean negotiating the terms of the existing mortgage between the seller and the seller's lender, that is NEITHER a real estate broker's job NOR a title agent's job; it is the seller's attorney's job, or a loan originator's job.

Representing another person in making legal decisions is the practice of law. A seller may decide to file bankruptcy, or convey a deed in lieu of foreclosure, or one of several other options that are all legal decisions. In my opinion, a document produced by My Florida Regional MLS that instructs real estate licensees to "renegotiate loans with lenders," "offer lender a deed in lieu of foreclosure," and "negotiate a short sale," is advising its members to arguably cross the line into the loan originator license area and the practice of law area.

HOWEVER, if, when you say "negotiating," you really mean "facilitating" or some other word that means simply obtaining information and passing on that information to other parties, then both the real estate broker and title agent may do this activity if it is an action they would perform as part of their licensed authority. Would the title agent normally contact the seller's lender to obtain payoff information? Sure! Would the seller's real estate broker work between the seller and buyer to obtain a final purchase price? Of course! Anything more than that? Probably not.

Just remember - you may continue to do what your license has always allowed you to do; you may not go outside what is authorized by your license.