10 Things REALTORS® Should Know About License Law

Cut through the clutter to learn the basic rules for compliance

My mama use to tell me that too many people didn't hear the music in their lives because they let it get drowned out by all of the noise around them. Today we call that information overload. It is definitely a problem for REALTORS© who regularly get bombarded with new things to learn. License law seems like the latest new thing with the new emphasis of the Georgia Real Estate Commission (GREC) on real estate licensees getting regular continuing education on this subject. While there is a lot to keep up with on license law, this article will focus on just 10 issues where licensees often make mistakes. See if one or two of these points don't surprise you.

1. ***A selling agent cannot use a purchase and sale agreement to negotiate his or her commission.***

Selling agents are free to negotiate their commissions with listing agents. The selling agent can call the listing agent, complain about the commission being too little and demand a higher commission. They can fight and argue about the commission to be paid to the selling agent until they are both blue in the face.

What is prohibited under license law is "inducing any person to alter, modify or change any licensee's fee or commission for real estate brokerage services without that licensee's prior written consent". (O.C.G.A. § 43-40-25(b)(35)).

What this means in plain English is that while licensees are free to negotiate commissions directly with one another, they cannot use other people to negotiate their commissions for them. So, for example when a buyer submits an offer which includes a stipulation that the selling agent's commission shall be increased from one percent of the sales price to three percent of the sales price, that is seen by GREC as the selling agent inducing the buyer to modify or change another licensee's commission. I have heard a few REALTORS© argue that including such a provision in a purchase and sale agreement is not seeking to change the commission being paid, just how it is divided between the listing agent and the selling agent. While such an argument can be made, it is <u>not</u> how the GREC views it. They see any third party effort to modify what the listing agent will ultimately receive as violating license law.

Now is it still a violation if the selling agent negotiates a change in the commission with the listing agent and then confirms that agreement in the purchase and sale agreement? Probably not so long as it is clear from reading the contract that it is not being used as a vehicle for an ongoing negotiation. So, for example, adding the following special stipulation to the contract to confirm a revised agreement on the commission should be compliant with license law. "This is to confirm that the listing broker and selling broker have previously renegotiated the commission to be paid by the listing broker to the selling broker in an amount equal to ___ percent of the sales price".

2. A departing agent cannot contact his or her clients.

Believe it or not, here is what license law says about what a licensee cannot do after they leave a brokerage firm:

> "Whenever a licensee decides to terminate an affiliation with a firm, such licensee may not have contact with any of the firm's clients that the licensee is serving under a listing, management agreement or such other brokerage engagement, except as may be expressly approved in writing by the broker or qualifying broker of the firm that the licensee is leaving". (O.C.G.A. § 520-1-.07(5)(e)).

So, for example, unless the licensee's broker agrees, a departing licensee cannot send out announcements that he or she has joined another brokerage firm or call his clients to ask if they would like to switch brokerage firms to the new firm that the licensee has joined. Even if the client contacts the licensee, the rule prohibits the licensee from communicating with the client. Are there any loopholes in this provision? Possibly. The rule appears to only limit the licensee's behavior when the licensee terminates an affiliation with a brokerage firm. It does not appear to apply if the broker terminates the affiliation with the licensee.

Second, the provision does not apply until the licensee "decides to terminate an affiliation with a firm". Could a licensee, prior to deciding whether to leave a brokerage firm call the client and ask, "I haven't decided yet, but I am thinking about moving to a different brokerage firm and was wondering if you would transfer your listing to the new firm?" While such an argument can at least be made, the GREC has historically tended to enforce both the letter and the spirit of the law. As a result, this would be risky behavior for licensees trying to get around license law. Of course, asking a seller to cancel his or her listing agreement with one company to switch to a different company also violates O.C.G.A. § 43-40-25(b)(13) which prohibits a licensee from:

> "Inducing any party to a . . . a brokerage engagement agreement to break such . . . brokerage agreement for the purpose of substituting in lieu thereof any . . . brokerage agreement with another principal".

3. Licensees should notify the other agent when an offer has been presented.

Okay, to be clear, it is <u>not</u> a license law requirement to notify the other agent that an offer has been presented. However, among the common complaints of consumers to the GREC is they do not believe their offers were presented.

The GREC must investigate 100 percent of complaints. On the theory that no GREC investigation is a good investigation, why not largely eliminate the potential for this type of

complaint by communicating in writing that the offer was presented? This can be done with a simple e-mail to the other agent stating:

> "I wanted you to know that I received your offer [or counteroffer] this ____ day of _____, 20____ and delivered it on the same day [or state whatever date it was delivered] to my client [or customer]."

The other agent will likely forward the email to the client. If the client receives this type of notice, but then hears nothing about whether their offer was accepted or rejected, they will not likely think that the problem lies with the other agent. Instead, they will likely think that the client just has not decided how to respond to the offer. This is exactly what we want as REALTORS© because it should mean that no complaint is filed.

4. A licensee must notify his or her broker in writing before buying or leasing property.

License law requires licensees to notify their brokers in writing before they buy or lease real property (GREC Sub. Reg. 520-1-.11). While the broker has no right to approve or disapprove the purchase or lease of the property, the notice must be given in writing and before by the licensee actually buys or leases property.

5. Licensees must keep security deposits on properties they own in a trust account registered with a broker.

A licensee who manages rental property which the licensee owns must maintain any security deposits collected in a designated trust account. (GREC Sub. Reg. 520-1-.08(4)(c)). This means that the trust account must be an account of the broker and registered with the GREC. There are several areas of potential confusion with this requirement. The first is whether a licensee with one brokerage company can have a different brokerage company manage the property and hold the security deposits in a trust account registered with the second broker? The answer to this question is yes since the obligation to keep the security deposits in a trust account is only triggered if the licensee both owns and manages the property.

The second area of confusion in this area how does the GREC treat situations where the licensee is a part owner of the rental property or the licensee's spouse owns the rental property. The GREC treats property as being "owned" by the licensee if the deed for such property reflects either: (a) only the name of the licensee or (b) only the name of the business entity of which the licensee is the sole owner, member or stockholder. Whenever a licensee (a) owns any interest in such property that is less than 100% and (b) receives any trust funds on such property, such licensee must deposit those trust funds into the trust account of a firm licensed with the GREC. What this means, for example, is that if a licensee co-owns a property with the licensee's spouse and receives security deposits, the trust funds must be deposited into a designated trust account under the supervision of the licensee's broker. However, if the licensee's spouse owns and manages the property (and

the licensee is not an owner) the spouse does not need to deposit the security deposit in the broker's trust account.

6. A licensee cannot pay a referral fee to a non-licensee for referring a client or customer to the licensee.

License law specifically provides that a licensee can be sanctioned for "paying a commission or compensation to any person for performing the services of a real estate licensee who has not first secured the appropriate license" from the GREC. (O.C.G.A. § 43-40-25(b)(17)). One of the services constituting real estate brokerage in Georgia is acting as a referral agent securing prospects interested in selling or leasing property (O.C.G.A. § 43-40-1(2)(B)). In other words, a real estate licensee can legally only pay another licensee for the referral of real estate brokerage business. This means that a real estate licensee violates license law if he or she pays "a commission or compensation" for the referral of brokerage business.

So, does sending a referral source a gift certificate for a nice dinner constitute a "commission or compensation" in violation of license law. That depends on whether GREC interprets the words "commission or compensation" broadly or narrowly. However, since a commission can in theory be money or any other thing of value, it likely prohibits such gifts.

7. A licensee who puts his or her license on an inactive status cannot go to work for an unlicensed builder exclusively selling his or her homes.

An unlicensed individual can sell the homes of a builder who is also not licensed under an exception to license law. Specifically, any person can sell the property of an owner on a fulltime basis without being required to be licensed. (O.C.G.A. § 43-40-29(a)(1)). However, under license law, the exceptions allowing some people not to be licensed "shall not apply to any person who holds a real estate license". (O.C.G.A. § 43-40-29(d)).

License law also specifically provides that a licensee whose license is on an inactive status may not perform brokerage services for an unlicensed person (GREC Sub. Reg. 520-1-.05(2)(h). Therefore, any person wanting to go to work for an unlicensed builder must give up their license before they are able to do so.

8. Licensees cannot encourage or "induce" sellers to break their existing listing agreements to enter into a new agreement with the licensee.

What constitutes a violation of this section of license law? O.C.G.A. § 43-40-25(b)(13) has been the subject of debate, as it is not always clear where the line is between normal marketing activities and illegally inducing someone to break a listing agreement. The dictionary definition of "inducement" is "a thing that persuades or influences someone to do something". Let's look at some common situations which REALTORS© find themselves in to see if we cannot get a better sense of what constitutes "inducing".

Let's say that a broker cold calls a prospective seller. The seller informs the agent that she is working with Broker Z. Broker 1, not being a particularly nice person, tells the seller that in his opinion, Broker Z has a horrible reputation and the seller should fire Broker Z and hire Broker 1. The seller thanks Broker 1 and tells him that he is happy with Broker Z and is not switching. Has Broker 1 unlawfully induced the seller in violation of license law? My reading of license law is that while Broker 1 attempted to illegally induce the seller, he was unsuccessful in doing so and thus, no violation occurred. Of course, if the seller listens to Broker 1 and hires Broker 1, Broker 1 would definitely have violated this provision of license law, since the seller was influenced to act by Broker 1.

What if Broker 1's comments influence the seller to make a change, but instead of hiring Broker 1, the seller fires Broker Z and hires Broker 2. In that case, a violation would still likely be found since Broker 1 influenced the seller to make a change.

What if Broker 1 calls the seller and the seller says that his property is listed, but his listing is ending soon and he would like to hear about the services Broker 1 can provide. In that case, Broker 1 can, in my opinion, explain what services he has to offer, provided that he does nothing to encourage the seller to terminate the existing listing agreement early. As a matter of fact, to be safe, Broker 1 should communicate to the seller (preferably in writing) that it is not his intent to interfere with the existing listing agreement in any way, and he is only providing information for the seller to consider when the listing ends.

What if seller likes what Broker 1 has to say and asks for his or her help in reading the existing listing agreement to determine how to fire Broker Z? Even though the seller is asking for this help (rather than Broker 1 volunteering to give it) I would not provide this advice for two reasons. First, offering advice on how to terminate a listing contract may cross the line into the unauthorized practice of law. Second, this type of activity puts the REALTOR© in a much more active role in bringing about the termination of the listing agreement and may therefore cross the line into unlawful behavior.

9. While licensees can communicate with another broker's client, they cannot negotiate unless the other broker is not providing negotiation services.

License law only allows a licensee to negotiate with another agent's client in two scenarios. The first is where the client has not entered into an exclusive agency or right to sell agreement with the client. The second is where the broker is not providing negotiation services. The challenge for some REALTORS© is how best to find out whether or not the other broker is providing negotiation services. Since some brokers are not always responsive to inquiries on this subject. Still, the best way to be protected is to communicate with the listing broker and get some written confirmation from them that it is permissable to negotiate with the listing broker's client.

If you cannot get the listing broker's approval, my recommendation is to create and save a written record showing that you, in good faith, tried on multiple occasions to get in touch with the listing broker. Only after that has been done, would I contact the seller. Even

then, in speaking with the seller, I would not initially negotiate. Instead, I would ask for the Seller's help in getting in touch with the listing broker. If the licensee has an offer to present, I would tell the seller that fact, but would not reveal the terms of the offer (since that might open the door to a negotiation). If the seller has no luck in communicating with the listing broker, I would try to get the seller to sign a confirmation that the listing broker is not providing negotiation services.

This is a difficult area for REALTORS© because they owe competing duties. On the one hand, they are obligated to timely present all offers. On the other hand, they must not negotiate directly with the seller if the listing broker is providing negotiation services. How best to balance these competing duties is a decision licensees should consult with their brokers on since a misstep in this area can result in a sanction.

10. Licensees must get the written consent of parties before referring them for brokerage services.

O.C.G.A. § 43-40-25(b)(36) provides that a licensee can be sanctioned for "failing to obtain a person's written agreement to refer that person to another licensed broker for brokerage or relocation services and to inform such person being referred whether or not the licensee will receive a valuable consideration for referral." So, what should a licensee living in Atlanta do if a friend asks the licensee to help find the friend a vacation home in Rabun County, Georgia? My recommended response would be something like this:

> "I'm glad to find you an agent in Rabun County. It is a beautiful place to live and they have many fine REALTORS© up there. Before I do, however, state law requires that I get you to sign a form consenting to me finding you an agent. I happen to have the form with me. I just need you to sign right here."

The GAR Referral Authorization (CO11) form not only includes the consent, it also includes a disclosure that the agent may receive a valuable consideration for the referral. Therefore, if the form is used no other discussion of money needs to take place. If the licensee uses a different form, the licensee would merely need to add something to his or her verbal statement like the following:

> "I'm glad to find you an agent. Finding you an agent may also help me because I may get a referral fee."

These 10 issues in license law are among the ones most frequently asked by REALTORS©. Hopefully, being familiar with these issues will help keep REALTORS© out of trouble.

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