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Episode 16: A Seemingly Innocent Marketing Fee

Call from the Agent: I was approached by a person who “markets” to find properties. Once he finds a property, he says he’ll refer it to me to list. The sales are to close like normal sales, but I am to pay him a “marketing fee” after closing. The person is not a licensed real estate agent. Is it okay for me to do this?

The Response: Before getting to substance, let me add that the person told the agent that “another agent is doing it.” That’s a cunning attempt to make it sound to the agent as though it’s deemed to be perfectly alright or that, by failing to do it, this agent will be falling behind her competitors. Dangerous allure.

Both state and federal law apply to the matter. They blend pretty nicely, but I’ll separate them for clarity:

Real Estate Settlement Procedures Act (RESPA):

Section 8(a) provides as follows:

“No person shall give and no person shall accept any fee, kickback or thing of value** pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person”

**“Thing of value” is defined in RESPA Section 3 as including “any payment, advance, funds, loan, service or other consideration.”

RESPA Section 8(b) provides as follows:

“No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”

These sections forbid many things – some obvious and some not – but within the topic of “agents giving gifts to clients,” the proscriptions of 8(a) and 8(b) might be effectively paraphrased as follows: An agent may not give or transfer a fee, kickback, payment, gift, tangible item, special privilege or any other thing of value to any other person in exchange for a referral of business.

South Carolina Code:

SC Code 40-57-145 provides, in pertinent part, as follows:

“The Commission* may take disciplinary action against a licensee who pays a commission or compensation to an unlicensed individual for activities requiring a license under this chapter.** A licensee may not pay or offer to pay a referral fee or finder’s fee to an unlicensed individual that is not a party to the real estate transaction.

*the Real Estate Commission created by LLR

** “chapter” refers to the chapter within the “Professions Article” of the SC Code spelling out licensing requirements and rules pertaining to the real estate profession. The actual chapter is called “Real Estate Brokers, Brokers in Charge, Salespersons and Property Managers

Conclusion: The proposal this agent received violates both state and federal law. Federal law allows severe monetary sanctions – state law allows discipline up to and including loss of license. Notice the prohibitions are wall-to-wall – disclosure of the fee does not protect the agent because the fee itself is the violation, not just the concealment of it (though I’m sure we can all agree concealment makes the violation more egregious).