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License Law Changes 7.2011

GEORGIA LEGISLATURE MAKES POSITIVE CHANGES TO LICENSE LAW

The next time you wonder what your REALTOR® dues pay for, remind yourself that among other things they pay for the best lobbyists in Georgia to be down at the state house protecting the interests of REALTORS®. In the last session of the Georgia Legislature some much needed changes to our Georgia real estate license law were passed and have now been signed into law by Governor Deal. The changes were made to what are known as the unfair trade practices section of Georgia real estate license law (See O.C.G.A. § 43-40-25(b)). These are the practices for which real estate licensees can be sanctioned, up to and including, the loss of their licenses. This article explains the revisions to the law.

UNFAIR TRADE PRACTICE #35 (NOW #36)

The first change is to O.C.G.A. § 43-40-25(b)(35). This unfair trade practice previously provided that a licensee could be sanctioned for:

"(35) Failing to obtain a person's written agreement to refer that person to another licensee for brokerage or relocation services and to inform such person being referred whether or not the licensee will receive a valuable consideration for such referral and an estimate of such consideration."

The revised unfair trade practice (now #36) provides as follows:

"(36) 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 such referral."

The old law arguably required a licensee to get written consent to refer a client or customer even to another licensee within the same brokerage company. This was because the old law required prior written consent whenever a referral was made to "another licensee" without any destination being made whether the licensee was in the same company or a different company as the licensee making the referral. In all likelihood, this was never the intent of the law.

The new law now only requires a client or customer to consent in writing to a referral when the referral is made to another licensed broker. The idea behind this change in the law was to try to limit the need to get written consent to situations where the customer or client is being referred to another brokerage firm. In other words, no prior written consent should be needed for intra-company referrals.[1]

[1] In its rule-making authority, the Georgia Real Estate Commission may still want to clarify that the term "another licensed broker" in unfair trade practice #36 shall not include any broker associate whose license is held by the same qualifying broker as the licensee making the referral.

The second change in unfair trade practice #35 is that in referring a client or customer to another broker for brokerage services, it is no longer necessary to give the person being referred an estimate of how much money the referring broker will be paid. The old requirement had been a real problem for REALTORS® because the amount of the referral fee was often unknown to the licensee making the referral at the time of the referral. As a result, it was hard for REALTORS® to give meaningful estimates in advance of what their referral fees were going to be.

The new law now merely requires a licensee to tell a client or customer that he or she will be compensated for the referral without having to disclose the amount of compensation the licensee will receive. This should make it easier for licensees to get customers and clients to consent to being referred.

The other benefit of this change in license law is that real estate brokerage firms should now be able to get their clients to give advance written consent to being referred in signing a brokerage engagement agreement. In other words, since no estimate of the fee the REALTOR® will receive for the referral needs to be disclosed to the client, brokerage engagement agreements can now include blanket consent of the type provided for below.

CONSENT TO BEING REFERRED

"In the event Client decides to look for real property for purchase or lease of a type or in a geographic area in which Broker is unfamiliar, Client does hereby consent to Broker referring Client to another real estate broker and receiving a valuable consideration for the referral."

Look for the GAR Forms Committee to consider modifying our brokerage engagement agreements accordingly.

Let's look at the sample script below to better understand the requirements of the old and new laws as they pertain to REALTORS® and referral fees.

OLD LAW

REALTOR®: Joe, congratulations on your upcoming move to Florida. Destin is a great town. You'll love the golf and that beautiful white sand. The Georgia Association of REALTORS® often meets down there for convention. By the way, if you need a REALTOR® to help find you a home down there, I can refer you to someone who really knows that market.

JOE: Gosh, I didn't realize that you knew any REALTORS® in Destin. We're just about to start looking for a home and I'd appreciate any help you can give me. My wife and I really didn't know who to call.

REALTOR®: No problem, my company is actually part of a national referral network. We can help our clients find great REALTORS® wherever they may be looking for a home.

JOE: Well, that's wonderful.

REALTOR®: To get started, I just need to get you to sign this form in which you agree to let me refer you to an agent on the Panhandle. In that way it is clear that I have your permission to find you an agent.

JOE: By the way, speaking of panhandle, will this cost me anything?

REALTOR®: Well, I'm glad you asked that question. If all goes well, I should get paid a referral fee by the broker to whom I refer you. However, the broker only pays me if you actually buy a home. Based on the price range you said you were looking in, I estimate that I will be paid a referral fee somewhere between $4,500 and $6,500.

JOE: I see. You know, on second thought, why don't I think about your offer and get back to you. I just remembered that I may already know a REALTOR® in Destin.

NEW LAW

When Joe asks whether finding an agent in Destin is going to cost him anything, the REALTOR® can now reply as follows:

REALTOR®: I'm glad you asked. Normally, REALTORS® in a referral network pay each other some type of referral fee when they refer new clients. Therefore, if all goes well, I should get some type of referral fee. However, I'll have to speak with the local REALTOR® to see what their policy is.

JOE: I see. Well, okay. I guess you deserve something for helping me out. Let me sign the form so that you can get to work.

UNFAIR TRADE PRACTICE #29

The second change to our license law was to delete in its entirety what had been unfair trade practice #29. The section used to provide that a licensee could be sanctioned for:

"(29) Failing to cause or preventing the disclosure of, on a real estate transaction settlement statement, settlement document, lease agreement, or management agreement, any fee, charge, rebate, profit, commission, referral fee, or other valuable

consideration for any service related to such transaction and the recipient of the consideration."

This old law was problematic because as it turned out, real estate licensees simply did not have enough control over the closing process to dictate what ended up on a settlement statement. As a result, some licensees trying to comply with license law were unable to do so. In other cases, compliance was impossible because licensees did not know that they were even entitled to a commission until after the transaction had closed. For example, a REALTOR®'s entitlement to a commission might not be established until after an arbitration proceeding. In these cases REALTORS® were left wondering how to comply with the license law requirement after the fact. As discussed below, in eliminating the state law requirement that every "fee, charge, rebate, profit, commission, referral fee, or other valuable consideration paid or received be shown on the settlement statement" the Georgia Legislature favored a more specific approach limiting disclosure only to an agent's principal.

UNFAIR TRADE PRACTICE #6

The final change to license law involved unfair trade practice #6 (O.C.G.A. § 43-40-25(b)(6). This section previously provided that a licensee could be sanctioned for:

"(6) Accepting, giving, or charging any undisclosed commission, fee, rebate, direct profit; or other valuable consideration on expenditures made for a principal or any undisclosed commission, fee, rebate, direct profit for procuring a loan or insurance or for conducting a property inspection, or for any other service related to a real estate transaction."

Since under the old law it was unclear what exactly was allowed and disallowed, it was struck in its entirety and replaced with the following:

"Failing to disclose in writing to a principal in a real estate transaction any of the following:

(A) The receipt of a fee, rebate, or other thing of value on expenditures made on behalf of the principal for which the principal is reimbursing the licensee;

(B) The payment to another broker of a commission, fee, or other thing of value for the referral of the principal for brokerage or relocation services; or

(C) The receipt of anything of value for the referral of any service or product in a real estate transaction to a principal."

The first problem with the old language is that it required the disclosure of fees, rebates, commissions and other valuable consideration (either paid or received) but did not specify to whom the disclosure was supposed to be given. The guidance that was given by the Georgia Real Estate Commission was that disclosure should be given to all parties in the transaction. Unfortunately, this turned out to be too broad a directive and sometimes resulted in disclosure to people who did not care to receive the disclosure and did not understand why it was being given. For example, REALTORS® debated at length whether in working with a buyer they had to disclose to the seller that the

REALTOR® had given the buyer a small housewarming gift. Known to some REALTORS® as the famous "Doorknocker Gift Debate", it lead some REALTORS® to question what possible public good was being served in requiring sellers to be told about a housewarming gift being given to the buyer. Since laws should serve some positive public purpose, the lack of such a purpose in this part of license law had the potential to undermine the integrity of our license law. Therefore, both the Georgia Association of REALTORS® and the Georgia Real Estate Commission advocated that the old law to be changed.

The new language still requires disclosures but now specifies that the disclosures are to be made to the broker's principal. While the disclosures must also still be made in writing, the scope of what must be disclosed to a principal has also now been narrowed. Let's look more closely at the examples below to better understand what must now be disclosed.

The first requirement is to disclose:

"The receipt of a fee, rebate or other thing of value on expenditures made on behalf of a principal for which the principal is reimbursing the licensee."

Therefore, if a REALTOR®, for example, buys a 12 pack of paper towels for a client for $6.00, the REALTOR® cannot mark up the expenditure to $10.00 without first disclosing this practice to the client. Similarly, let's say that a roofing contractor gives a property manager a kickback of a portion of the cost of replacing the roof in appreciation of the property manager hiring the roofer on behalf of the seller. This would also need to be disclosed if the client is responsible for paying for the new roof.

It should be noted that the disclosure obligation to a principal has been narrowed under the new law to expenditures for which the principal is reimbursing the agent (or which are being paid by the agent). Let's assume, for example, that a local newspaper periodically gives large advertisers a rebate based upon the total dollars they expended for advertising. If the principal is paying for advertising, the rebate would have to be disclosed. However, if the principal is not paying for advertising and this is simply built into the real estate commission, then no disclosure of the rebate is required.

The second item that must be disclosed is:

"The payment to another broker of a commission, fee or other thing of value for the referral of the principal for brokerage or relocation services."

Based on the new law, let's say that a relocation company refers a buyer to a brokerage company in Georgia for real estate brokerage services. The Georgia broker must still disclose to the buyer in writing that a referral fee will be paid to the relocation company. However, the referral fee may but is no longer required to appear on the settlement statement.

Historically, some relocation companies have not wanted REALTORS® to disclose to the clients they referred that a portion of the REALTOR®'s commission was being paid to the relocation company. In some cases, relocation contracts even included language prohibiting such disclosure. GAR's position remains that referral

contracts should not be used to silence REALTORS® who want to explain to whom their commission dollars are being paid. As a result, GAR supported the continuation of this disclosure requirement.

The third item that must be disclosed is:

"The receipt of anything of value for the referral of any service or product in a real estate transaction to a principal."

Based on the new law, let's say that a mortgage broker offers to pay a real estate licensee an illegal kickback for the referral of mortgage brokerage business. Not only would such a payment violate RESPA, it would also violate this unfair trade practice. However, let's say that a broker is paid a referral fee for referring a landscape company to a buyer after closing. This would not need to be disclosed under RESPA because a landscape company is not a settlement service provider. It would also not need to be disclosed under this unfair trade practice because it is not a service or product in a real estate transaction. This last disclosure obligation would require a licensee making a referral to an affiliated mortgage or title company to make a written disclosure of the arrangement to the consumer. This should be done in an Affiliated Business Disclosure Statement meeting HUD guidelines.

CONCLUSION

The new changes to license law clarify what is allowed and disallowed with regard to the referral fees. This should make it easier for REALTORS® to comply with the law and avoid inadvertent and unintended violations.

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