

# Nonlawyer Assisting the Short Sale Seller: Ministerial Acts or UPL?

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Do you recall the last major real estate recession, in the late 1980's and early 1990's? In my practice at the time, at least half of the closings involved sellers who were "underwater", with their outstanding mortgage indebtedness and other judgments and liens exceeding the net sales proceeds. The phrase "short sale" had not been coined yet, but I and many of my transactional real estate colleagues counseled our seller clients as to their legal options and became adept at crafting settlements with the seller's lender and any other lienholders so as to release the property owner from these burdens and provide marketable title to the purchaser. The transactions closed and the real estate cycle gradually transformed from bust to boom over the ensuing years.

Fast forward to the present bust cycle where the staggering inventory of distressed real property has resulted in plummeting real estate values. A properly vetted and conducted short sale transaction may be an excellent option for the owner of distressed real estate and a reasonable opportunity for the purchaser. The typical property owner, however, lacks the knowledge to process the short sale of real property, is unaware of the legal ramifications and requires professional assistance. While a competent real estate attorney would, in my opinion, offer superior counsel for the property owner throughout the short sale process, many property owners have turned to nonlawyers who market themselves as short sale specialists to guide them through the maze of lender requirements. These nonlawyers typically assert that lawyers do not want to handle short sales or are too expensive or that lawyers want to "kill the deal", so nonlawyers need to fill the void and assist property owners in processing short sale transactions. In particular, nonlawyer title agents and real estate licensees have created a cottage industry to supplement their typical functions by offering to assist owners of distressed real property in obtaining short sale approvals. As attorneys, should we be thankful that these nonlawyers are getting deals closed and benefiting the community by reducing the foreclosure and REO inventory, or are we turning a blind eye to potential and actual public harm?

## UPL Committee Investigates and RPPTL Responds

The Unlicensed Practice of Law ("UPL") Committee of the Florida Bar held a public hearing on February 11, 2011, seeking comments on the following questions:

Whether a nonlawyer who assists a property owner in a short sale transaction is engaged in the unlicensed practice of law? Would the answer be different if the nonlawyer was a real estate licensee regulated un-

der Chapter 475, Florida Statutes, a title insurance agency/agent regulated under Chapter 626, Florida Statutes, or a mortgage broker or other individual regulated under Chapter 494, Florida Statutes?

The RPPTL Section was informed of the UPL Committee's concerns and, prior to the public hearing, established a subcommittee to examine the issue and provide guidelines to the UPL Committee. The RPPTL subcommittee was comprised of members of the following RPPTL committees: Mortgages and Other Encumbrances Committee, **Residential Real Estate & Industry Liaison Committee, Real Property Problems Study Committee and Professionalism and Ethics Committee. The subcommittee members were real property attorneys from throughout Florida with both positive and negative experiences involving nonlawyers assisting property owners in short sale transactions.**

The subcommittee members included counsel who represent the nonlawyer categories under consideration by the UPL Committee, as well as counsel with years of experience representing property owners in short sale transactions. The subcommittee members extensively discussed the benefits and detriments of having a nonlawyer participate in a short sale with the property owner's lender(s) and other creditors, with the concern being at what point the nonlawyer crossed the line into the unlicensed practice of law. Based upon the consensus of the subcommittee, the RPPTL Section offered the following guidelines for the UPL Committee's consideration regarding a nonlawyer assisting a property owner in a short sale transaction:

--A non-lawyer who assists a property owner in performing the following in connection with a short sale transaction is not practicing law: fact finding, information and documentation gathering and transmittal of the information and documentation to the property owner's lender(s) to facilitate the approval of the short sale transaction.

--A non-lawyer who assists a property owner in performing the following in connection with a short sale transaction is practicing law: evaluating and/or giving an opinion as to the legal significance of any document, including, without limitation, documents submitted by the property owner to the lender or documents from the lender relating to the terms of the short sale approval or deficiency; providing advice regarding the legal ramifications of a short sale (with or without deficiency waiver), foreclosure, bankruptcy or any other legal recourse.

--A non-lawyer who assists a property owner in ne-

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gotiating the terms of a short sale approval may or may not be practicing law depending on the particular facts. Generally, if the negotiating involves evaluating, advising or giving a legal opinion, then such negotiating is practicing law. Generally, if the negotiating is simply the transmittal of information from one party to the other without evaluating, advising or opining, then the negotiating is not the practice of law.

Considerable oral testimony was presented by interested parties to the UPL Committee at the February meeting and the RPPTL Section's guidelines were often cited and supported by participants offering testimony at the meeting. According to Lori S. Holcomb of The Florida Bar, the UPL Committee is currently not scheduled to accept further oral testimony, but is accepting written testimony until May 23, 2011.<sup>1</sup> It is unclear what action, if any, the UPL Committee will take on this issue. The RPPTL Section, in its written testimony to the UPL Committee, concluded by stating that since "the unlicensed practice of law can inadvertently or deliberately occur when a nonlawyer assists a property owner in a short sale transaction, the UPL Committee may consider legislation requiring disclosure by any nonlawyer assisting a property owner in processing a short sale transaction."

### **Are these Nonlawyers Engaged in UPL?**

Although the UPL Committee considered three specific categories of nonlawyers, I confess that I have not encountered a mortgage broker assisting a property owner in a short sale transaction. It has been my experience that notwithstanding recent legislation<sup>2</sup>, mortgage brokers prefer to originate new loans due to the profitability factor. Accordingly, this article will focus on the other two categories.

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Even though the preparation of a contract for sale and purchase of real estate is the practice of law, the Florida Supreme Court has held that a real estate licensee may prepare the contract "recording his handiwork – that is the bringing together of buyer and seller."<sup>3</sup> Similarly, even though the drafting of legal documents is the practice of law, the Florida Supreme Court has held that nonlawyer title agents can draw legal documents to fulfill the conditions of a title insurance commitment which the title agent has issued.<sup>4</sup> Do any aspects of assisting a property owner with a short sale transaction constitute the practice of law and, if so, is there an applicable carve out for certain nonlawyers?

I have observed real estate licensees who have assisted property owners by initiating a short sale through the online "Equator" system required by Bank of America. In fact, Bank of America requires all of its first mortgage short sales to be initiated through Equator and, up until recently, required that the short sale be initiated by a real estate licensee.<sup>5</sup> Once the short sale request is initiated through Equator, the system prompts the licensee to upload certain documents, such as the listing agreement, contract, hardship letter and the property owner's tax returns, bank statements and other financial documents (privacy concerns are another topic beyond the scope of this article). The mere requesting and uploading of these documents would be information and document gathering and transmittal and should not constitute the practice of law. It is certainly possible for a real estate licensee to undertake only the ministerial acts of document submission and retrieval to obtain a letter from the property owner's lender agreeing to accept a certain sum to release the lien from the property, but it would be difficult to envision this process occurring without the property owner seeking the real estate licensee's opinion during the lender negotiation and upon receipt of any lender documentation. If the real estate licensee offered the property owner advice on the ramifications of applying and proceeding with the short sale versus foreclosure or offered an opinion on drafting the hardship letter, the line would be crossed. If no such advice or opinions were offered and the real estate licensee obtains a written short sale approval from the lender, the real estate licensee cannot opine as to the terms of the approval as that is giving legal advice. The language of the short sale approval letters is often vague and many a real estate licensee has mistakenly thought the approval of the short sale also meant that the lender waived the deficiency. This is a sad case of the blind leading the blind and the potential for public harm is great.

It has been my experience that most real estate licensees prefer to sell real estate rather than submit documents to the seller's lienholders.<sup>6</sup> The typical Florida real estate licensee who lists or sells short sale properties will refer the property owner either to a real estate attorney (no problem there) or to a title agent or title agency<sup>7</sup> to process the short

sale with the seller's lender(s) and close the transaction. The title agent who is merely gathering information and documents and submitting them to the lender upon request would, similar to the real estate licensee, not be practicing law. For example, in a non-short sale transaction, the title agent sends a form letter with the property owner's authorization requesting a payoff estoppel letter from the mortgage holder(s). There is no need for back-and-forth negotiating or evaluation of the ramifications of the payoff estoppel letter.

The process of obtaining a short sale approval letter from a lender, however, is not as simple as sending a form payoff request and receiving the customary form payoff estoppel letter. Rather, the process, if correctly executed, involves the analysis of the property owner's financial situation and alternatives, the evaluation of the relative rights of all lienholders, the negotiation of the claims of all lienholders<sup>8</sup> and, if the lender does not waive its deficiency rights, a strategy for handling post-sale deficiency claims. Although the properly executed short sale is an excellent vehicle for many, other legal options may be in the best interest of the property owner. None of the nonlawyers has a duty to consider what is in the best interest of the property owner.

While the Florida Supreme Court has granted nonlaw-

yer title agents considerable inroads into the practice of law, the Court has not and should not allow title agents to engage in such evaluation and negotiation as these are strictly within the purview of legal counsel. If nonlawyers are to be permitted to continue to assist property owners in short sale transactions, then at a minimum the nonlawyer must be required to disclose the limitations of the services provided by the nonlawyer. This disclosure must be direct and concise (not buried in fine print) and made upon the initial interaction with the property owner so that there is no doubt that the nonlawyer is only performing ministerial acts and is offering no advice, evaluation or legal opinion whatsoever (other than as contained in the title insurance commitment and policy). If the property owner understands that she has, in effect, merely retained a "secretary" to request and upload documents and elects the ministerial assistance of the nonlawyer in lieu of the advice and counsel of an attorney, then the property owner should be permitted to make this informed choice.

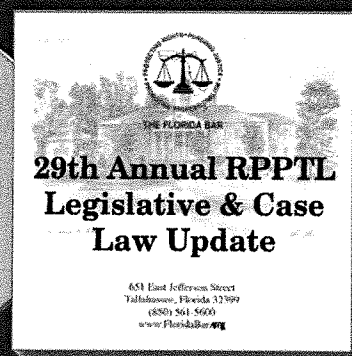
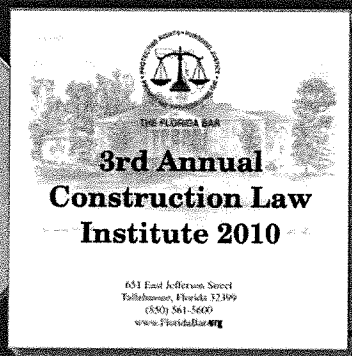
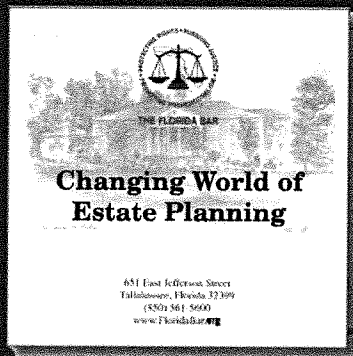
### **What Are You Implying?**

When a nonlawyer advertises that he is, or holds himself out as, a short sale specialist, having the expertise to assist

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the property owner in a short sale transaction, the implication is that the nonlawyer has special skills and knowledge of short sales that the ordinary lay person does not possess. Clearly the implication is that these special skills and knowledge are beyond the ministerial acts of requesting and transmitting documents that are not the unauthorized practice of law. The general public would be led to believe that such special knowledge is legal knowledge, namely the skills required to evaluate the options available to the property owner and, if appropriate, negotiate with the various lienholders to obtain the appropriate approvals of the short sale. So the nonlawyer advertising a short sale specialty or expertise is doubly harming the public by implying legal skills while merely providing ministerial services.

An attorney is not permitted to imply or advertise that she is a "specialist" or has expertise in any area of the law unless that attorney is board certified by the Florida Bar in that area. Advertising by nonlawyers in this scenario must be regulated or prohibited because the nonlawyer is implying assistance with legal and quasi-legal issues. The public is acting on the misleading nonlawyer advertising pertaining to short sale assistance, frequently to their detriment.

For example, if a nonlawyer title agent is simply performing the ministerial acts already permitted by the Florida Supreme Court, then any marketing by the title agent must clearly indicate that the nonlawyer will only be submitting the property owner's documents to the short sale lender in an effort to obtain a letter from the lender satisfactory to release the lien of the mortgage from the property. This requires no special skills or expertise pertaining specifically to short sales and all advertising must be consistent with this message. Perhaps, similar to the requirement that individuals seek credit counseling prior to pursuing bankruptcy, property owners seeking assistance from nonlawyers in short sale transactions should be required to first seek legal counsel to determine if the short sale is the appropriate remedy under their specific circumstances.

## Conclusion

The UPL Committee's next meeting has not been scheduled and it is unclear as to what action, if any, the UPL Committee will take. It is anticipated that it may be at least another year or two before the implementation by the Court of any action recommended by the UPL Committee on this topic. While there will likely still be short sales and

distressed real property two years from now, there will be hundreds, if not thousands, of short sale transactions being processed and closed in the meantime in Florida by nonlawyers holding themselves out as "specialists" who are clearly misleading the public. While I realize it is rather aspirational to contemplate that each property owner (short sale or not) would have the assistance of a competent real estate attorney, it is critical that the property owner understand that the nonlawyer he hired to assist with his short sale transaction is only permitted to perform clerical functions and does not have any special (i.e., legal) skills pertaining to short sale transactions.

The crisis in the real estate market that we are experiencing is not new and history will repeat itself. As aptly stated by the Florida Supreme Court, "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."<sup>9</sup> Will we have the mechanisms in place to protect the public the next time around? ■

## Endnotes:

- 1 Written testimony may be filed by sending to Jeffrey T. Picker, Assistant UPL Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.
- 2 See revisions effective January 1, 2010 to Chapter 494, Florida Statutes
- 3 *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605, 606 (Fla. 1950)
- 4 *Cooperman v. West Coast Title Company*, 75 So.2d 818 (Fla. 1954); *The Florida Bar v. McPhee*, 195 So.2d 552 (Fla. 1967)
- 5 The author is a real estate licensee as well as a member of the Florida Bar and initially submitted short sale approval requests through Equator as a real estate licensee since the system would not otherwise acknowledge the submission. The Equator system was revamped in 2010 to allow attorneys to register and initiate short sale requests.
- 6 I am told that in rural areas of Florida, real estate licensees are unable to find legal counsel willing to assist property owners in processing short sales. However, in South Florida and the other more populated areas of Florida, real estate licensees have many other options, including reasonably priced legal counsel.
- 7 For purposes of this analysis, the presumption is that the title agent or title agency is a nonlawyer title agent or title agency.
- 8 Frequently there are delinquent condominium or homeowner's association assessments that cannot be paid in full and must be negotiated. Likewise, there may be inferior judgment creditors that must be negotiated to a reduced sum. A contribution from the property owner may be requested. It is challenging to contemplate how a nonlawyer could engage in such negotiation on behalf of the property owner without evaluating, advising or opining.
- 9 *The Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980)



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