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June 2024

Use of “Showing Agents” and the Real Estate Practice Act

A recent trend has come to the attention of the South Carolina Real Estate Commission: the use of “showing agents” by licensees to show properties to prospective buyers. Showing agents are individuals, either licensed or unlicensed, that are not affiliated with the hiring licensee’s real estate brokerage firm. They are typically hired in one of two ways: they can be found and paid directly by the hiring licensee’s real estate brokerage firm or their services can be secured through websites that connect listing or buyers’ agents with showing agents. The Commission finds it important to address this trend as it relates to the laws governing the practice of real estate in South Carolina.

Use of Unlicensed Showing Agents

In accordance with the Real Estate Practice Act, S.C. Code Ann. § 40-57-5 *et seq.*, unlicensed individuals may not act as showing agents. More specifically, per S.C. Code Ann. § 40-57-135(K)(5)–(7), unlicensed individuals, including those who work under the supervision of a licensed broker-in-charge or property manager-in-charge, are prohibited from engaging in a number of activities, including:

- Conducting or hosting an open house;
- showing real property for sale (other than vacant units in a multifamily building); and
- answering questions regarding company listings, title, financing, and closing issues, except for information that is otherwise publicly available.

A hiring licensee found to have engaged the services of an unlicensed showing agent may face discipline against their license. S.C. Code Ann. § 40-57-710(A)(12) authorizes the Commission to take disciplinary action against a licensee who pays a commission or compensation to an unlicensed individual for activities requiring a license under the Real Estate Practice Act.

Use of Licensed Showing Agents

The Real Estate Practice Act makes clear that hiring licensees using licensed individuals as showing agents is problematic for many reasons, including but not limited to the following:

1. **Agency**

S.C. Code Ann. § 40-57-135(I)(2)(a) and (f) require that a buyer's representation agreement or listing agency agreement be in writing and must set forth all material terms of the parties' agency relationship, including, among other items, a description of the agent's duties or services to be performed for the client, as well as the duration of the agency relationship, with specific dates for the beginning and ending of the relationship. Additionally, for listing agents, S.C. Code Ann. § 40-57-135(E)(1) requires that a written listing agreement between the property owner and the real estate brokerage firm with whom the licensee is associated with must first be obtained before the licensee may advertise, market or offer to conduct a real estate transaction regarding that property.

Moreover, S.C. Code Ann. § 40-57-30(1), the real estate brokerage firm is the agent of the buyer or seller. Any showing agent hired by the hiring licensee would be acting outside of that written agency agreement because showing agents are not affiliated with the hiring licensee's real estate brokerage firm. While the hiring licensee, through the agency agreement, is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting, a showing agent hired by the hiring licensee is not similarly bound. *See* S.C. Code Ann. § 40-57-350(A). While a client may believe that the hired showing agent is likewise bound by the agency duties, that is simply not the case. As such, not only are clients not fully realizing the benefits of their agency relationships when the hiring licensee enlists a showing agent to perform the hiring licensee's responsibilities and activities, the client may actually be put in a worse position by this improper delegation.

2. **Supervision**

Brokers and associates are both categorized as associated licensees. *See* S.C. Code Ann. § 40-57-30(5) and (6). An associated licensee is defined as a licensee affiliated with and under the supervision of a broker-in-charge. *See* S.C. Code Ann. § 40-57-30(7) and (39). When a hiring licensee uses the services of a showing agent that is affiliated with and supervised by another broker-in-charge, the hiring licensee has no supervisory authority over the showing agent's actions. Instead, the showing agent remains under the supervision of their broker-in-charge and it is the showing agent's broker-in-charge who would remain responsible for ensuring their associated licensees comply with the Real Estate Practice Act. *See* S.C. Code Ann. § 40-57-135(A)(1).

3. **Compensation**

Associated licensees are prohibited from receiving compensation from an activity requiring a real estate license (which includes showings and open houses) from an entity or person other than the one for which the license is issued. *See* S.C. Code Ann. § 40-57-135(B) ("An associated licensee may not receive compensation from an activity requiring a real estate license from an entity or person other than the one for which the license is issued.") As such, it is a violation of the Real Estate Practice Act for a hiring licensee to directly pay a licensed showing agent for activities that require a license, as the showing agent is, by definition, unaffiliated with the hiring licensee's real estate brokerage firm.

4. **Disclosures**

S.C. Code Ann. § 40-57-370 requires a licensee to provide at the first practical opportunity the following to all potential buyers and sellers of real estate with whom the licensee has substantive contact:

- (1) a meaningful explanation of brokerage relationships in real estate transactions that are offered by that real estate brokerage firm, including an explanation of customer and client services;
- (2) Disclosure of Brokerage Relationships form prescribed by the Commission.

Importantly, “substantive contact” is defined in the law as “contact in which a discussion or dialogue between the consumer and the associated licensee moves from casual introductory talk to a meaningful conversation regarding the selling or buying motives or objectives of the seller or buyer, financial qualifications, and other confidential information that if disclosed could harm the consumer's bargaining position.” S.C. Code Ann. § 40-57-30(29).

All licensees must follow the aforementioned laws regarding the disclosure of brokerage relationships. As such, a hiring licensee that has employed the services of a showing agent, who again by definition is unaffiliated with the hiring licensee’s real estate brokerage firm, would have no control or supervisory authority to ensure that the showing agent is in fact making the disclosures as required.

Conclusion

These are just some of the many potential problems and concerns that arise when a hiring licensee considers using a showing agent. Licensees are strongly urged to carefully consider and understand these problems and concerns regarding showing agents to ensure they are practicing real estate in compliance with the Real Estate Practice Act.