

THE 'STRAIGHT-SKINNY' ON REFERRAL FEES

REQUIREMENTS, *THE DETAILS*, and ETHICS

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INTRODUCTION

Under VERY SPECIFIC circumstances, Florida law permits the payment of Commissions (too often referred to, and too often improperly paid as "Referral Fees") from Banks and Correspondent Lenders (*not* permitted from Mortgage 'Brokers') to other licensed or unlicensed persons provided such fees are commensurate with the services performed, with certain services being *required*. On the surface, this sounds like an easy way for a Title Agent, Attorney, CPA/Financial Planner, or Realtor to pick up a few extra bucks on a property transaction they may or may not be directly or indirectly involved in. BUT, in order to properly comply with the law (and in the process of so complying, if they are to offer learned and meaningful assistance to the prospective borrower) the party seeking a mortgage referral fee, as it turns out, must actually be quite knowledgeable of the mortgage lending industry. In essence, Florida law permits such referral fees to be paid, despite an obvious potential conflict-of-interest; it is sort of a 'loophole' big enough to drive a Mack truck through, but with only an inch to spare on each side!

Summarized below are the requisites to legally *earn* such a referral fee as provided under the law. As you will see in the accompanying comments, there is more than meets the eye. Even though representatives from several National Banks and various local mortgage companies/associates promote the fact they can pay a 'Referral Fee', boasting "all you have to do is fill out the Application" or "we'll just put you on a 1099" or some other virtually effortless measure by the referring party, they are not telling you the whole truth. Nor are they telling you of the civil and criminal penalties you could be exposed to if you do not do everything *juuuust right*.

Lets also discuss here the ethics of soliciting and receiving such referral fees. Unlike some *specific* attorney's or title company's fee or a *known* real estate commission, even if fully disclosed to the prospective borrower and properly *earned* in accordance with Florida law (which to my experience is rare, at best), any such referral fees paid to a third party only and always inure to the detriment of the borrower. Let me say that again... any such referral fees paid to a third party only and always inure to the detriment of the borrower. In other words, whereas most others' fees are known up front or are not likely subject to change (as in a real estate commission where the seller normally pays, and which does not cost the buyer/borrower anything extra - no matter how many agents are involved claiming some piece of the commission pie), *mortgage referral fees are an added expense* which the borrower will ultimately pay in the form of additional fees or a modestly higher interest rate. Further, knowing a referral fee is to be paid, a bank rep or mortgage associate may direct the borrower's loan to a lesser competitive program/lender in order to earn a little more in 'par-plus' pricing (what lender's pay mortgage companies). As one can begin to gather, here, *the payment or acceptance of referral fees is never in the borrower's best interest*. A person can try to make the argument that the mortgage company or bank (or their associate) does, indeed, *not* bump up fees or move the loan to a different lender/program in order to cover their additional expense of having to pay a referral fee and that they or the associate are "just working for a little less". But, if that is the case, why didn't

they look out for the client's best interests in the first place and work "...for a little less" from the get-go?

On the following pages are the State of Florida's requirements for legally obtaining a referral fee from a mortgage lender. The underlying comments are my *personal* thoughts and opinions, but see if you don't agree.

NOTE: Receipt of compensation when providing less than the below constitutes a violation of RESPA.

The law requires all those seeking a referral fee first to complete the borrower's loan application, and then they must in good faith materially perform at least 5 of the listed items...

A MUST: Completely and properly fill out the Loan Application Form 1003 with information provided by the prospective borrower.

While, on the surface, this would appear to be a relatively easy thing to do (and if you know well the nuances of the various loan types and lender requirements, it *can* be a rather easy form to complete), but there are any number of considerations and questions to be asked as or before one simply 'fills in the blanks'. The knowledgeable mortgage consultant is asking questions about the borrower's employment and income and goals, etc., and is otherwise thinking and partially pre-qualifying the borrower as to what kinds of mortgages may best suit the borrower's individual needs and qualifications BEFORE entering this information on the 1003. By way of example, an experienced and knowledgeable mortgage consultant will decide, based on the borrower's answers, whether or not to do a 'Fully Doc'd' application or 'Stated Income' or 'No-doc'... and if one doesn't know the difference between a 'Stated' and a 'No-doc' loan, they should not be taking the prospective borrower's loan application in the first place. In other words, even the 'simple' completion of the Loan Application 1003 form, requires a rather thorough understanding of underwriting guidelines and lender programs.

FIVE (5) OF BOLDED BELOW

(Remembering, a legal referral fee is that which is *commensurate* with the *actual* services performed:

Analyzing the prospective borrower's income and debt, and pre-qualifying the prospective borrower to determine the maximum mortgage amount the borrower can afford; or the mortgage amount borrower requested.

Even highly experienced and truly knowledgeable mortgage consultants can sometimes have a little trouble with this one. There are any number of variables which come into play. While the old rule of thumb of 2½ - 3 times the borrower's gross income can occasionally be moderately accurate, borrower credit scores, LTVs, borrower documentation (or lack of), employment, and type

of mortgage(s) desired can all affect the range of mortgage amounts a particular borrower may qualify for. When a borrower is self-employed or has various corporations, the technicalities and pre-qualifying guidelines can increase tenfold. See 'Assisting/Explaining Credit Scores' item, below.

Educating the prospective borrower in the home buying and financing process, advising the borrower about the different loan products available, and demonstrating how closing costs and monthly payments would vary under each product.

You've got to be kidding. Just about every lender has dozens or hundreds of different mortgage programs - all with very specific underwriting or qualifying criteria. And at any time, often frequently and often without notice, lenders will change the qualifying guidelines on a particular product, or remove a loan type

altogether from their available lending programs. Unless a mortgage consultant, or the referring party, receives daily updates from the numerous lenders 'out there', it is impossible - if not negligent - to proffer *any* mortgage/program advice to the borrower. Of course, it is pretty much impossible to know everything all the time, but those who are not actually in the mortgage profession earning their livelihoods thusly (as opposed to full-time mortgage consultants who are most in tune with current lender conditions and programs), they can not possibly provide meaningful, accurate, or timely information and advice to prospective borrowers. Period. And forget about compliance and disclosure requirements which also seem to grow or change daily. Along these lines, did you know some lenders will not offer certain programs, or that some lenders will not lend at all in Dade or Broward counties? And that some lenders will not finance Realtors or mortgage associates at all? I wonder what this says about South Florida's mortgage and real estate industries(?).

Collecting financial information (tax returns, bank statements, etc.) and other related documents that are part of the process.

OK. So what is so difficult to collecting a few bank statements or tax returns? You'd be surprised... How many months of statements? Which accounts? All pages? Individual and/or Corporate tax returns? All schedules? How many years? What other documents? 401K? Satisfactions? Assets? What is considered a 'liquid asset' to a lender? What about rent history? Will a landlord letter be acceptable or does one need copies of 12 or 24 months cancelled rent checks? Both sides? What is required on a 'Stated Income' or 'Stated Asset' mortgage? Do you even need all or some of the above, anyway? Which lender or which mortgage program requires what? Yadda, yadda, yadda. Gettin' the picture?

Initiating / Ordering VOE's and VOD's.

Do you have the proper authorization to obtain these? Is it on a form and requested in such a manner as to satisfy BOTH the lender and VOE/VOD provider? Do you know what to check to make sure these have been properly completed? Do you even need to bother with obtaining a VOE or VOD in the first place?

Initiating / Ordering requests for mortgage and other loan verifications.

Do you have the proper authorization to obtain these? Do you know the appropriate date(s)? Did the seller or borrower (re-fi) make the most recent payment? Do they need to?

Initiating / Ordering appraisals.

Be careful here... Do you know how to properly order? what the appraiser needs? have the proper authorization? Do you know the EXACT lender clauses? Is the appraiser acceptable to the lender(s)? Lenders have a so-called 'Watch List' of appraisers. If the appraiser is not an approved appraiser or is on the Watch List, (1) the appraisal may not be accepted, (2) the lender may require a second appraisal, (3) the lender may perform, and charge for, a 'desk review' ~ all of which are either an inconvenience or an additional cost to the borrower. And unless you've been living on Mars, you'd know from the newspapers this past year there has been a fair amount of collusion and fraud between sellers, real estate salespersons, and appraisers in this area. Lenders are paying ever closer attention to appraisers and appraisals.

Initiating / Ordering inspections or engineering reports.

If the referring party seeking a referral fee wishes to do this as one of the five requirements, with a little care, no real difficulties here. Most Realtors know of reputable inspectors for their residential buyers. If you are not a Realtor, ask one and they can easily provide a couple of legitimate home inspectors' names. But does the *lender* need such a property inspection report? Should it be included for lender? Is a termite

or roof inspection *really* required by the lender? Sure, these are good things for a buyer to know about their home purchase, but what does a particular lender *actually* require? And if you thusly learn of and have knowledge of a situation which may affect the lender, must you disclose?

Providing disclosures (TIL, GFE, ECO, others) to the borrower.

Do you have ALL the necessary disclosures? Are they current? Homeland security requirements? Privacy disclosure? *How about a disclosure that you are receiving a referral fee?* And for how much? Or other referral-related remuneration (bonuses, higher commission splits, health insurance paid, free trips or tickets, etc.)? Are your forms the requisite forms required by a particular lender(s)? Can you *clearly* explain what each are to the borrower? Do you know how or have the ability to complete/calculate an accurate GFE, TIL, etc.? Can you explain thoroughly what these and the respective line items are and how they are arrived at? For example, did you accurately reflect estimated title costs - including addendums? Did you include a per diem based on the contract closing date? Or a more conservative time frame? And what about escrows? Did you accurately estimate ad valorem taxes, or just use the prior year's? What about POC costs (like insurance or appraisal)? Is your GFE really done in 'GF' and is it a realistic 'E'? Do you know when a GFE can be provided to the borrower "within 3 days" or when it must be delivered immediately?

Assisting the borrower in understanding credit reports/scores.

Even something as supposedly cut-n-dry as credit scores is in reality not so cut-n-dry; while scores may be at one level, the quality (number, size, age, type, # payments left, derogs, etc.) of the borrower's *overall* credit will also come in to play. Again, unless the mortgage consultant, or referring party, has a material grasp of such credit issues, they shouldn't be advising a prospective borrower on much of anything.

Maintaining regular contact with the borrower, Realtors, lender and other relevant parties between application and closing, and to apprise them of the status of borrower's loan application and to gather additional information as needed.

Easy enough to make a couple of phone calls. Keeping in mind, however, privacy laws and lender/lawyer/Realtor policies usually will not permit them to share personal and/or relevant information on the borrower or the borrower's loan file with others without the express written permission of the borrower.

Ordering legal documents such as title, survey, etc.

These things are usually ordered through the mortgage company. In most cases, a new survey (if/when required) is most frequently obtained via the title company or closing attorney. Does the seller have a recent survey? Can it be updated to save the borrower maybe a couple of hundred dollars? Regardless, providing the proper and exact lender clauses is of paramount importance - as is checking to make sure the title and appraisal, etc. do, indeed, have them stated correctly.

Determining whether the property was located in a flood zone or ordering such service.

Usually done through appraiser and/or surveyor. But, as in the case of ordering title or survey or appraisal or whatever, if you want to do this, have at it; but too many chefs in the kitchen can spoil the stew. Who ordered what and who is ultimately responsible for insuring the requested item or information is completed or obtained on time, done accurately; who does what with what? The shortest distance between two points is a straight line... any time a 'middle man' is added to the mix, you tell me what tends to happen.

Participate in the loan closing.

If you're a Realtor or an attorney involved in the transaction, by all means 'participate in the closing'. This is a celebratory occasion and a buyer/borrower would probably appreciate your presence. From a closing perspective, if the involved Realtors and attorneys are present, should there be any contractual or property questions, their presence could prove quite helpful. If you're *not* a part of the actual transaction, just how do you propose to 'participate' anyway?

CONCLUSION

As you can see, there are a pretty good number of very specific i's to dot and t's to cross in order to earn a *legal* commission (erroneous aka 'referral fee') from a mortgage lender. In fact, in order to provide effective and knowledgeable mortgage financing assistance to a prospective home buyer-borrower, one has pretty much to be an experienced mortgage professional. So, if you really want to earn additional monies from such mortgage referrals, and inasmuch as *considerable time and expertise* is required to do so properly and legally, why not just become a licensed mortgage consultant and go to work directly for a reputable lender or broker where you could earn a *meaningful* fee or percentage? Whether this is or is not an honest suggestion, or a little cynicism, that's for you to decide. BUT... As an attorney, one could assume you are probably pretty competent in [real estate] contract law; as a CPA/Financial Planner, one could probably assume you are pretty competent in tax law; and as a Realtor, one could assume you are pretty competent in real estate sales and related buyer-seller needs. Rather than spend your valuable time trying to earn such a small referral fee (while exposing yourself to serious civil and criminal penalties if you do not properly perform the requisite services), compared to the income you might have received by better using that same time in the normal course of your 'real' business or profession, would not it be more productive to do what you do best ~ and let the lender and mortgage consultant do what they do best?

Oh, as an aside, it is also a compliance requirement to include on the borrower's closing statement the names/entities of all parties receiving compensation and the amount of compensation they will be receiving, including the names and amounts of those receiving mortgage referral fees. If such a referring party is not listed on the closing statement, they can not be paid. While such mortgage referral fees can be earned (per above requirements and provided the referrer is identified on the HUD), there still exists an interesting 'Catch 22' type of dilemma with most lenders. And *that* is that they will not fund a loan if there is more than one party receiving a mortgage commission. Did you get that? Even when it has been legally earned and is properly disclosed on the HUD that a third party is, indeed, legally receiving a piece of the action, the *lender* will not permit the payment of such a referral fee. And if the referring party's name is not on the HUD, then *that* is a violation. Sorta' damned if you do, damned if you don't. Mmmm, who'd a thunk?

As said in the INTRODUCTION, any such referral fees paid to a third party only and always inure to the detriment of the borrower... Which is why we at MORTGAGE RESULTS OF FLORIDA, INC. *never* pay referral fees. Never have, never will. **And if you are the buyer-borrower** who has been referred to a particular lender or mortgage consultant, ask the person who referred you if they are receiving a referral fee or other compensation for doing so (?). Remember, you're paying for it.

This article is for informational purposes only and should not be relied upon for legal advice. Consult your attorney for compliance and/or legal advice.