

DOES A CALIFORNIA ATTORNEY NEED A BROKERS LICENSE TO PERFORM LOAN MODIFICATIONS IN CALIFORNIA? ONE ATTORNEY/BROKERS OPINON.

The following is general legal information only and not intended to be legal advice or a substitute for legal advice. If you have any specific questions about any of the following you are advised to seek out the advice of a competent lawyer or ethics attorney to further guide you. This is simply an overview of a topic of great public importance and I am providing the blog below to generate comments, questions and perhaps generate some clarification on this essential issue.

There is a major financial crisis that we are all dealing with and we need to help each other in resolving some of these difficult issues to which answers may not be readily apparent. This blog is my attempt to raise awareness of this issue and perhaps find a way to clarify the points contained herein. If only licensed brokers with an approved advance fee agreement are allowed to engage in loan modifications in the State of California (currently there are only about 90 approved DRE companies) can this major economic social problem be ameliorated? There are literally hundreds of thousands of foreclosures across the United States. Keep this in mind as you read this posting. I welcome your input, comments, questions, assertions, corrections and opinions.

My comments are provided in Italics.

I. INTRODUCTION:

The big question I KEEP HEARING OVER AND OVER IS, can a California licensed Attorney perform loan modifications in California without having to first obtain a real estate brokers license?

The following section(s) comes from the California Business and Professions Code Sections 10131, 10131.1, and also Sections 10133 (a)(3), and Section 10133.1(a)(5).

II. ANALYSIS:

Section 10131 defines what a real estate broker is (meaning, if you fit the definition of any of the following you are acting as a real estate broker and you need to have a broker's license to do the following):

10131. A real estate broker within the meaning of this part is a person who, **for a compensation or in expectation of a compensation**, regardless of the form or time of payment, **does or negotiates to do one or more of the following acts for another or others:**

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) **Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.**

*This Section appears to suggest that anyone who "negotiates a loan" or performs services in connection with loans secured by liens on real property IS a broker and needs a real estate license to do it. A lawyer seeking compensation to perform loan modification services would arguably fall under this section and would seem to require a real estate license to perform loan modifications. As discussed below, the DRE has stated that soliciting, marketing or performing loan modifications is a licensed activity. See Page 1 of the Fall 2008 Mortgage Loan Bulletin which can be found here: <http://www.dre.ca.gov/> (click on the mortgage loan bulletin icon on the top right of the page).*

*Note: There is no reference under this Section to an Attorney having to do eight (8) loans or more before a real estate license is required.*

*Also Note: It could be argued by an Attorney that there is no "negotiation of a loan" but rather that this is simply "negotiating a modification to an existing loan." This is a matter of interpretation to which I provide no opinion. The DRE considers loan modifications to be "negotiating a loan."*

*Therefore, under Section 10131, it could easily be argued that an attorney would need a California Real Estate Broker's license to perform even one loan modification.*

*That being said, we must now move on to the next section of the Code. Here is the section following section 10131. This section seems to ADD to Section 10131 by stating that "a real estate broker is ALSO a person who...." does any of the following (essentially this Section seems to add MAKING loans rather than just NEGOTIATING them as described above).*

**10131.1. (a) A real estate broker within the meaning of this part is ALSO a person who engages as a principal "in the business" of "making loans" or buying from, selling to, or exchanging with the public, real property sales contracts or promissory notes secured directly or collaterally by liens on real property,**

OR, "makes agreements with the public for the collection of payments"

OR,

(One who apparently makes agreements with the public).....for the performance of services in connection with real property sales contracts or promissory notes secured directly or collaterally by liens on real property.

*What does this Section mean?*

*The first part of this Section seems to indicate that a broker is one who is engaged as a principal in the business of making loans..... or.....promissory notes secured by liens on real property. An Attorney performing loan modifications does not seem to meet this definition as they are not really "in the business of making loans." Rather, an attorney would simply be seeking to modify the terms of an existing loan. But this is just one man's interpretation. Reasonable Minds may differ.*

*The second part of this section may provide a better argument that an attorney who engages in loan modifications is a broker (therefore requiring a broker's license in order to legally engage in loan modifications). This Section states that an attorney who makes an agreement with the public.....for the performance of services (i.e. a loan modification service) in connection with a promissory note secured by a lien on real property is a broker. It is not clear whether this Attorney is "making an agreement for the performance of services in connection with a promissory note."*

*If so, then you could conclude that an attorney would in fact need a California Broker's real estate license under this Section to perform loan modifications.*

*Also, does this section require such an agreement to be from an Attorney who is "in the business"?*

*Question: What does "in the business" mean? The Code continues:*

(b) As used in this section:

(1) "In the business" means any of the following:

(A) **The acquisition for resale** to the public, and not as an investment, of eight or more real property sales contracts or promissory notes secured directly or collaterally by liens on real property during a calendar year.

*An Attorney performing loan modifications is not looking to resell anything.*

(B) **The sale to or exchange with the public of eight or more real property sales contracts or promissory notes** secured directly or collaterally by liens on real property during a calendar year. However, no transaction negotiated through a real estate licensee shall be considered in determining whether a person is a real estate broker within the meaning of this section.

*Again, an attorney performing loan modifications in California is not selling or exchanging any promissory notes, so this section does not seem to make an attorney a real estate broker.*

(C) The making of eight or more loans in a calendar year from the person's own funds to the public when those loans are held or resold and are secured directly or collaterally by a lien on residential real property consisting of a single dwelling unit in a condominium or cooperative or on any parcel containing only residential buildings if the total number of units on the parcel is four or less. However, no transaction negotiated through a real estate broker who meets the criteria of subdivision (a) or (b) of Section 10232 shall be considered in determining whether a person is a real estate broker within the meaning of this section.

*An attorney is certainly not making any loans from its own personal funds in performing loan modifications.*

(2) "Sale," "resale," and "exchange" include every **disposition** of any interest in a real property sales contract or promissory note secured directly or collaterally by a lien on real property, **except the original issuance of a promissory note by a borrower** or a real property sales contract by a vendor, either of which is to be secured directly by a lien on real property owned by the borrower or vendor.

(3) **"Own funds"** means either of the following:

(A) Cash, corporate capital, or warehouse credit lines at commercial banks, savings banks, savings and loan associations, industrial loan companies, or other sources that are liability items on the person's financial statements, whether secured or unsecured.

(B) Cash, corporate capital, or warehouse credit lines at commercial banks, savings banks, savings and loan associations, industrial loan companies, or other sources that are liability items on the financial statement of an affiliate of the person, whether secured or unsecured.

(4) "Own funds" does not include funds provided by a third party to fund a loan on condition that the third party will subsequently purchase or accept an assignment of the loan.

*So, under Section 10131.1 of the California Business and Professions Code, it looks tome like a real estate broker is ALSO someone who "makes" eight or more loans "from its own funds" in a calendar year.*

*I don't think this section makes an attorney negotiating loan modifications a broker who would need to be licensed in order to perform loan modifications.*

*Again, this is just my opinion.*

*SUMMARY OF THE ABOVE TWO SECTIONS: Section 10131 of the California Business and Professions Code seems to indicate (to me) that a California Licensed Attorney who performs even one loan modification may need a California Real Estate Broker's license to do it. The reason being that Section 10131 simply states:*

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

*Again, this position rests on what constitutes "negotiating a loan." The DRE has stated that loan modifications is a licensed activity.*

*However, I do not think Section 10131.1 of the California Business and Professions Code requires a California Attorney seeking to perform loan modifications on behalf of its Clients to have a California Broker's license. This Section seems to require a broker's license only where the Attorney would "make" eight or more loans "from its own funds" in a calendar year in the course of making loans. This section just does not seem applicable to me in the loan modification setting. However, it could be argued that the latter section of 10131.1 would require a brokers license if the Attorney were to make agreements (with the public) for the performance of services in connection with promissory notes secured directly or collaterally by liens on real property.*

*At any rate, because Section 10131 appears to arguably require a real estate license to perform loan modifications, we need to move on to the next question which involves exemptions from having to have a brokers license for Attorneys.*

*The issue becomes under what circumstances are Attorneys exempt from having to have a broker's license when engaged in activities that constitute being a broker?*

*The DRE has addressed this issue in its Fall 2008 Mortgage Loan Bulletin, which is available on its website as referenced above.*

*Here are the two critical sections of the California Business and Professions Code dealing with Attorney Exemptions from having to have a real estate brokers license when engaged in licensed real estate activity:*

California Business and Professions Code Section 10133

10133. (a) The acts described in Section 10131 are not acts for which a real estate license is required if performed by:

(1) A regular officer of a corporation or a general partner of a

partnership with respect to real property owned or leased by the corporation or partnership, respectively, or in connection with the proposed purchase or leasing of real property by the corporation or partnership, respectively, if the acts are not performed by the officer or partner in expectation of special compensation.

(2) A person holding a duly executed power of attorney from the owner of the real property with respect to which the acts are performed.

**(3) An attorney at law in rendering legal services to a client.**

(4) A receiver, trustee in bankruptcy or other person acting under order of a court of competent jurisdiction.

(5) A trustee for the beneficiary of a deed of trust when selling under authority of that deed of trust.

(b) The exemptions in subdivision (a) are not applicable to a person who uses or attempts to use them for the purpose of evading the provisions of this part.

*WHALLAH...THERE IT IS, the magical Attorney Exemption. Looks like an Attorney in California can engage in licensed real estate activity under Section 10131 without having to sit for the real estate broker's license.*

*The DRE Seems to Concur with this analysis, AS NOTED IN THE CALIFORNIA DEPARTMENT OF REAL ESTATE MORTGAGE LOAN BULLETIN (FALL 2008 - Page 7):*

*"The Real Estate Law provides very specific licensing exemptions for Attorneys who provide legal services to their clients...Business and Professions Code Section 10133(a)(3) provides an exemption for an "attorney at law rendering legal services to a client."*

*FANTASTIC! You would think this resolves the issue and gives California licensed Attorneys a green flag to perform loan modifications without a real estate broker's license by virtue of their having a law license.*

*BUT WAIT!! The DRE Bulletin goes on (it giveth the exemption, but then it taketh away - at least a bit). Here is what the DRE Loan Bulletin Article goes on to say.....*

*"Section 10133.1(a)(5) is more specific stating in pertinent part: "Any person licensed to practice law in this State, not ACTIVELY AND PRINCIPALLY engaged in the business of negotiating loans secured by real property, when that person renders services in the ordinary course of practicing as an attorney...." (is apparently exempt).*

Here is the actual Code Section (CA Business & Professions Code Section 10133.1(a)(5)):

**10133.1. (a) Subdivisions (d) and (e) of Section 10131, Section 10131.1, Article 5 (commencing with Section 10230), and Article 7 (commencing with Section 10240) of this code and Section 1695.13 of the Civil Code do not apply to any of the following:**

**Quick Note: Subdivision 10131(d) is the "negotiating loans" provision.**

(1) Any person or employee thereof doing business under any law of this state, any other state, or the United States relating to banks, trust companies, savings and loan associations, industrial loan companies, pension trusts, credit unions, or insurance companies.

(2) Any nonprofit cooperative association organized under Chapter 1 (commencing with Section 54001) of Division 20 of the Food and Agricultural **Code**, in loaning or advancing money in connection with any activity mentioned therein.

(3) Any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, livestock, poultry, or bee products on a cooperative nonprofit basis, in loaning or advancing money to the members thereof or in connection with any business of that type.

(4) Any corporation securing money or credit from any federal intermediate credit bank organized and existing pursuant to the provisions of an act of Congress entitled the "Agricultural Credits Act of 1923," in loaning or advancing money or credit so secured.

(5) Any person licensed to practice law in this state, not actively and principally engaged in the business of negotiating loans secured by real property, when that person renders services in the course of his or her practice as an attorney at law, and the disbursements of that person, whether paid by the borrower or other person, are not charges or costs and expenses regulated by or subject to the limitations of Article 7 (commencing with Section 10240), and the fees and disbursements are not shared, directly or indirectly, with the person negotiating the loan or the lender.

(6) Any person licensed as a finance lender when acting under the authority of that license.

(7) Any cemetery authority as defined by Section 7018 of the Health and Safety **Code**, that is authorized to do business in this state or its authorized agent.

(8) Any person authorized in writing by a savings institution to act as an agent of that institution, as authorized by Section 6520 of the Financial **Code** or comparable authority of the Office of Thrift Supervision of the United States Department of the Treasury by its regulations, when acting under the authority of that written authorization.

(9) Any person who is licensed as a securities broker or securities dealer under any law of this state, or of the United States, or any employee, officer, or agent of that person, if that person, employee, officer, or agent is acting within the scope of authority granted by that license in connection with a transaction involving the offer, sale, purchase, or exchange of a security representing an ownership interest in a pool of promissory notes secured directly or indirectly by liens on real property, which transaction is subject to any law of this state or the United States regulating the offer or sale of securities.

(10) Any person licensed as a residential mortgage lender or servicer when acting under the authority of that license.

(b) Persons described in paragraph (1), (2), or (3), as follows, are exempt from the provisions of subdivisions (d) and (e) of Section **10131** or Section **10131.1** with respect to the collection of payments or performance of services for lenders or on notes of owners in connection with loans secured directly or collaterally by liens on real property:

(1) The person makes collections on 10 or less of those loans, or in amounts of forty thousand dollars (\$40,000) or less, in any calendar year.

(2) The person is a corporation licensed as an escrow agent under Division 6 (commencing with Section 17000) of the Financial **Code** and the payments are deposited and maintained in the escrow agent's trust account.

(3) An employee of a real estate broker who is acting as the agent of a person described in paragraph (4) of subdivision (b) of Section 10232.4.

For purposes of this subdivision, performance of services does not include soliciting borrowers, lenders, or purchasers for, or negotiating, loans secured directly or collaterally by a lien on real property.

(c) (1) Subdivision (d) of Section **10131** does not apply to an employee of a real estate broker who, on behalf of the broker, assists the broker in meeting the broker's obligations to its customers in residential mortgage loan transactions, as defined in Section 50003 of the Financial **Code**, where the lender is an institutional lender, as defined in Section 50003 of the Financial **Code**, provided the employee does not participate in any negotiations occurring between the principals.

(2) A broker shall exercise reasonable supervision and control over the activities of nonlicensed employees acting under this subdivision, and shall comply with Section 10163 for each location where the nonlicensed persons are employed.

This section does not restrict the ability of the commissioner to discipline a broker or corporate broker licensee or its designated officer, or both the corporate broker licensee and its designated officer, for misconduct of a nonlicensed employee acting under this

subdivision, or, pursuant to Section 10080, to adopt, amend, or repeal rules or regulations governing the employment or supervision of an employee who is a nonlicensed person as described in this subdivision.

*So, let's see if I can decipher this, although California Business and Professions Code Section 10133 seems to provide a wide blanket exemption for Attorneys at law (who want to perform loan modifications) and who render legal services for their Clients, the next section (Section 10133.1(a)(3)) seems to curtail or modify this exemption basically because 10133.1(a)(5) is more specific than 10133(a)(3).*

*It appears to me that 10133(a)(5) means that if a lawyer is ACTIVELY and PRINCIPALLY engaged "in the business of negotiating loans" (i.e. the loan modification business), meaning that they are "negotiating loans" for clients for compensation or the expectation of compensation, then they need to have a broker's license.*

*Query: Is a lawyer PRINCIPALLY engaged in the loan modification business (i.e. negotiating loans) if it also practices another area of law such as criminal law, family law, divorce law, estate planning, etc.? What does the word "principally" actually mean?*

*CONCLUSION: So, what does all of this mean? Can a California Licensed Attorney engage in the loan modification business without having to obtain a California Real Estate Broker's License? I think the code sections are a bit confusing and there is definitely some grey area here.*

*If you are an Attorney Actively and Principally engaged in performing loan modifications, (meaning this is basically all you do) then there is an argument to be made that a real estate broker's license is required.*

*Some attorneys have suggested to me that performing loan modifications is not "negotiating a loan" but that too is a grey area and contrary to the DRE's position which it has made clear - Loan modifications is a licensed activity. Please consult your legal counsel for specific questions relating to your business and your practice.*

*The foregoing is a general overview of the topic of whether lawyers need to have a real estate license to perform loan modifications. The above are merely the opinions and analysis of the author. Reasonable minds can differ and case law and other opinions and interpretations may modify the foregoing.*

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