

# Popular Threads on Solosez

## Affiliated Business Arrangements

A real estate broker has approached me and offered to send me all of her agents' closings...in exchange for some financial compensation. I was willing to cut my fee in exchange for the volume (small as it is), but that's not what she's looking for. She wants her brokerage to be financially rewarded off the closings referred to me.

I can't split attorneys fees with her obviously, so does anyone have any other suggestions? I'm not sure I'm willing to compensate her brokerage for the referrals, but I want to know what the options are.

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What you're proposing is either splitting attorneys' fees, engaging in a kickback, or both. Don't do it.

Sasha Golden, Needham, Massachusetts

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I generally don't care for people who base their referrals on receiving a commission and therefore I refuse to form an agreement. If you would like her business otherwise, I believe you could set up a separate business entity that only conducts real estate closings and provides no legal services whatsoever. At least in Nebraska, real estate brokers are legally authorized to conduct closings; as are lending institutions and title companies. The separate business entity you create should be able to split fees between you and her as real estate brokers. You might want to run this past your bar ethics committee; but I think it would pass muster as long as the separate business entity makes no mention of your status as lawyer and you provide no services beyond what any other real estate broker could do.

D.A. "Duke" Drouillard, Omaha, Nebraska

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Beyond being improper, what she proposes is actually illegal, at least in the jurisdictions in which I practice.

Alan P. Bernstein

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Read RESPA - this sort of thing gets people prosecuted.

Marc Stern

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This is illegal in all jurisdictions. It is a violation of RESPA - the Real Estate Settlement Procedures Act. HUD is the enforcer on this - although how much they would care about a single violation I have no idea. You simply cannot do it.

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There was a recent case here in MA with SUBSTANTIAL penalties when a mortgage company (East-West Mortgage for those who have heard the ads on New England radio stations) had a quid pro quo arrangement for closings. East West was extorting sports tickets and requiring attorneys who did closings for them to advertise in their listings magazine and on the isoldmyhouse.com website.

The broker in your case should also know that he/she is violating the National Association of Realtors Code of Ethics by suggesting such an arrangement.

Personally, I have found that I get substantial business from real estate agents - although it took awhile - by letting them know that I would help them get business by PROMPTLY answering the "quickie" questions that they need help with gratis. For example, 5 minutes on the phone today helping a local Century 21 agent with language for a contingency in an Offer to Purchase will get me the referral for the Buyer's P&S and will likely get me the loan closing as I will strongly recommend my preferred lender. It is all about networking, not the illegal exchange of cash.

-- Peter T. Clark, Mansfield, Massachusetts

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A number of large real estate companies either own or have a significant interest in the title insurance companies that conduct their closings. Disclosure of ownership interest is required, but that isn't usually a significant problem. If she forms a real estate closing company together with her broker friend that does nothing but closings; there is no RESPA violation or ethics violation provided GA state bar allows her to form a partnership with someone else in a business not related to her law practice.

D.A. "Duke" Drouillard, Omaha, Nebraska

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This is state specific. In Mass. for example, and I am pretty sure Georgia where she is located, performing a real estate closing by a non-attorney is the unauthorized practice of law. If I am correct about Georgia, Traci would not be able to form a closing company partnership with the broker. Here in Mass., attorneys are the agents for the national title insurance companies and we write the policies. The national title companies hate this arrangement as they have to pay us the majority of the premium, but so far our lobbying group REBA (Real Estate Bar Association of Massachusetts) with 2000 members strong has been successful in fighting off legislative efforts by the title companies.

-- Peter T. Clark. Mansfield, Massachusetts

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But there IS a problem if she offers legal advice, Duke, which is as the question was posited what at least I assume would be offered.

Alan P. Bernstein

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I'm certain it does vary by state. Mass. seems to have a cozy arrangement.

Iowa doesn't allow title insurance, so every transfer is abstracted by attorneys. In Nebraska, and I believe Georgia, real estate brokers, title companies, and lending institutions may all conduct closings; no attorneys required. She is also a licensed real estate broker.

D.A. "Duke" Drouillard, Omaha, Nebraska

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I agree 100% with you Alan, if she offers legal advice. I didn't get that inference from her question though.

D.A. "Duke" Drouillard, Omaha, Nebraska

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I think there was an unauthorized practice of law ruling last year that stated that real estate closing must be conducted by an attorney. Next, an attorney cannot conduct the practice of law with someone who is not an attorney. Finally, you cannot split fee with non lawyers. I think the situation you describe would be unethical for three separate reasons in GA.

Robert W. "Robby" Hughes, Jr., Stone Mountain, Georgia

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I was looking for a final resolution on that issue. The Georgia bar formed the opinion that closings were exclusively the practice of law. Both the FTC and Dept of Justice wrote amicus briefs to the Georgia supreme court asking the court not to approve the policy of allowing only attorneys to close on real estate. I couldn't Google up the GA Supreme Court decision yet. If that is the case, I agree she cannot split fees or partner with her broker friend. I'm not sure I understand your second point; every time you take a client you are conducting the practice of law with someone who is not an attorney. The third point relates only to legal fees. She may split real estate commissions with other brokers because she is a licensed broker. If she sold Tupperware she could split commissions with ladies who hosted her parties.

D.A. "Duke" Drouillard, Omaha, Nebraska

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I absolutely agree! I made it clear to her that I can't split fees or give her any other compensation for referrals which would violate RESPA. But, she insists that others do it in some legal fashion, but she doesn't know how. So I'm just inquiring as to whether anyone knows of any legal way to do it.

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Duke--I think you're right...in GA, brokers are allowed to close loans---theoretically. But, since the closing attorney represents the lender in GA, and the lender ultimately has to approve who closes the loan, in reality, I don't think that business model would work because the lenders would never let a broker close their loans here. It might work for an all cash deal though. Nonetheless, I tend to agree with your first premise...don't do business with folks who want commissions for their referrals.

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I definitely am not going to do anything illegal, unethical, borderline, or that violates even the "spirit" of black-letter RESPA or any other law, or is otherwise "edgy". But, for example, could I agree to buy an ad that features her brokerage and my law practice in it that runs on a regular basis and I pay for it? That way, it's not a commission or otherwise tied in any way to a "per referral" transaction. It's just that based on the anticipated volume from her brokerage, I could estimate that I would make "\$x" on her closings in 2007; and therefore, I'm willing to spend "\$y" in advertising in 2007. I'd re-evaluate on a quarterly basis as to whether I'm getting a sufficient ROI. Again, I doubt that I'm going to do this, mainly because it just doesn't "feel" right, even I can find a completely legal way to do it, but I want to at least explore the options.

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Well, so much for my idea about buying ad space!!! I think you're all right. There's no way to do it...legally and ethically. I agree Peter with your approach, which I have offered to her, along with a \$50 discount on my attorneys fees for her closings. That's as good as it's going to get for her--- she'll have to find another way to generate cash for her business.

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Well, it's interesting here in Georgia. Under the Georgia Real Estate Commission (of which I'm a member as a licensed real estate agent), real estate BROKERS can close loans. But, apparently, GREC never talked with the Georgia bar association about that because if a broker does that, it is the UPL. Also, like Mass, I am an agent for the title insurance companies that I've applied to, and I get the majority of the premium (which by the way, in my opinion, is the only reason doing closings is a financially profitable endeavor--but I digress). But, by law, the closing attorneys represent the lender, so ultimately, the lenders control who closes their loans. Some lenders have elaborate application processes to be on their "approved attorney" list; others approve you upon request. So, title companies (or any other company) don't/can't close loans in GA.

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And it would be very difficult for me to avoid giving ANY legal advice in a real estate closing. I think it would be hard to separate my legal knowledge and just supervise a perfunctory signing ceremony--even if I could do it legally.

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In addition to state law considerations, see Section 8 of RESPA. What value is the broker providing for her "cut"? If none. or disproportionate, I think you have a kickback violation. Question: Even where state law says an attorney must perform the closing, does that mean an attorney and a non-attorney (RE Broker) can't co-own a closing/settlement company where attorney does the actual closing?

Robert Strupp

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We have similar issues here in North Carolina.

You will find this broker who thinks you walk on water today will move her business down the street when someone offers her \$5 more a pop for

closings. Or when you fail to properly kiss her \_\_\_\_\_. Don't move your practice to her building in reliance on any of these representations. Also, her volume will be 25% of what was represented. After you buy her ad, what do you tell the next broker who sees her ad and wants you to buy an ad in her book. And the next broker. You may find that her good agent may not want to use the cheapest attorney and will use the attorney they prefer. Or the attorney that provides that agent the biggest kickback.

I prefer to compete based on experience and quality of service. Some brokers appreciate that and some don't. The broker you bust your butt for today may remember you tomorrow and may not.

Jim Pardue

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Rob, I think you're right. I could co-own a title company with a non-attorney and close loans as the attorney.

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Jim--that's great advice. I'd end up pandering to every broker out there for the elusive promise of "all" their closings.

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I thought so. In my opinion, the affiliated arrangements are potential nightmares and justifiably heavily scrutinized by HUD & other regulators. Georgia has had so much housing fraud, I'd be reluctant to get too close. I would think there is nothing wrong with just referring business back & forth without having shared economic ties.

Robert Strupp

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I saw back in the summer where the Feds arrested a buyer and mortgage broker at a closing one Friday afternoon. Would that be exciting or what?

I think they would probably have to pick me off the floor if they came into my closing and did that.

Jim Pardue

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I agree that would be exciting...but the kind I can do without!!!

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