

Public Comment to the Federal Trade Commission Proposed Rule - MARS Up Front Fees

Summary:

The Dargon Law Firm PLLC is a fast-growing firm of ten attorneys whose practice primarily consists of mortgage modification and bankruptcy for our clients. We believe that we have developed an ethical and effective model for helping our clients apply for mortgage modifications, negotiate with their lenders, and give special help to clients for whom a mortgage modification is unavailable. Our model relies very heavily on collecting and earning a fee within the first few months of the mortgage modification process, as the modification process can be quite long.

We do not believe that we would be able to continue practicing mortgage modifications if we were forbidden from asking for, or earning our fees before the mortgage modification process is complete for each client. Creating a blanket rule that sweeps legitimate attorneys in with mortgage scam artists would ultimately destroy all for-profit legitimate mortgage modification outright. State bar associations are currently unable to deal with the volume of *pro bono* mortgage modification requests, and so under this proposed rule, many Americans would lose their homes due to a lack of guidance from a skilled attorney.

Main:

Attorney Daniel Dargon started our firm in 2008, and it has grown rapidly to its current size. Our attorneys run the gamut from recent law school graduates, to veteran ex-public defenders, former prosecutors, bankruptcy attorneys, family law, and personal injury attorneys. We all practice mortgage modification, as the demand for that service is many times the demand for any other particular legal service. Our rapid growth and success are only possible because of the great demand for professionals who can assist consumers through the labyrinthine mortgage modification process.

We have developed a model for mortgage modification that complies with both New Hampshire's Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Responsibility. It also protects consumers from spending good money for disappointing results.

Foremost, screening is everything. When a prospective client calls our firm and inquires about a mortgage modification, the first thing we do is make sure that that prospective client is a good candidate for a program. If a prospective client already has a low interest rate, has no stable income, has too much equity in their home, has a lender that neither participates in HAMP nor has an internal corporate mortgage modification program, has already failed out of one or more mortgage modification programs, or for any other reason that causes us to believe that he or she will likely not be accepted into an adequate program, we will not represent that client for a mortgage modification. We may look at a client's unsecured debts and determine that a bankruptcy may assist the client in helping to make their monthly mortgage payment, and we may offer alternate services to such a client, but modification representation is out of the question.

Without an adequate screening process, any firm or business that provides mortgage modification services is going to have a large number of irate clients simply because they will fail to gain modifications much of the time. Irate clients make complaints to state and federal regulators, including attorney disciplinary agencies. We have served well over 500 clients, and we have never had a client complain about our ethics to the New Hampshire Attorney Discipline Office. We maintain an "A-" rating with the Better Business Bureau with zero complaints. We have had many satisfied clients refer family and friends to our firm. We treat every client with respect, make refunds where clients are unhappy with our work, and uphold our obligations under the ethical rules that govern our profession.

Central to the screening is a large disclaimer: "There is no such thing as a guarantee in mortgage modification." We go out of our way to make sure that clients pay us for a good faith effort in attempting to obtain a mortgage modification, and not for any promised result.

Next, we discuss fees with the client. We charge \$2,500 for modification representation as a flat fee, regardless of the mortgage's value, the home's value, or other related circumstances. We have found that some cases take only a few hours of attorney and paralegal time to finish, and some cases take dozens and dozens of hours. It is difficult to predict which cases will be time consuming, because each client's financial situation is different. Statistically, we have found that on average, \$2,500 covers the work for which an attorney and paralegal would charge if we were billing the median homeowner by the hour at New Hampshire's prevailing rates for attorney work. We have found that clients appreciate a predictable, definitive fee that includes representation throughout the process regardless of complexity or duration.

We ask prospective clients to make three payments to us over a 60 day window, so as to break up our fee into manageable parts for a homeowner who is already struggling with debts. We do offer a small discount to clients who pay in full up front, or make two equal payments instead. For clients in special circumstances, we may make an exception for them to pay in four or five equal payments.

When the client signs the contract and tenders his or her first payment to us, we begin work on that client's file immediately. First, the assigned attorney calls the client and makes sure the client understands that they have hired us to represent them through the mortgage modification process to the lender, and not for appearing in a local court action, intervening in a judicial foreclosure, enjoining the lender through the courts on some principle of law, conducting a "forensic audit" to find purported violations of law, etc. If the client wants legal services in addition to the modification, that can be arranged through either our staff, or attorney affiliates.

Next, we make sure the client understands that we have been hired for one purpose: to help the client through the modification process by keeping them organized, assisting them in filling out forms, submitting properly completed and updated paperwork, vigorously following up with the lender, holding the lender to the modification process, and negotiating with the loss mitigation or underwriting department of the lender until a final decision on the mortgage modification has been reached.

With those disclaimers in mind, we begin the process of helping the client set goals for the mortgage modification, give them insight into the process, gather all of the necessary documents that client's lender requires for the submission of a mortgage modification request, and "get the ball rolling" on the modification. Note that we normally have only collected a third of our fee by this point: we begin the modification process before we have even been paid in full.

Each modification is different, and each lender has its own idiosyncratic procedures and forms. Lenders regularly lose authorization forms, financial statements, tax returns, and other critical paperwork. Much of our time is spent calling and recalling notorious lenders like Litton Loan Servicing, or Bank of America, simply to confirm that the lender received and filed the paperwork we've sent them.

Many major lenders are chronically disorganized. It is not unusual for us to call the same lender three different times and receive three very different answers about the status of a properly submitted mortgage modification request: First call: "your request is being processed and it looks like the foreclosure has been postponed"; second call: "your modification request has been rejected because we don't have your client's financials on record, and the sale date for the home is now set for two weeks from today"; third call: "I don't see a sale date on file, but more importantly we have no record of who you are, did you send us an authorization form?"

Any attorney who has spent even a brief amount of time working in this field could express to you how opaque the mortgage modification process seems to be. Lenders supposedly have HAMP or internal corporate procedures to follow as guidelines when deciding to whom they should offer a modification, but everything still seems negotiable. Similarly situated clients with even the same lender may be offered radically different modifications. Client A, who earns \$3,000 per month and has a \$1,500 monthly mortgage payment with no credit card debt might receive a reduction of \$500 per month, and Client B who also earns \$3,000 per month and has a \$1,500 monthly mortgage payment with no credit card debt might not even be offered a modification at all. We have been told "no" many times by lenders, and yet persisted and eventually negotiated at least some kind of temporary payment reduction on behalf of our clients.

For clients who are denied a modification, we offer them a Chapter 7 bankruptcy at no additional charge (but the client pays filing fees and court costs) in order to clear any deficiency judgment as a result of a foreclosure sale, where appropriate. We will also normally refund a client's money where they are denied a modification and a bankruptcy would not serve their interests. Our policy is to serve our clients well, and to always do what is fair.

Proposed Rule:

Mortgage modification has quickly become its own area of expertise - only with little judicial or administrative oversight. This is a full time practice, and there is an art and skill to be mastered in performing it. Our clients pay our fees up front, and those fees are earned according to a schedule. If the FTC removes the up-front fee, it will effectively create a contingency area of law akin to personal injury - only without an insurance company or solvent defendant at the end of the case to absorb the attorneys' fees. From the moment the client signs up, to the time that they are offered and accept a temporary or permanent mortgage modification by their lender, many months could pass.

All attorneys will be loathe to take modification cases if they have no assurance of being paid for their time and effort. What happens when an attorney and paralegal spend twenty or thirty hours on a case, only to have the lender unilaterally decide not to offer a modification in the end? Attorneys will desert this area of law in droves. They will also likely begin advising their clients to declare bankruptcy more often, in order to gain the protection of the Automatic Stay as a defense against foreclosure. In our experience, even the most sophisticated homeowner would not be able to negotiate the bank processes, wait on hold for extended periods of time, or be able to understand and respond to lender questions efficiently.

Just as state bars generally discourage attorneys from "dabbling" in serious criminal work, we would discourage any rule or policy that pushes clients to *pro bono* representation by attorneys who generally practice in other areas of law. In our opinion, few attorneys can really do this work "part time", and still offer competent representation. Removing the up-front fee will either throw literally hundreds of thousands of homeowners facing foreclosure upon the *pro bono* rolls of state bars (because for-profit modification will be gone), or force them into bankruptcy (so that attorneys can assist them in modifying their mortgages as an ancillary matter).

Neither of these alternatives would be better for the American homeowner than simply creating an broad exemption for licensed attorneys. We agree that non-attorneys should not be performing mortgage modification work without the supervision and direction of an attorney. We further agree that state bars need to do a better job in punishing unscrupulous attorneys who defraud or misrepresent themselves or mortgage modification to their clients. But don't strangle legitimate attorneys in your efforts to regulate hucksters and scam artists. Putting us out of business would harm our clients greatly, and will only make the foreclosure crisis worse and punish the very people who most need the services.

We would welcome you to discuss this matter further with us. Please do not hesitate to call Attorney Dargon at 603-224-6333.

Sincerely,

Daniel Dargon, Esq.

Peter Larkowich, Esq.

Erik Simensen, Esq.

Patricia Ellis, Esq.

Stephen Kasmar, Esq.

Joseph Becher, Esq.

Joseph Russell, Esq.

Donald Lader Jr., Esq.

Sarah Dimitradis, Esq.