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wrobinson@fbtlaw.com

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ABA DAY IN WASHINGTON  
PLANNING COMMITTEELaurel G. Bellows, Chair  
lbellows@bellowspsc.com

March 29, 2010

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex W)  
600 Pennsylvania Avenue, NW  
Washington, DC 20580**Re: Proposed Changes to the Practice of Law Exemption, FTC Mortgage Assistance Relief Services Rulemaking, Rule No. R911003, 75 Fed. Reg. 10707 (March 9, 2010)**

Dear Sir/Madam:

On behalf of the American Bar Association, which has nearly 400,000 members, I write to express our concerns over the above referenced proposed rule (the "Proposed Rule") regarding "Mortgage Assistance Relief Services" ("MARS") to the extent that it would impose excessive new regulations on lawyers engaged in the practice of law. If adopted in its current form, the Proposed Rule could undermine both the confidential attorney-client relationship and the ability of state courts to supervise and discipline lawyers effectively. In addition, the rule would make it difficult or impossible for many consumer debtors to obtain the legal services that they desperately need to help negotiate changes to their residential mortgages with their lenders and keep their homes.

To avoid these negative consequences, the ABA urges the FTC to modify the rule to expand its existing attorney exemption to exclude lawyers engaged in the practice of law from the entire proposed rule, not just certain narrow provisions of the rule. In addition, the ABA urges the FTC to broaden the exemption to cover all aspects of the attorneys' legal representation of clients in connection with mortgage assistance relief services, not just those provided in connection with the filing of a bankruptcy, court, or administrative proceeding. After all, one of the principal goals of securing legal representation is to avoid bankruptcy and litigation if possible, not encourage them. Finally, the ABA urges the Commission to apply the exemption to all licensed attorneys representing clients in connection with mortgage assistance relief services, not just those attorneys who are licensed in the consumer's state of residence.

### The Mandates of the Proposed Rule and the Narrow Lawyer Exemption

In its Proposed Rule, the FTC seeks to create new standards and requirements "concerning the practices of for-profit companies that, in exchange for a fee, offer to

GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR

Thomas M. Susman  
(202) 662-1765  
susmant@staff.abanet.org

DEPUTY DIRECTOR

Denise A. Cardman  
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

R. Larson Frisby  
frisbyr@staff.abanet.orgLillian B. Gaskin  
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

Ann Carmichael  
carmicha@staff.abanet.orgKristi Gaines  
gainesk@staff.abanet.orgKirra L. Jarratt  
jarratk@staff.abanet.orgE. Bruce Nicholson  
nicholsonb@staff.abanet.org

LEGISLATIVE COUNSEL/DIRECTOR

GRASSROOTS OPERATIONS  
Julie M. Strandlie  
jstrandlie@staff.abanet.orgLEGISLATIVE COUNSEL/  
DIRECTOR OF STATE LEGISLATIONKenneth J. Goldsmith  
goldsmithk@staff.abanet.org

INTELLECTUAL PROPERTY

LAW CONSULTANT  
Hayden Gregory  
gregoryh@staff.abanet.org

LEGISLATIVE COORDINATOR

Jared D. Hess  
hessj@staff.abanet.org

work with lenders and servicers on behalf of consumers to modify the terms of mortgage loans or to avoid foreclosure of those loans.”<sup>1</sup> After broadly defining the term “mortgage assistance relief service provider,”<sup>2</sup> the Proposed Rule imposes a number of new mandates on MARS providers that fall into several major categories, including “Prohibited Representations” (Section 322.3); “Required Disclosures” (Section 322.4); “Prohibition on Collection of Advance Payments” or fees (Section 322.5); “Assisting and Facilitating” violations of the rule (Section 322.6); and “Recordkeeping and Compliance Requirements” (Section 322.9).

The Proposed Rule also includes two very narrow and limited exclusions for certain types of lawyers. In particular, Section 322.7(a) would exempt “a person licensed to practice law in the state in which the consumer resides...from Section 322.3(a) of this rule”, *i.e.*, the subsection of the rule that prohibits MARS providers from “representing...that a consumer cannot or should not contact or communicate with his or her lender or servicer.”<sup>3</sup> In addition, Section 322.7(b) would exempt “a person licensed to practice law in the state in which the consumer resides...from requesting or receiving [advance] compensation under Section 322.5 if such person complies with all applicable state laws, including licensing regulations, [but only] in connection with preparing or filing...a bankruptcy petition” or any other document that must be filed in a bankruptcy, court, or administrative proceeding.<sup>4</sup>

In explaining its reasoning for including this limited attorney exemption in the Proposed Rule, the FTC states as follows:

The Commission...recognizes that legal counsel may be valuable to some consumers who are trying to save their homes. Frequently, consumers will turn to attorneys for legal assistance with bankruptcy or other legal proceedings regarding their mortgage. Consumers may also seek legal advice that may not necessarily be connected to a legal proceeding. For example attorneys may conduct a review of mortgage contracts to determine legal options and obligations, which may aid the attorney in negotiating with a servicer on behalf of a consumer.<sup>5</sup>

While acknowledging the valuable legal services that lawyers provide to consumers who are having difficulty meeting their mortgage obligations, the FTC declined to grant a broad exemption to all lawyers providing mortgage assistance relief services to clients and instead has proposed the much more limited exemption outlined in Sections 322.7(a) and (b) outlined above. The FTC specifically requested “comment from attorneys and other interested parties...on the role of attorneys in connection with providing loan modification services”<sup>6</sup> and whether a broader lawyer exemption is appropriate.<sup>7</sup>

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<sup>1</sup> See Summary of Proposed Rule, 75 Fed. Reg. 10707.

<sup>2</sup> Proposed Rule, Section 322.2(i), 75 Fed. Reg. at 10736. Section 322.2(i) defines the term “Mortgage Assistance Relief Service Provider” to mean “any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service. Section 322.2(h), in turn, provides a detailed definition of the related term “Mortgage Assistance Relief Service.”

<sup>3</sup> See Proposed Rule, Sections 322.7(a) and 322.3(a), 75 Fed. Reg. at 10737 and 10736.

<sup>4</sup> See Proposed Rule, Section 322.7(b), 75 Fed. Reg. at 10737.

<sup>5</sup> See Commentary to Proposed Rule, 75 Fed. Reg. at 10723.

<sup>6</sup> See *id.*, footnote 188, 75 Fed. Reg. at 10723.

<sup>7</sup> See *id.*, 75 Fed. Reg. at 10730

### The ABA's Concerns Regarding the Narrow Lawyer Exemption in the Proposed Rule

While the ABA concurs with the FTC's observations regarding the valuable legal counsel that lawyers provide to consumers seeking to save their homes and the need for a lawyer exemption in the Proposed Rule to allow lawyers to properly represent consumers in these matters, the ABA believes that the current exemption in the Proposed Rule is far too narrow. Therefore, the ABA urges the FTC to substantially broaden the exemption for a number of important reasons.

#### 1. Applying the Proposed Rule to Lawyers Engaged in the Practice of Law Will Undermine the Confidential Attorney-Client Relationship

The ABA is concerned that the application of the Proposed Rule to lawyers engaged in the practice of law will interfere with the confidential attorney-client relationship in a variety of ways. Because the definition of MARS is worded so broadly, it will likely apply to many bankruptcy lawyers, consumer lawyers, real estate lawyers, family lawyers, litigators, and general practitioners who, in the course of their legal representation, help their clients renegotiate their mortgage loans or otherwise avoid foreclosure. In addition, the broad wording of the rule will likely cover lawyers' employees, agents, and others acting under the direction of the lawyers as well. Therefore, the rule will have a far-reaching effect on a large segment of the legal profession, not just on lawyers who specialize in helping consumers renegotiate mortgages.

Under the Proposed Rule, any lawyer who helps a client renegotiate a mortgage or avoid foreclosure will be subject to a long list of new regulations. For example, lawyers covered by the rule will be required under Section 322.4 to provide all prospective clients with an awkward, irrelevant, boilerplate statement that "(name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."<sup>8</sup> Lawyers also would be required to indicate in the statement that "You will have to pay (insert amount) for this service," which shall consist of "the total amount the consumer must pay to purchase, receive and use all of the mortgage assistance relief services that are the subject of the sales offer, including...all fees, charges, or penalties."<sup>9</sup>

These required disclosure statements will likely cause confusion among clients regarding the special nature of their relationship with their lawyers. Unlike most corporate for-profit MARS providers, which agree to help consumers renegotiate mortgages or avoid foreclosures as part of a one-time, generic, arms-length business transaction, lawyers often provide mortgage and foreclosure assistance to their clients within the context of their ongoing, confidential, fiduciary relationship with the clients. In addition, while the mortgage renegotiation and foreclosure avoidance services are likely to be the only services provided to the consumer by the corporate MARS entity, lawyers are more likely to provide these types of services as merely one facet of the overall legal services provided to their clients. Because the practice of law and legal representation of clients is inherently different from the generic mortgage renegotiation services provided by corporate entities or other nonlawyers, it is inappropriate to subject lawyers to the detailed "Disclosure Requirements" in Section 322.4 of the Proposed Rule; doing so will only confuse and harm consumer clients.

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<sup>8</sup> See Proposed Rule, Section 322.4(a)(1), 75 Fed. Reg. at 10736-10737.

<sup>9</sup> See *id.*, Section 322.4(b)(1), 75 Fed. Reg. at 10737.

The ABA is also concerned that Section 322.9 of the Proposed Rule would undermine the confidential attorney-client relationship, including the attorney-client privilege, by subjecting attorneys to stringent recordkeeping requirements and permitting FTC inspection of the confidential client records. In particular, this section of the rule would require lawyers providing mortgage assistance relief services to “keep, for a period of twenty-four (24) months from the date the record is produced...” a wide variety of client materials, including: contracts and agreements between the lawyer and client; copies of correspondence between the lawyer and the client before the lawyer is hired; and extensive personal information about the clients including their names, phone numbers, fees paid, and detailed information about the legal services provided to the clients (i.e., the “items or services purchased”).<sup>10</sup> Though not specifically stated in the Proposed Rule, the FTC presumably would have the right to examine these detailed client records in the future to ensure compliance with the rule.

The attorney-client privilege has been a fundamental bedrock of our nation’s legal system for hundreds of years. Its underlying purpose is to encourage individuals—as well as companies and other organizations—to seek legal advice from their lawyers and to communicate candidly during consultations with their lawyers without fear that the information will be revealed to others. This enables clients to receive the most competent legal advice possible from fully informed counsel. Therefore, protection of the privilege is absolutely essential to promote full and frank discussions between clients and their lawyers and to ensure that clients receive the effective legal representation to which they are entitled.

The ABA strongly supports the preservation of the attorney-client privilege and opposes governmental policies, practices and procedures that have the effect of eroding the privilege.<sup>11</sup> By requiring lawyers to maintain detailed personal information about their clients, correspondence between the client and the lawyer, and detailed information about the confidential legal services provided to the client—and by suggesting that the FTC would have the authority to examine these materials in the future—Section 322.9 of the Proposed Rule could seriously undermine the attorney-client privilege and other rules designed to encourage open and frank communication between client and lawyer.

Perhaps even more troubling, Section 322.3 of the Proposed Rule would seriously undermine the confidential attorney-client relationship by prohibiting lawyers from giving certain proper legal advice to their consumer clients who live in another state, including advice to “not contact or communicate with his or her lender or servicer.”<sup>12</sup> Under the ABA Model Rules of Professional Conduct (the “ABA Model Rules”), a lawyer is required to be a zealous advocate and representative for the client.<sup>13</sup> When a lawyer is retained to represent a client in any matter, whether relating to renegotiation of mortgages or otherwise, the client will typically ask the lawyer to serve as the client’s representative and agent in dealing with the adverse party, including lenders and other mortgagees. Therefore, the language in Section 322.3 prohibiting lawyers from advising their out of state consumer clients not to communicate with their lenders could impede the lawyer’s ability to

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<sup>10</sup> See Proposed Rule, Section 322.9, 75 Fed. Reg. at 10737-10738.

<sup>11</sup> See, e.g., ABA Resolution 111, adopted by the ABA House of Delegates in August 2005. Resolution 111, the related background Report, and many other useful materials on the privilege prepared by the ABA Task Force on Attorney-Client Privilege are available on the Task Force’s website at <http://www.abanet.org/buslaw/attorneyclient/>

<sup>12</sup> See Proposed Rule, Section 322.3(a), 75 Fed. Reg. at 10736.

<sup>13</sup> See ABA Model Rules, Preamble: A Lawyer’s Responsibilities [1] and [2], 2004 Edition.

effectively represent the client and will often be contrary to the client's wishes and interests.

Although Section 322.7(a) of the Proposed Rule would exempt "a person licensed to practice law in the state in which the consumer resides" from Section 322.3(a)'s prohibition against advising a consumer client to no longer communicate with his lender,<sup>14</sup> the exemption is inadequate to the extent that it is limited to those lawyers who are licensed in the consumer's state of residence. Under the ABA Model Rules, a lawyer must be licensed by at least one state before the lawyer can practice law or represent a client.<sup>15</sup> However, the ABA Model Rules and the corresponding state rules do not prohibit a lawyer from representing a consumer or other client just because the client does not happen to reside in the state in which the lawyer is licensed. Therefore, the narrow exemption in Section 322.7(a) of the Proposed Rule should be expanded to exempt any lawyer engaged in the practice of law who is helping a consumer client renegotiate a mortgage or avoid foreclosure, not merely those lawyers who are licensed in the consumer's state of residence.

## 2. Applying the Proposed Rule to Lawyers Engaged in the Practice of Law Will Interfere with Traditional State Court Regulation and Supervision of Lawyers

The ABA also is concerned that the application of the Proposed Rule to lawyers engaged in the practice of law will undermine the ability of state courts to effectively supervise and discipline lawyers. For centuries, lawyers have been primarily regulated by the highest court of the state in which the lawyer is licensed. During that time, the courts have promulgated and enforced extensive regulations governing all aspects of the practice of law, including admission requirements, strict ethical codes and disciplinary rules. An unbroken line of U.S. Supreme Court decisions recognizes the unique nature of the legal profession and the inherent power of the states to regulate the practice of law.<sup>16</sup> In particular, the Supreme Court has indicated that the states' interest in regulating the legal profession "is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.'"<sup>17</sup> As a result, the Supreme Court often has refused to permit the application of federal laws to the legal profession.

Applicable state laws subject attorneys to stringent duties of competency, diligence, confidentiality, undivided loyalty, and the obligation to charge reasonable fees<sup>18</sup> that extend well beyond the new regulatory duties that the Proposed Rule would impose on lawyers helping consumer clients to renegotiate their mortgages or avoid foreclosure. These and other extensive lawyer duties contained in the ABA Model Rules—and the similar binding rules adopted by the states—are specifically designed to nurture and protect the confidential attorney-client relationship and ensure that clients receive effective representation of counsel.

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<sup>14</sup> See Proposed Rule, Sections 322.7(a) and 322.3(a), 75 Fed. Reg. at 10737 and 10736

<sup>15</sup> See generally ABA Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, and the corresponding state rules.

<sup>16</sup> See, e.g., *Hoover v. Ronwin*, 466 U.S. 558 (1984) (precluding Sherman Act suit against development and grading of bar examinations); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (state prohibition against lawyer advertising does not violate the Sherman Act); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (refusing to impose Sherman Act to a state bar organization).

<sup>17</sup> *Bates*, 433 U.S. at 362.

<sup>18</sup> See, e.g., ABA Model Rules 1.1, 1.3, 1.5, 1.6, 1.7, and 3.4. Rules identical or substantially similar to the ABA Model Rules have been adopted as legal binding ethical rules in all fifty states and the District of Columbia and are binding on all lawyers licensed in each particular state.

The Proposed Rule contains a number of key provisions that, if applied to lawyers engaged in the practice of law, would directly or partially conflict with well-established state court rules governing lawyers. Section 322.5 of the Proposed Rule, for example, would prohibit lawyers providing mortgage assistance relief services from requesting or receiving advance payment of any fee or other consideration until the lawyer has (1) achieved all of the results that the lawyer represented—or implied—to the consumer would be achieved and (2) provided the consumer with documentation of the achieved results.<sup>19</sup> This prohibition conflicts with ABA Model Rule 1.5, which permits a lawyer to require advance payment of a legal fee, but requires the fee to be reasonable and obligates the lawyer to return any unearned portion.<sup>20</sup>

Although Section 322.7(b) of the Proposed Rule contains an exemption from the prohibition on advance fees referenced in Section 322.5, the exemption is too narrow and inadequate for several reasons. First, the exemption only covers lawyers in connection with the preparation or filing of (1) a bankruptcy petition or other required filings in a bankruptcy proceeding or (2) any required filing in connection with a court or administrative proceeding.<sup>21</sup> This limitation is wholly arbitrary, however, because a lawyer helping a consumer client renegotiate a residential mortgage loan or avoid foreclosure is providing many of the same essential legal services, including analyzing the mortgage loan documents for state and/or federal law violations—and owes the same fiduciary duties—to the client regardless of whether a formal bankruptcy, court, or administrative proceeding has been filed. In addition, the limitation could create a perverse incentive for lawyers to pressure the consumer client to file unnecessary bankruptcy petitions or lawsuits so as to exempt the lawyer from the prohibition on collecting an advance fee. Therefore, the exemption in the Proposed Rule should cover all legal services provided by the lawyer to the consumer client, not just those related to formal bankruptcy, court or administrative filings. Second, the exemption should apply to all lawyers who are licensed by a state court (and therefore subject to those state court standards), not just those lawyers that the FTC has determined are in compliance with the state court rules. Lawyers licensed by their state supreme courts and subject to those courts' rules should be regulated and disciplined solely by the court and should not be subject to the concurrent jurisdiction of both the state court and the FTC, as would be the effect with the current language in the Proposed Rule. Third, the exemption should apply to all licensed lawyers representing consumer clients, not just those lawyers who happen to be licensed in the client's state of residence.

The Proposed Rule also conflicts with well-established state court rules governing lawyers' conduct with regard to the type and manner of legal fees that can be charged to clients. Section 322.5 of the Proposed Rule provides that when a lawyer or other MARS provider has represented—expressly or by implication—that he will negotiate or obtain a modification of a mortgage loan, the lawyer or other provider is prohibited from requesting or receiving any payment until the modification is actually achieved and documented to the client.<sup>22</sup> In addition, Section 322.4(b)(1) requires the lawyer or other provider to provide the client with a written disclosure stating “You will have to pay (insert amount) for this service,” which it defines as “the total amount the consumer must pay to

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<sup>19</sup> See Proposed Rule, Section 322.5(a)(1)-(2), 75 Fed. Reg. at 10737.

<sup>20</sup> See ABA Model Rule 1.5, Comments [1] and [4]. The legal fee also must be held in a trust account until earned pursuant to ABA Model Rule 1.15, as discussed in more detail below. See ABA's comments at p. 9, *infra*.

<sup>21</sup> See Proposed Rule, Section 322.7(b), 75 Fed. Reg. at 10737.

<sup>22</sup> See *id.*, at Section 322.5(b)(1)-(2).

purchase...the mortgage assistance relief services...including, but not limited to, all fees, charges, or penalties.”<sup>23</sup> Section 322.5, which amounts to a de facto contingent fee requirement, and Section 322.4(b)(1), which amounts to a de facto flat fee requirement (and hence a ban on hourly fees that cannot be quantified before the lawyer is hired), both conflict with the well-established state court rules that allow clients and lawyers to agree to a variety of different fee arrangements. In particular, both of these fee restrictions in the Proposed Rule conflict with ABA Model Rule 1.5, which expressly permit lawyers to agree to a variety of different fee structures, whether contingent, hourly, or some other arrangement, so long as the fee is reasonable and it is communicated to the client in accordance with certain stated procedures.<sup>24</sup>

The Proposed Rule would also undermine well-established state court rules in a number of other ways. For example, the recordkeeping mandate in Section 322.9 of the Proposed Rule that requires lawyers to keep copies of client contracts, correspondence, and other detailed client files containing the “quantity...and descriptions of items or services purchased” (*i.e.*, information about the legal services provided to the client) and then presumably makes that information available to FTC enforcement staff appears to conflict with state court rules on client confidentiality. In particular, ABA Model Rule 1.6 requires the lawyer to keep client information strictly confidential and prohibits the lawyer from revealing “information relating to the representation of a client unless the client gives informed consent...” or unless certain other conditions are met.<sup>25</sup>

By imposing new mandates on lawyers that conflict with the well-established state court rules governing lawyer conduct, the Proposed Rule would undermine the state courts’ traditional supervision and regulation of lawyers. In addition, to the extent that the Proposed Rule could displace certain existing state court rules that offer more comprehensive and stronger protections for clients—including more flexible fee arrangements and stronger confidentiality protections—the application of the Proposed Rule to lawyers could end up hurting consumer clients. This overlapping federal-state regulation also could cause confusion over the standards that lawyers must follow in dealing with their clients.

### 3. Applying the Proposed Rule to Lawyers Could Deny Essential Legal Representation to Consumers Seeking to Renegotiate Their Mortgages and Avoid Foreclosure

The ABA also is concerned that the application of the Proposed Rule to lawyers could have the unintended consequence of denying essential legal representation to consumer clients who are in danger of losing their homes.

As explained more fully above, the Proposed Rule will subject any bankruptcy lawyer, consumer lawyer, real estate lawyer, family lawyer, litigators, general practitioner, or other lawyer that helps a client renegotiate a mortgage or avoid foreclosure to a long list of new regulations, including: mandatory boilerplate statements that the lawyer is a “for-profit business not associated with the

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<sup>23</sup> See Proposed Rule, Section 322.4(b)(1), 75 Fed. Reg. at 10737. In the Commentary to the Proposed Rule, the FTC describes this requirement to provide the consumer client with the total cost of the mortgage assistance relief services as “perhaps the most material information for consumers in making well-informed decisions whether to purchase those services.” *Id.* at 10716.

<sup>24</sup> See ABA Model Rule 1.5: Fees.

<sup>25</sup> See ABA Model Rule 1.6(a).

government”; a de facto requirement that the lawyer charge only contingent, flat fees (and a de facto ban on hourly fees); and burdensome recordkeeping requirements that could erode the attorney-client privilege. Also, lawyers representing consumers who reside in another state would be prohibited from advising their clients not to communicate directly with their lenders, even when that is the proper legal advice. Furthermore, lawyers who try to help their consumer clients to renegotiate their mortgages or avoid foreclosure but who do not actually file bankruptcy, court, or administrative proceedings—and lawyers representing out of state consumers—would be prohibited from charging an advance fee, thereby greatly increasing the risk that the lawyer would not receive payment for the legal services provided.

These and other key requirements and prohibitions in the Proposed Rule, when taken together, will have a substantial negative impact on consumers’ ability to retain quality legal counsel when threatened with insolvency or the loss of their homes to foreclosure. As a result of these burdensome mandates, many lawyers who currently help consumers renegotiate their mortgages or avoid foreclosure as a part of their practice might stop handling these types of cases altogether rather than comply with these new regulations. With fewer lawyers available to represent consumer debtors, many more of these consumers will be forced to retain nonlawyer, for-profit MARS providers who, unlike licensed attorneys, are not subject to the strict ethical standards, supervision, and disciplinary authority of the state courts. Many other consumers will be forced either to negotiate directly with their lenders, without any expert assistance, or to file their bankruptcies *pro se*, without first obtaining adequate advice regarding the necessity or advisability of doing so. For all these reasons, applying the Proposed Rule to licensed attorneys will likely harm, rather than protect, consumers seeking to save their homes from foreclosure.

#### 4. Applying the Proposed Rule to Lawyers Engaged in the Practice of Law is Not Necessary to Protect Consumers

The ABA also believes that additional FTC regulation of lawyers engaged in the practice of law in this area is not needed to protect consumers seeking to negotiate modifications of residential mortgage loans or avoid foreclosure. The primary reason to regulate those providing mortgage assistance relief services to consumers is to keep them honest and ensure proper government oversight over them. But because lawyers already have substantial fiduciary duties to their clients that are strictly enforced by the state supreme courts and state bars that license and oversee the lawyers, this rationale for regulating MARS providers simply does not apply to lawyers who are already licensed by their state courts and bars.

As explained more fully above<sup>26</sup>, lawyers are already subject to extensive state court rules that impose stringent duties of competency, diligence, confidentiality, undivided loyalty, and the obligation to charge reasonable fees on lawyers. The lawyer’s employees and agents also are effectively subject to these same ethical duties.<sup>27</sup> Therefore, the existing state court rules effectively

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<sup>26</sup> See discussion of the extensive state court regulation of lawyers at p. 5 and footnote 18, *supra*.

<sup>27</sup> According to the official Commentary to the ABA Model Rules, which have been adopted in some form by almost all state supreme courts, a lawyer’s non-attorney assistants such as secretaries, paralegals, investigators, and law student interns “act for the lawyer in rendition of the lawyer’s professional services...(and the) lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment...” See ABA Model Rule 5.3, Comment 1. The ABA Model Rules further provide that a lawyer having direct supervisory authority over a nonlawyer assistant “shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations



cover both lawyers and all of their key nonlawyer employees and agents working under their direction.

One key area in which existing state court regulation of lawyers and law firms already protects consumer clients receiving mortgage assistance relief services is that of client trust or escrow accounts. In particular, ABA Model Rule 1.15 dealing with “Safekeeping Property” requires lawyers to deposit into a client trust account any legal fees and expenses that have been paid in advance.<sup>28</sup> The lawyer is further required to keep the client funds separate from the lawyer’s business and personal property and must maintain complete records on such funds for a period of five years after termination of the representation.<sup>29</sup> While the client’s funds are held in the trust account, the lawyer is obligated to maintain on a current basis books and records in accordance with generally accepted accounting practices.<sup>30</sup> Once the fees are received from the client, the lawyer is permitted to withdraw funds from the trust account “only as fees are earned or expenses incurred.”<sup>31</sup> Because almost every state court system has adopted—and vigorously enforces—binding rules similar to ABA Model Rule 1.15 that require lawyers to keep their clients’ funds in separate trust accounts until the legal fees have been earned or expenses incurred, the proposed FTC rule prohibiting many lawyers from collecting advance fees in MARS cases is simply not needed to protect consumer clients.<sup>32</sup>

Although the FTC states in its commentary to the Proposed Rule that “a growing number of attorneys themselves are engaged in deceptive and unfair practices in the marketing and sale of MARS,”<sup>33</sup> the Commission also acknowledges in the same commentary that “the states have continued to engage in their own aggressive law enforcement” against these abuses,<sup>34</sup> “the states also have continued to enact laws and regulations to address practices relating to MARS,”<sup>35</sup> and that the state bars have brought numerous cases against lawyers alleged to have engaged in these practices.<sup>36</sup>

The ABA believes that primary regulation and oversight of lawyers and the legal profession should continue to be vested in the state courts, not the federal agencies, and that the courts are in the best position to fulfill this important function. Therefore, although the ABA does not oppose the Proposed Rule to the extent that it would cover lawyers acting outside their traditional capacity (*i.e.*, not providing legal services to consumer clients),<sup>37</sup> the ABA believes that the rule should not cover

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of the lawyer.” *See* ABA Model Rule 5.3(b). Therefore, individuals working under the direction of a licensed attorney are effectively subject to the same professional standards as the attorney.

<sup>28</sup> *See* ABA Model Rule 1.15(c).

<sup>29</sup> *See* ABA Model Rule 1.15(a).

<sup>30</sup> *See* ABA Model Rule 1.15, Comment [1].

<sup>31</sup> ABA Model Rule 1.15(c).

<sup>32</sup> In its Commentary to the Proposed Rule titled “Alternatives to an Advance Fee Ban,” the FTC sought “comment...on whether the Commission should...(2) allow MARS providers to use independent third-party escrow accounts to hold fees until they achieve the results...” 75 Fed. Reg. at 10721. Because virtually all state court systems require lawyers to keep client funds in special trust accounts until the fees have been earned or expenses incurred, a new system of third-party escrow accounts are not needed in light of the lawyers’ existing duties under Rule 1.15.

<sup>33</sup> *See* Commentary to Proposed Rule at 10712.

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 10712, footnote 68, noting that “the state bar [of California alone] has initiated over 175...investigations of attorneys” for alleged misconduct relating to MARS.

<sup>37</sup> In the Commentary to the Proposed Rule, the FTC expressed concern that “...some MARS providers make the specific claim that they offer legal services, when, in fact, no attorneys are employed at the company or, even if they are, they do

lawyers engaged in the practice of law and that additional FTC regulation of such lawyers and those acting under their direction is not necessary to protect consumers.

5. The Licensed Attorney Exemption in the Proposed Rule Should be Expanded to be Consistent with HUD's Proposed Rule Under the SAFE Act

Finally, the ABA is concerned that unless the existing lawyer exemption in the Proposed Rule is substantially broadened, it will conflict with HUD's proposed rule that seeks to define the terms "loan originator" and "third-party loan modification specialist" under the Secure and Fair Enforcement Mortgage Licensing Act of 2008, P.L. 110-289 (the "SAFE Act").<sup>38</sup> The proposed HUD rule would broadly define "loan originator" to include any individual who "...negotiates terms of a residential mortgage loan for compensation or gain" or "represents to the public, through advertising or other means of communicating or providing information...that such individual can or will provide..." such services.<sup>39</sup> The HUD Proposed Rule also would expand the definition of "loan originator" to include so-called "third-party loan modification specialists," *i.e.*, individuals other than lenders and loan servicers who work on behalf of borrowers to negotiate modifications of existing loan terms.<sup>40</sup> Any lawyer or law firm falling under either definition would become subject to the registration and licensing requirements of the SAFE Act.

The HUD Proposed Rule also contains the following limited lawyer exemption:

- (6) A licensed attorney who only negotiates the terms of a residential mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client, unless the attorney is compensated by a lender, a mortgage broker, or other mortgage loan originator or by any agent of such lender, mortgage broker, or other mortgage loan originator;<sup>41</sup>

As the ABA explained in the comments it filed with HUD on March 5, 2010,<sup>42</sup> although the ABA supports the lawyer exemption in the HUD Proposed Rule as far as it goes, the ABA believes that the exemption is too narrow and should not be limited to those situations where the attorney is negotiating the terms of a residential mortgage loan as an "ancillary" matter to the attorney's representation of the client. Therefore, the ABA urged HUD to expand the lawyer exemption in the rule to eliminate the ancillary limitation and to add a new corresponding exemption for attorneys helping their clients to renegotiate or modify existing mortgage loans (*i.e.*, lawyers acting as "third-party loan modification specialists") that is not limited to "ancillary" matters.

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little or no legal work for consumers." See Commentary at 10711-10712. However, if the ABA's proposed exemption for licensed attorneys engaged in the practice of law was added to the Proposed Rule, lawyers acting as a mere "front" for nonlawyer MARS providers would continue to be covered by the rule; only those lawyers engaging in the practice of law by providing actual legal services to consumer clients would be exempt.

<sup>38</sup> In the Commentary to the Proposed Rule, the FTC invited comment on the issue of whether "any other federal statutes, rules, or policies...would duplicate, overlap, or conflict with the proposed Rule." See Commentary, Section VI. E., Duplicative, Overlapping, or Conflicting Federal Rules, 75 Fed. Reg. at 10732.

<sup>39</sup> See HUD Proposed Rule titled "SAFE Mortgage Licensing Act: HUD Responsibilities Under the SAFE Act," Docket No. FR-5271-P-01, 74 Fed. Reg. 66548 (December 15, 2009) (hereinafter, the "HUD Proposed Rule")

<sup>40</sup> *Id.* at 66553.

<sup>41</sup> See *id.* at Section 3400.103(e)(6), 74 Fed. Reg. at 66558.

<sup>42</sup> The ABA's March 5, 2010 comment letter to HUD regarding the Department's proposed rules under the SAFE Act is available online at [http://www.abanet.org/poladv/letters/attyclient/2010mar3\\_HUDrule\\_1.pdf](http://www.abanet.org/poladv/letters/attyclient/2010mar3_HUDrule_1.pdf).

In addition to the other reasons explained above, the ABA urges the FTC to substantially broaden the current lawyer exemption in its Proposed Rule so that it will not be inconsistent with the HUD Proposed Rule. If HUD amends its final rule to incorporate the broader lawyer exemption to the definitions of “loan originator” and “third-party loan modification specialist” recommended by the ABA, then lawyers helping their consumer clients to negotiate or renegotiate their residential mortgages and avoid foreclosures will be exempt from HUD’s rule and will not be required to be licensed and regulated by HUD and the states as “loan originators.” Even if HUD declines to adopt the broader lawyer exemption recommended by the ABA, however, and adopts the rule in its current proposed form, the FTC’s Proposed Rule should still be substantially expanded so that it does not directly conflict with the final HUD rule.<sup>43</sup> Unless the FTC and HUD rules are harmonized with respect to their lawyer exemptions, the conflicting rules will cause unnecessary confusion and might discourage lawyers from providing valuable legal assistance to consumers who seeking to modify their mortgages and avoid foreclosures.

#### The ABA’s Proposed Amendment

To remedy these problems arising from the application of the Proposed Rule to lawyers, the ABA respectfully urges the FTC to amend the rule to exempt licensed attorneys engaged in the practice of law, as well as those attorneys’ employees and agents, who help consumer clients to renegotiate their residential mortgage loans or to otherwise avoid foreclosure. In particular, the ABA recommends that the FTC replace the current attorney exemption contained in Section 322.7(a) and (b) with the following broader language:

#### **§322.7 Exemption for Licensed Attorneys Engaged in the Practice of Law.**

A licensed attorney engaged in the practice of law and those individuals acting under the direction of the attorney are exempt from this rule.

If adopted, this change to the Proposed Rule would allow licensed attorneys and those acting under their direction to continue to provide the effective legal representation their consumer clients need to renegotiate their residential mortgage loans, prevent foreclosure, and stay in their homes.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA’s position on the Proposed Rule or our suggested amendment, please contact me at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,

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Thomas M. Susman

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<sup>43</sup> Even if the HUD Proposed Rule is not amended to broaden the current lawyer exemption, it will still exempt lawyers who negotiate or renegotiate mortgage loans on behalf of clients so long as these services are “ancillary” to their representation of the client and the lawyer does not receive compensation from the lender, mortgage broker, other mortgage loan originator, or their agents. *See* HUD Proposed Rule, Section 3400.103(e)(6), 74 Fed. Reg. at 66558.