

**JULIA LEAH GREENFIELD
ATTORNEY-AT-LAW**

March 26, 2010

VIA OVERNIGHT DELIVERY
Federal Trade Commission
Office of the Secretary
Room H 135 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Proposed Rulemaking for Mortgage Assistance Relief Services

To Whom It May Concern:

The undersigned are attorneys in California who practice or teach in the area of consumer financial services. We submit these comments as individuals.

We submit these comments in response to the recent Notice of Proposed Rulemaking; Request for Public Comment ("Proposed Rulemaking") regarding Mortgage Assistance Relief Services ("MARS") and the providers that offer MARS to consumers throughout the United States ("MARS Providers"), published in the March 9, 2010 Federal Register. The Proposed Rulemaking follows an Advance Notice of Proposed Rulemaking that was published in the Federal Register on June 1, 2009.

The comments provided in this letter are given in response to footnote 188 of the Proposed Rulemaking in which the Commission stated that it did not receive any comments to the Advance Notice of Proposed Rulemaking from attorneys or organizations representing attorneys addressing the role of attorneys in connection with providing mortgage loan modification services. The Commission stated that it was requesting comment from attorneys and interested parties in order to provide it with an understanding of how attorneys are involved in the MARS process.

Specifically, the Proposed Rulemaking prohibits MARS Providers from charging advance fees. Although it contains an exemption for attorneys, that exemption, in

Section 322.7, is narrowly limited to attorneys who provide bankruptcy and litigation services. The Commission explained:

The Commission recognizes that this narrow exemption would not apply to attorneys providing MARS to consumers outside of the bankruptcy or litigation context, and therefore might deter some attorneys from providing legitimate assistance to consumers, for example, by calling lenders or servicers on their behalf. There is nothing in the record, however, indicating how many attorneys provide these types of services and whether an advance fee ban would deter them from helping consumers.

We wish to provide some constructive input regarding these issues.

I. We Applaud the Basic Restrictions Proposed by the Commission

We applaud the basic restrictions that are proposed on the ability of MARS Providers, most of whom are unlicensed to practice law, to request and accept advance fees. These restrictions are warranted because there is ample evidence from the state Attorneys General and other sources in California and nationwide that persons who are looking to take advantage of distressed consumers are gravitating toward this relatively new field. Thousands of distressed homeowners in California have been victimized by unscrupulous people – including a small number of attorneys - promising to save their homes, who took advance fees of two to twelve thousand dollars and did little or no work for them.

The Federal Trade Commission, the State Bar of California, the California Attorney General, the California Department of Real Estate and local District Attorneys, acting either individually or jointly, were responsible for closing down in 2009 and earlier this year certain MARS Providers in California that were owned or spearheaded by attorneys licensed to practice in California. Seven attorneys¹ tendered their resignations to the State Bar because of charges alleging wrongdoing in connection with a mortgage loan modification business, and a small number of other attorneys were implicated in the July, 2009 Operation Loan Lies initiated by California Attorney General Jerry Brown.

However, apart from a small number of attorneys, there is no evidence that California attorneys as a group acted in an unfair or deceptive manner when offering mortgage loan modification services to California borrowers. The fact that a small number of attorneys were involved in unfair and deceptive practices with other MARS Providers or individually does not require the entire profession to be barred from collecting legal fees in the usual manner in which they are paid for services when requested by a client to look

¹ The attorneys who resigned their California State Bar licenses this year as a result of allegations of wrongdoing in connection with mortgage loan modifications were Christian Dillon, Nabile Anz, James Parsa, Christopher Deiner, Ronald Rotis, Sean Rutledge and Paul Lucas. Julia Leah Greenfield, a signer of this letter, was the expert witness for the State Bar of California in its disbarment proceedings against Nabile Anz. Some of the seven attorneys were also charged with violations of the California Foreclosure Consultant Act.

into possible options regarding their mortgage loans. As evidenced by the response to a similar prohibition already in effect in California, the likely impact of banning the collection of an advance fee retainer and requiring completion of most or all services before an attorney can charge a fee will be to drive competent and ethical attorneys out of the market for the provision of MARS services, resulting in a significant unmet need for legal services on the part of distressed homeowners.

II. There is Evidence that California's 2009 Ban on Attorneys' Charging Advance Fees for MARS Has Resulted in an Unmet Need for Legal Services on the Part of Distressed Homeowners

On October 10, 2009, the California legislature enacted Senate Bill 94 ("SB 94"). SB 94 added Cal. Civil Code §2944.7 which read in part as follows:

- (a) Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:

(1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform...."

After its enactment, the State Bar of California issued an ethics FAQ that receiving an advance fee retainer, depositing it in a client trust account, and collecting a fee from the client trust account once services have been performed would constitute a violation, because receipt of the retainer is "receipt" of pre-performance compensation even if it is held in trust for the client.

While SB 94 was working its way through the State legislature, it triggered considerable controversy among attorneys. At the State Bar of California Annual Meeting in September 2009 in San Diego, which the undersigned attended, approximately 85 attorneys attended a program on the mortgage crisis offered (on a Sunday morning) by the State Bar Business Law Section Consumer Financial Services Committee. Many of them identified themselves as attorneys engaged in representing distressed homeowners, and they voiced vociferous opposition to the prohibition on advance fees. Several attorneys complained that they would be unable to continue representing distressed homeowners if the bill passed.

One of the signers of this letter, Julia Leah Greenfield, served as an expert witness on loan modification services for the State Bar of California in one of the disbarment proceedings referred to above. A mortgage banking and regulatory compliance attorney with over 30 years as an attorney in the mortgage industry spent primarily in-house as General Counsel or Regulatory Counsel to prime and subprime mortgage lenders, she now represents distressed homeowners in the MARS process and has given presentations

on mortgage loan modification to the American Bar Association Business Law Section Consumer Financial Services Committee, the State Bar of California and other groups. Another signer, Arnold S. Rosenberg, is Assistant Dean of an ABA-accredited law school in San Diego, currently chairs the State Bar of California Business Law Section's Consumer Financial Services Committee², spent four years as General Counsel of a bank in San Francisco, and earlier in his career, for over three years was a consumer lawyer with the Legal Assistance Foundation of Chicago. The third signer, Steven L. Saxe, is a consumer financial services attorney who has represented consumer and commercial lenders for over 30 years, spent over 10 years as in-house counsel at Bank of America, and is a Regent of the American College of Consumer Financial Services Lawyers.³

Ms. Greenfield is personally aware of at least ten other attorneys in California who prior to SB 94 were rendering competent legal representation to distressed homeowners in MARS matters and now have discontinued providing MARS services. Dean Rosenberg has been informed by a number of his former students and by several other attorneys that they have either ceased providing MARS services, or have limited MARS services to cases in which bankruptcy or litigation work is also appropriate. To comply with the restrictions of SB 94, some California attorneys are providing MARS services in an incremental manner – for example, they consult with the client and prepare a financial package to send the Servicer, then collect payment for those services, then have the client sign another fee agreement for negotiation and follow-up, then collect payment for the additional legal services, and so forth.

Mortgage loan modifications are difficult and time-consuming projects for competent and ethical attorneys primarily due to the dysfunctionality of mortgage loan servicers. Files are juggled among underwriters and negotiators who work for the servicers. Mortgage loan modifications often take from six months to a year to reach a resolution. Frequently, borrowers are placed into trial modifications or forbearance agreements prior to approval of a permanent modification. The trial periods are supposed to last only three months but they have been expanded to more than six months in many cases because the servicers' backlog delays evaluation of the mortgage loan for permanent modification.

Very few attorneys would be willing to provide legal representation to distressed homeowners in mortgage loan modifications without obtaining a retainer and then be expected to wait several months or a year to see if the homeowner will pay them for their services. On the other hand, many of the unlicensed scam artists will not be deterred by legal requirements.

Because of these delays, attorneys should be permitted to request a client retainer to be held in a regulated trust account,⁴ and to bill a client for legal work performed on an interim basis starting with the consultation with the client. Additional work that should

² The signers submit this letter as individuals and not on behalf of the State Bar of California. Nothing in this letter should be taken as the official position of the State Bar.

³ The signers submit this letter as individuals and not on behalf of the American College of Consumer Financial Services Attorneys. Nothing in this letter should be taken as the official position of that organization.

⁴ See, e.g., Rule 4-100, State Bar of California Rules of Professional Conduct.

permit legal services to be billed on an interim basis and paid from the trust account. would include submission of a modification package to the servicer, negotiation of a trial modification, review of trial modification documents, negotiation of a permanent modification and review of permanent modification documents.

Requiring an attorney to wait to be paid until a permanent modification is approved by the servicer is unreasonable when the actual time that elapses could be six months to one year. In addition, attorney compensation is not based upon results but on actual legal work performed. An attorney who attempts to negotiate but is unable to achieve a mortgage loan modification for her client is still entitled to be paid for legal services actually rendered . The Commission's position that attorneys who represent that they will "negotiate" a mortgage loan modification cannot be compensated until a permanent modification is offered to the borrower is unreasonable and unrealistic.

III. With Appropriate Safeguards, Attorneys Who are MARS Providers Should be Permitted to Receive and Hold an Advance Fee Retainer in a Regulated Trust Account, or to Bill for Legal Services on an Interim Basis

For the above reasons, the undersigned urge the Commission to modify proposed Section 322.7 to expressly permit attorneys to charge an advance fee retainer for the provision of MARS to consumers or to bill for services on an interim basis, not only in the bankruptcy or litigation context but in dealing with lenders, servicers and other parties, provided that adequate safeguards are established. These safeguards should include, at minimum, the following:

- A. The attorney is licensed in the state in which the consumer resides or the property is located;⁵
- B. Any advance fees are deposited into an attorney trust account governed by state bar or court rules and maintained in a manner consistent with applicable state law;
- C. The client has signed a written attorney-client fee agreement that
 - i. establishes clear conditions under which the attorney may charge or collect a reasonable fee for services already actually and necessarily rendered,
 - ii. discloses the fee rate and the method by which fees will be determined; and
 - iii. clearly and prominently discloses that the attorney cannot guarantee a favorable result in obtaining the mortgage loan relief sought;
- D. All fees charged and collected from the client or the trust account are reasonable, for services actually and necessarily performed on behalf of

⁵ In a divorce situation, for example, a homeowner might live in a different state than the home, even though his or her family lives in the home. We note that the proposed rules do not limit the definition of "consumer" to an owner who resides in the dwelling at issue.

the client, and for services that have already been rendered at the time when fees are charged or collected from the trust account; and

- E. The client receives periodic accountings of any advance fees deposited in the trust account, and at the time when fees are charged or collected, an itemized statement of services rendered is provided to the client that includes (1) the dates and description of services, (2) the amount of time spent on each date, (3) notice of any available rights the client may possess to fee arbitration or mediation under the rules of the state or local bar or other applicable law; and (4) otherwise complies with applicable law and the terms of the fee agreement.

In our view, it is important that the rule not only exempt attorneys but expressly permit attorneys to provide MARS services subject to the above conditions, and that the FTC rule preempt California Senate Bill 94 to the extent it is inconsistent so that the unmet legal needs of distressed homeowners in California can be met.

Very truly yours,

Julia Leah Greenfield
Greenfield Law Offices

The following join in these comments and have authorized Ms. Greenfield to submit them on their behalf:

Arnold S. Rosenberg
Assistant Dean
Thomas Jefferson School of Law

Steven L. Saxe
Boyden, Cooluris, Livingston & Saxe P.C.