

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 716

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

OPINION 45

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**Lawyers Performing Loan or Mortgage
Modification Services for Homeowners**

The Advisory Committee on Professional Ethics hotline has received an increasing number of inquiries from attorneys regarding the propriety of performing loan or mortgage modification services for homeowners. Apparently, for-profit loan modification companies, some with significant direct-to-consumer marketing budgets, are approaching New Jersey lawyers asking to partner with them to negotiate loan or mortgage modifications on behalf of distressed homeowners. Attorneys have also inquired about using financial or mortgage analysts in the course of providing loan or mortgage modification services for homeowners who have directly retained the attorney.

The Committee recognizes that, in this time of economic crisis, some attorneys with diminishing practices, such as residential real estate practices, are turning to loan modification work. The for-profit loan modification companies are aggressively courting lawyers to do this

work. Most of the business models raised by attorneys for review by the Committee, however, entail serious attorney ethics violations.

The Committee urges the bar to structure any loan modification services in close accordance with the principles in this Opinion. Like the distressed homeowners who may be tempted by a fraudulent scam that guarantees to “save their homes,” New Jersey lawyers are also being tempted with a seemingly lucrative business opportunity that could adversely affect their licenses to practice law.

The inquiries presented to the hotline generally involve three scenarios. In the first scenario, a for-profit loan modification company approaches homeowners directly and indicates that it is working with an attorney. The homeowner either: (1) pays one fee to the company, a portion of which the company pays over to the attorney; (2) pays one fee to the attorney named by the company, a portion of which the attorney pays over to the company; or (3) pays separate fees to the company and to the attorney.

In the second scenario, the attorney works as in-house counsel to the for-profit loan modification company and provides legal services to the company’s customers. A variation of this scenario is an attorney formally affiliating or partnering with the loan modification company or an attorney separately retained by the company to re-negotiate loans with its customers’ lenders. In each of these situations, the loan modification company approaches homeowners directly and solicits the work.

In the third scenario, the attorney or law firm brings a financial or mortgage analyst in-house or contracts with an analyst, who processes the homeowner’s paperwork and may take initial steps in renegotiating the loan under the supervision of the attorney. The attorney or law firm solicits the work in accordance with the attorney advertising rules and the homeowners approach and retain the attorney directly.

1. A New Jersey Attorney May Not Pay Fees to the Loan Modification Company for Clients Referred to the Attorney by the Company and an Attorney May Not Share Fees With the Company.

New Jersey does not permit a lawyer to give a referral fee or “anything of value” to a person to recommend or secure the lawyer’s employment by a client or as a reward for having made the recommendation. *RPC 7.3(d)*; *see also RPC 7.2(c)*. Accordingly, a New Jersey attorney is prohibited from paying monies to a for-profit loan modification company that farms legal work to the attorney or recommends the attorney’s services.

Moreover, if the New Jersey attorney accepts a fee for legal services from the company or if the homeowner pays separate fees to the company and the attorney, the attorney is impermissibly sharing fees with a layperson in violation of *RPC 5.4(a)*.

This scenario is no different from the “runner” who signs up clients for an attorney and is paid by the attorney for doing so. Paying monies to a loan modification company that refers or recommends clients to an attorney or sharing fees with the company are both flatly prohibited.

2. A New Jersey Attorney May Not Work As In-House Counsel to a For-Profit Loan Modification Company, Formally Affiliate or Partner With the Company, or Be Retained by the Company to Provide Legal Services to the Company’s Customers, and an Attorney May Not Assist the Company in the Unauthorized Practice of Law.

A New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company.¹

¹ In contrast, however, legal services may be provided by a staff attorney to beneficiaries of a *Rule 1:21-1(e)* nonprofit legal assistance organization. A *Rule 1:21-1(e)* legal assistance organization is a nonprofit organization incorporated for the purpose of providing legal assistance to the poor or functioning as a public interest law firm that provides legal assistance through staff attorneys to a defined and limited class of clients.

A New Jersey attorney also may not share legal fees with a for-profit loan modification company or assist the company in the unauthorized practice of law.

In-house counsel is defined in *R. 1:27-2* as a lawyer employed in New Jersey for an entity “authorized to transact business in this State that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization.” The Supreme Court held in *New Jersey State Bar Ass’n v. Northern N.J. Mortgage Associates*, 22 N.J. 184, 197 (1956), *modified* 34 N.J. 301 (1961), that “[c]orporations may act for themselves through their own attorney-employees, but they cannot perform acts for others in this capacity which amounts to the practice of law.” Accordingly, a New Jersey attorney may not serve as in-house counsel and provide legal advice to a for-profit loan modification company regarding loan modifications of its customers.

A New Jersey attorney may not officially affiliate or partner with a non-legal business or a non-lawyer when the activities of the partnership include the practice of law. *RPC 5.4(b)*. Moreover, a New Jersey attorney may not share legal fees with a non-legal business or a non-lawyer, *RPC 5.4(a)*, or assist a non-legal business or non-lawyer in the unauthorized practice of law, *RPC 5.5(a)(2)*. Therefore, a New Jersey attorney may not partner with or be separately retained by a for-profit loan modification company to provide legal advice to the company’s customers.

The principles discussed in subparts one and two above are illustrated in opinions by the Advisory Committee on Professional Ethics and the Committee on the Unauthorized Practice of Law. The Advisory Committee on Professional Ethics in Opinion 56, 87 N.J.L.J. 700 (October 29, 1964), considered whether an attorney who represents a plaintiff in an automobile accident case may hire an independent adjuster to negotiate and settle the plaintiff’s case with the

defendant's insurance carrier and pay the adjuster a percentage of the legal fee. The Committee noted that a lawyer may not partner with members of other professions when any aspect of the partnership employment consists of the practice of law. The Committee further noted that an attorney may not perform professional legal services through lay intermediaries and may not abet or make possible the unauthorized practice of law by an agent. Lastly, the Committee found that the adjuster's compensation was a fee for professional legal services and the lawyer was improperly splitting the legal fee.

Similarly, the Committee on the Unauthorized Practice of Law, in Opinion 25, found that a company that solicited homeowners to file property tax appeals, gathered necessary paperwork, conducted comparative appraisals, and then arranged with an attorney to handle the appeal before the County Tax Board was engaging in the unauthorized practice of law. 130 *N.J.L.J.* 115 (1992). The Committee noted that the attorney who participated in this arrangement violated *RPC* 5.5 by assisting a non-lawyer in the performance of an activity that comprised the unauthorized practice of law.

The Committee on the Unauthorized Practice of Law further noted that the arrangement, whereby the property tax appeal consultant collected monies from the homeowner then took a portion of that money and gave it to the attorney retained for the appeal, was impermissible fee-sharing under *RPC* 5.4. In addition, "[s]uch a division of fees creates the appearance of an attorney compensating the group for obtaining a client for the attorney and, as such, is prohibited."

The Committee on the Unauthorized Practice of Law, which joins in this Opinion of the Advisory Committee on Professional Ethics, specifically finds that negotiating the terms of a legal document such as a mortgage as an advocate for another person is the practice of law. "The practice of law in New Jersey is not limited to litigation. . . . One is engaged in the practice

of law whenever legal knowledge, training, skill, and ability are required.” *In re Jackman*, 165 N.J. 580, 586 (2000). *See also Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 120-21 (1951) (same); Committee on the Unauthorized Practice of Law Opinion 22, 103 *N.J.L.J.* 246 (March 22, 1979) (“the practice of law relates to the rendition of services for others that calls for the professional judgment of a lawyer”).

The Committee on the Unauthorized Practice of Law, however, finds that it is in the public interest and not the unauthorized practice of law for a person who is duly licensed or certified by a governmental agency, such as the New Jersey Department of Banking and Insurance, the New Jersey Housing and Mortgage Finance Agency (NJHMFA), or the United States Department of Housing and Urban Development (HUD), to re-negotiate the terms of a mortgage as an advocate for another person. The public interest is served and potential harm is mitigated by the protections inherent in the regulatory framework supporting governmental licensure and certification.² *Cf. In re Application of the N.J. Society of Certified Public Accountants*, 102 N.J. 231 (1986) (preparation and filing of inheritance tax return is the practice of law but, provided clients are notified of the desirability of review by an attorney, it is not the unauthorized practice of law for a licensed New Jersey certified public accountant to engage in this activity). Hence, a certified HUD or NJHMFA housing counselor, a New Jersey licensed debt adjuster, *N.J.S.A. 17:16G-1 et seq.*, and a New Jersey licensed lender such as a mortgage broker, *N.J.S.A. 17:11C-1 et seq.*, would be permitted to engage in this activity.

² The Committee on the Unauthorized Practice of Law further finds that it is in the public interest and not the unauthorized practice of law for an employee of a lender to negotiate the terms of a mortgage on behalf of the lender employer. *Cf. In re Riverview Professional Services, Inc.*, 198 N.J. – (2009) (insurance company employee may represent employer in Personal Injury Protection arbitration proceedings; proposed new *Rule* at Notice to the Bar, 195 *N.J.L.J.* 848 (March 16, 2009)).

Accordingly, a New Jersey attorney may not share legal fees with a for-profit loan modification company. Nor may a New Jersey attorney assist the company in the unauthorized practice of law, or provide legal advice to customers of a for-profit loan modification company when the attorney is in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company.

3. A New Jersey Attorney May Use an In-House Financial or Mortgage Analyst or Contract With an Analyst, Provided the Attorney is Responsible For and Supervises the Work, the Compensation to the Analyst Is Not Improper Fee-Sharing, and the Attorney Solicits the Work and is Retained Directly by the Homeowner Client.

A New Jersey attorney may use an in-firm financial or mortgage analyst or contract with an analyst in the course of providing loan or mortgage modification services for homeowners who have directly retained the law firm. Just as an attorney may contract with a certified public accountant or other person with specialized knowledge to assist the attorney in the provision of legal services, an attorney may use, either within the firm or as a contractor, a financial or mortgage analyst to assist in mortgage modification work. The attorney is responsible for and must supervise the work performed by the analyst employee or contractor. The client homeowner must retain the attorney directly and the solicitation of the homeowner for mortgage modification services must be done by the law firm in accordance with the attorney advertising rules. The compensation paid for services by an analyst must, however, not be improper fee-sharing.

As the Supreme Court recently stated in *In re Tomar, Simonoff, Jacoby & Graziano, P.C.*, a law firm may not compensate a non-lawyer employee based on the number of clients (and resultant fees) the employee brings to the firm. 196 N.J. 352 (2008) (facts of this case are

discussed in the underlying Disciplinary Review Board decision at 193 *N.J.L.J.* 225 (July 28, 2008)). *See also In re Pajerowski*, 156 *N.J.* 509 (1998) (high salary of law firm office manager disguised a compensation scheme that rewarded the manager for obtaining clients for the firm and was found to be improper fee-sharing). Accordingly, while an attorney may hire a financial or mortgage analyst as employee or contract consultant, payments for the work cannot directly or indirectly be based on the number of clients the analyst brings to the firm.

The Committees recognize that, in an effort to address the housing crisis, the New Jersey Supreme Court initiated a Residential Mortgage Foreclosure Mediation Program. *See* Notice to the Bar with accompanying Rule Relaxation Order of November 17, 2008. 194 *N.J.L.J.* 769 (November 24, 2008). The Residential Mortgage Foreclosure Mediation Program involves foreclosure prevention counseling by housing counselors certified by the United States Department of Housing and Urban Development and the New Jersey Housing Mortgage Finance Agency (HUD/NJHMFA), who provide mortgage loan modification negotiation services. As noted above, the Committee on the Unauthorized Practice of Law does not find that HUD/NJHMFA-certified housing counselors who engage in mortgage modification negotiation are engaging in the unauthorized practice of law. The Department of Banking and Insurance found that HUD/NJHMFA-certified housing counselors engaged in these activities within the Foreclosure Mediation Program are exempt from licensure under its Act.³ Department of Banking and Insurance Bulletin 09-04 (March 2, 2009).

³ The New Jersey Department of Banking and Insurance licenses “debt adjusters.” *N.J.S.A.* 17:16G-1c(1) provides that a “debt adjuster” is a person who “acts or offers to act for consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or otherwise altering the terms of payment of any debts of the debtor” The statute provides that “[n]o person other than a nonprofit social service agency or a nonprofit consumer credit counseling agency shall act as a debt adjuster.” *N.J.S.A.* 17:16G-2a.

The Residential Mortgage Foreclosure Mediation Program provides court-referred mediation between homeowners and lenders that is designed to foster communication between the parties and assist them in reaching a resolution to the dispute short of foreclosure. Mediation under the Program is available to homeowners who are the subject of a foreclosure complaint filed in court. This Opinion should not affect any activities under the Program.

In sum, a New Jersey attorney who performs mortgage loan modification services in conjunction with a for-profit loan modification company imperils his or her license to practice law. Payment of monies to a loan modification company that refers or recommends clients to an attorney is flatly prohibited. Accepting legal fees from such a company, or dividing a total fee paid by a homeowner in part to the company and in part to the attorney, is impermissible fee-sharing. A New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company. A New Jersey attorney may not share legal fees with a for-profit loan modification company or assist the company in the unauthorized practice of law.

If an attorney is approached and retained directly by the homeowner client, the attorney may use an in-house financial or mortgage analyst or contract with an analyst, who processes the homeowner's paperwork and may take initial steps in renegotiating the loan. The attorney, however, is responsible for and must supervise the work, and the compensation paid to the analyst may not reflect improper fee-sharing.