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REAL ESTATE LAW

Joint Ethics & UPL Opinion on Mortgage Modifications: Practice Applications

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If you practice real estate law, your summer reading list should include the recently-released joint opinion of the New Jersey Supreme Court's Advisory Committees on Professional Ethics and on the Unauthorized Practice of Law (*Opinion 716/45*). 197 *N.J.L.J.* 9 (2009). The opinion addresses the issue of lawyers performing loan or mortgage modification services for homeowners.

Opinion 716/45 describes two prohibited attorney involvements in mortgage modifications which involve improper referrals, fee sharing and assistance in the unauthorized practice of law. It then goes on to state a means of attorney involvement in mortgage modifications but that means raises questions regarding modifications by nonlawyers. Who is exempt from its definition of the practice of law: housing counselors and debt adjusters? What is a debt adjuster? If mortgage modification is the practice of law, how are they exempt? Why should the work of licensed New Jersey attorneys be so closely scrutinized when debt adjusters and housing counselors are effectively given permission to practice law? Where do I find answers to

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these questions?

For reasons beyond the scope of this article, a mortgage modification is usually, but not always, related to either the threat of, or an already-filed, foreclosure complaint. This article addresses the typical combined foreclosure-modification scenario.

A mortgage modification is defined by the New Jersey Department of Banking and Insurance (DOBI) as: "... modifying the terms of an existing loan, typically to make it more immediately affordable for a borrower in default or in imminent danger of default, for instance because of a scheduled rate increase. The terms commonly modified are the interest rate and/or the term of loan."

Opinion 716/45 "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 opinion's exception to that rule permits a housing counselor or debt adjuster to perform a mortgage modification. In such a modification, the attorney effectively represents the client only in the foreclosure action. Alternately, under opinion part 3 the attorney takes responsibility for the entire foreclosure-modification matter, including the modification process.

A licensed debt adjuster is a

person employed by a nonprofit social service agency or a nonprofit consumer credit counseling agency. They are "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." Their fees are limited to 1 percent of the client's gross monthly income or an amount set by regulation. N.J.S.A. 17:16G-6. "An attorney-at-law of this state who is not principally engaged as a debt adjuster" is exempt from acquiring this license. N.J.S.A. 17:16G-1.

While an attorney is permitted by part 3 of *Opinion 716/45* to employ a "financial or mortgage analyst," New Jersey licensed mortgage brokers are prohibited from conducting mortgage modifications by DOBI. There is no indication of whether DOBI will permit N.J. mortgage licensees to provide the services described in part 3. Accordingly, consider only mortgagors, mortgage servicers, attorneys who are not debt adjusters, and debt adjusters eligible to perform mortgage modifications.

Housing counselors have been given control over the mortgage modification process. HUD/NJHMFA-certified housing counselors were administratively granted the debt adjuster license by DOBI based on the relaxed

court rules of November 17, 2008. The Office of Foreclosure has posted a notice on its Web site that, effective September 1, only housing counselors will be permitted to file a request for client participation in the Judiciary's Foreclosure Mediation program.

In the initial interview, an attorney's prospective client should be advised: (1) that they may be eligible for free services, such as lender-controlled mortgage modification procedures, free housing counselor mortgage consultation, loan modification and filing for court-sponsored Foreclosure Mediation, along with a NJHMFA-paid Foreclosure Mediation attorney; and (2) if they cannot afford any other needed legal representation, they should contact Legal Services of N.J. to determine if they qualify for free legal services. You may want to provide written instructions on obtaining the free services and a copy of *Opinion 716/45*.

Unless you either have expertise in mortgage underwriting, an in-house expert or can contract with an expert, a foreclosure-modification matter is a limited scope representation. Explain the limited representation and obtain client consent. Inform your client that they will need a housing counselor for loan modification and foreclosure mediation filing and that, due to no supervisory control, you disclaim any responsibilities for supervision over, or work performed by, the housing counselor.

If you can find someone who can effectively provide complete mortgage modification expert services, then strictly comply with *Opinion 716/45* part 3 and indicate whether or not you are an attorney "primarily engaged as a debt adjuster." N.J.S.A. 17:16G-1. If your fee agreement includes review of the hous-

ing counselor's proposed modification, find an expert to provide you with the technical review of the proposed modification's underwriting assumptions.

An attorney may become engaged in loan modification negotiations if she presents sufficient evidence of predatory lending violations to have the loan modification shifted from the lender's in-house loss mitigation or foreclosure unit to lender's New Jersey counsel. Otherwise, the attorney will conduct foreclosure avoidance while the housing counselor is attempting to obtain the loan modification.

In a limited representation fee agreement, specifically distinguish your role from that of the housing counselor. This could include: referencing an addenda copy of *Opinion 716/45*; stating that the housing counselor is not an attorney and that the housing counselor modification may, or may not, be the same as what you would recommend; disclaiming responsibility for work performed by the housing counselor unless otherwise specifically identified in the fee agreement, such as reviewing the housing counselor's recommended mortgage modification; documenting the reasons for, and the client's informed consent to, the limited representation, to wit, the state's public policy on housing counselors performing loan modifications and filing foreclosure mediation applications. Specify court deadlines in the foreclosure action. Obtain client approval to share the information with the housing counselor. Use whatever other language you deem helpful to minimize your exposure to an ethics or malpractice complaint based on any acts or omissions of the housing counselor.

If the modification work is to be performed under your supervision

under *Opinion 716/45* part 3, your fee agreement should identify whether the mortgage modification work is to be performed in-house, by a subcontractor or by a third-party contractor and the payment for those services. Avoid even the appearance of improper fee sharing or referral fees. Make sure that any contract between a third-party provider and your client specifies your control over the provider. Verify and state no representation of any third-party service provider/contractor and no other conflict of interest.

If the mortgage modification work is performed in-house, don't even think about performance pay. While an attorney may charge a contingency fee for mortgage modification services, that fee may not be shared with nonlawyer employees or third party contractors.

Under either option, disclose known relevant information about any housing counselor or third-party contractor, including state policy, the amount of time to obtain an appointment or deliver work product, etc. Advise the client that it takes a minimum 60 to 90 days for a mortgage modification to be completed and put court deadlines in writing.

Opinion 716/45 offers attorneys two options. Perform loan modifications in-house, or with a contractor, strictly adhering to the opinion. Alternately, a housing counselor will perform the loan modification and you should specifically disclaim responsibility over the housing counselor and for the modification process.

In *Opinion 716/45*, the Professional Ethics and UPL Advisory Committees have provided New Jersey attorneys with important parameters for client representation in this difficult area of the law. ■