

# The State Bar of California

## Senate Bill No. 94: Prohibition on Advance Fees; and Required Notice

### FAQs

The State Bar of California continues to receive questions regarding the scope and applicability of [Senate Bill 94 \(SB 94\)](#), which took effect October 11, 2009 and prohibits attorneys from charging or collecting legal fees for loan modification services prior to the completion of those services. The following is a summary of the law enacted with the passage of SB 94 and a discussion of some frequently asked questions regarding the impact of the law.

This writing addresses only California attorneys, not any other licensee involved in assisting clients with loan modifications such as real estate agents and brokers.

#### **Summary of the Law**

On October 11, 2009, the following code provisions, referred to collectively as SB 94, became effective:

[California Civil Code, section 2944.6\(a\)](#) providing that any person who offers to negotiate, arrange or perform a mortgage loan modification or forbearance in exchange for a fee paid by the borrower, shall provide the borrower, prior to entering into a fee agreement, a separate statement advising the borrower of various points including the fact that it is not necessary to pay a third party to arrange for a modification or forbearance and that the United States Department of Housing and Urban Development provides a list of non-profit organizations that provide assistance to borrowers at no cost.

[California Civil Code, section 2944.7\(a\)\(1\)](#) providing that it shall be unlawful for any person who offers to negotiate, arrange or perform a mortgage loan modification or forbearance in exchange for a fee paid by the borrower, to 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.

Section 2944.7(a)(2) prohibiting the taking of any wage assignment, lien or other security to secure the payment of compensation.

Section 2944.7(a)(3) prohibiting the taking of any power of attorney from the borrower for any purpose.

Section 2944.7(d) and (e) providing that the section applies only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units and that it expires on January 1, 2013.

[California Business and Professions Code, section 6106.3](#), providing that a violation of Civil Code sections 2944.6 or 2944.7 by a member of the State Bar of California constitutes a cause for the imposition of discipline.

### **Questions**

1. Does SB 94 apply to contracts or fee agreements entered into prior to October 11, 2009?

*No. The law is not retroactive. Advanced fees paid to an attorney prior to October 11, 2009 are not affected by SB 94.*

2. May an attorney accept an advance fee if the borrower agrees to waive the application of SB 94 to their matter?

*No. SB 94 does not provide for a waiver of its application by the borrower.*

3. May an attorney accept an advance fee if he or she places the fee in a Client Trust Account or escrow account until such time as he or she has completed all contracted services?

*No. The language of Civil Code section 2944.7(a)(1) is sufficiently broad and prohibits the collection or receipt of any fee for loan modification services prior to the completion of all contracted services.*

4. May an attorney accept an advance fee if he or she offers a full refund of the fee if a loan modification is not granted?

*No. Again, the language of Civil Code section 2944.7(a)(1) is sufficiently broad and prohibits the collection of any fee for loan modification services prior to the completion of all contracted services.*

5. May an attorney who provides a borrower loan modification or other forbearance services agree with the borrower that the services requested will be broken down into component parts and that a fee for each component part will be earned and collected as each part is completed?

*If an attorney has been employed by a borrower to assist the borrower in obtaining a loan modification or forbearance, then the answer is "no." It is a violation of SB 94 to attempt to obtain a payment for any portion of the services contracted for in pursuit of the modification or forbearance prior to the completion of all the services required by the employment contract.*

6. If the services to be provided are in fact loan modification services or other forbearance services, or are an integral part of such services, but the services are not expressly designated as “loan modification” services in the fee agreement, then does SB 94 apply?

*Yes. SB 94 would apply even if the services are labeled as something other than loan modification services.*

7. May an attorney, who has complied with SB 94, accept payment for loan modification services he or she has provided if the lending institution denies the modification or forbearance?

*Yes. An attorney may accept payment once he or she has completed all loan modification services he or she contracted to perform. SB 94 does not mandate that an attorney’s entitlement to a fee is contingent on a lending institution’s agreement to grant a modification or forbearance.*

8. Does SB 94 apply to circumstances where an attorney who represents a borrower in a civil action against a lending institution (for example, alleging that the lender engaged in predatory or unlawful loan practices) receives an offer from the defendant to settle the civil action by granting the borrower a loan modification?

*No. SB 94 applies only to employment contracts which are entered into for the purpose of obtaining a loan modification or forbearance for a borrower. If the genuine purpose and goal of an employment contract is to pursue remedies other than a loan modification or forbearance, SB 94 does not apply.*

9. Does SB 94 apply to an attorney who has been employed to enforce an existing loan modification agreement?

*No. SB 94 applies only to employment contracts which are entered into for the purpose of obtaining a loan modification or forbearance for a borrower.*

10. How do the Federal Trade Commission’s rules on mortgage assistance relief services ([16 Code of Federal Regulations Section 322.1](#)) apply to lawyers who provide loan modification or other forbearance services in California?

*The Federal Trade Commission’s rules on mortgage assistance relief services also regulate the provision of loan modification and other forbearance services in California but an exemption is included for attorneys who meet certain criteria. The criteria include compliance with all state laws and regulations relating to mortgage relief assistance. Therefore, the FTC rules require compliance with SB 94 and an attorney who fails to comply with SB 94 would be subject to the penalties provided for in both SB 94 and the federal law.*