



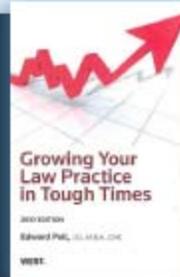
Week of **April 20, 2010**

The Law of Unintended Consequences Strikes Again

Ranking right up there with Murphy's Law is the Law of Unintended Consequences: Attempting to change a complex system may or may not have the intended result, but it will inevitably create unanticipated and often undesirable outcomes. The legal profession may increasingly find itself constrained by that law as states and the federal government implement a whole new regulatory structure to prohibit what is in fact a growing problem: companies that charge consumers an up-front fee to modify the terms of a mortgage or deed of trust they can no longer afford, then either fail to deliver results or actually abscond with the fee itself.

California's SB 94, prohibiting up-front loan modification fees, is now in effect through 2013. Many other states have such laws, and the Federal Trade Commission on March 29, 2010 closed a 45-day national comment period for such a ban throughout the entire country ([see the FTC's press release](#)). Only one problem - such bans also cover lawyers who accept retainers into a client's trust account to effect a loan modification, fees that are already thoroughly regulated by the Rule of Professional Conduct 1.15.

This attack on the lawyer-client relationship is quite explicit. According to a [story earlier this year in *Newsday*](#), New York enacted a ban on upfront mortgage modification fees but explicitly exempted retainers to lawyers. Reports that mortgage companies were using relationships with lawyers to get around the fee ban led to the December 2009 passage of New York's Mortgage Foreclosure Law, which bans retainer and escrow collections by lawyers unless the fee is collected as part of ongoing, regular legal counsel. The proposed FTC regulation would let attorneys collect up-front loan modification fees only if they are also representing homeowners in bankruptcy cases or some other legal proceeding.



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Once again, in their zeal to "do good," governments and regulators are "doing bad" in ways that could harm the future of lawyer-client relations. In the normal course of legal representation there is a full range of regulation and remedies for retainer fees. The lawyer is a fiduciary who must keep accurate accounting records of retainers and trust account transfers under every State's rules of professional conduct to prevent misappropriation or negligence. Failure to provide accurate accounting records on a State Bar inquiry means very bad news for the lawyer. Yes, loan modification scams are a problem - but the solution is not more restriction on lawyers' ability to help their clients. Will the next step be to pass similar restrictions on retainers to help people sort out the complexities of the health reform law, or the tax code? With the Law of Unintended Consequences in full swing, it certainly seems a possibility.

Personal Commentary

I'm writing this from a session on the internet and how to use websites and social media to advance one's business strategic plan. I'm consistently astounded by how little we know about the technology tools available to us and, worse, how little we apply them for our own benefit. Since more client prospects are visiting our web sites and blogs, it is important to design our internet outreaches so as to quickly establish our credibility! The web site may not create a sale, but it certainly will either affirm their desire to call you... or go on to someone else.

And don't forget, join us in Boston! April 23rd at 7:30 a.m. If you plan to join me, please call at (310) 827-5415 or [email me](#).

Also, [check out LawBizBlog's new contest](#) in celebration of my new book Growing Your Law Practice in Tough Times. The contest will run for the entire month of April. At the end of the month, participants' names will be



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Remember, you have all month to enter (but that doesn't mean you should wait)!

Best wishes,

Ed Poll

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