



Loan-Modification Services

There's been a boom in what is known as the loan-modification industry, populated by nonlawyer "foreclosure prevention specialists" or "foreclosure consultants." An Ohio case indicates how much trouble you can get into by doing business with or for a marginal foreclosure-prevention service.¹ In that case, the Ohio Supreme Court sanctioned three lawyers for their actions in working with a company. Foreclosure Solutions advertised itself as helping people threatened with losing their homes through foreclosure and solicited defendants listed on court foreclosure dockets. For a fee, it promised to negotiate with the lender and, if necessary, a lawyer and legal services would be provided as part of the fee. Negotiations rarely were successful, and the company eventually referred more than 2,000 clients to the lawyers, who were paid \$150 per client from the fee paid initially to Foreclosure Solutions. The lawyers then filed standard-form pleadings designed to delay the foreclosure process and, when foreclosure became inevitable, they sent the client a form-letter notification of the foreclosure date and suggested he seek the services of a bankruptcy lawyer.

The court noted that it was Foreclosure Solutions that hired the lawyers and that the clients had no choice in the selection process. The company's agreement with customers did not identify any lawyer who would be used, when the lawyer was to be hired, or the fee amount.² The court found that Foreclosure Solutions continued to deal with the lenders after the lawyers were hired and that the lawyers rarely, if ever, communicated with clients except through standardized form letters, which the lawyers had no indication the clients understood.


The court found a number of ethical violations, the chief of which I have translated to conform to Arizona's Rules of Professional Conduct³:

- ER 5.3 (Responsibilities Regarding Nonlawyer Assistants) requires lawyers to ensure that people working for them, even independent contractors,⁴ conduct themselves in a fashion compatible with the professional obligations of the lawyer. By allowing Foreclosure Solutions to be the clients' only representative vis-à-vis the lenders after they were hired, and by failing to supervise what was done or said by the company after the lawyers were hired, the lawyers violated this rule.
- ER 5.4(a) (Professional Independence of a Lawyer) prohibits fee sharing with nonlawyers.
- ER 5.4(b) (Professional Independence of a Lawyer) prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. In Arizona, the negotiation of contract rights constitutes the practice of law.⁵
- ER 5.5 (Unauthorized Practice of Law) prohibits a lawyer from assisting another person in UPL. In Arizona, we have opinions and guidance on how lawyers may associate with legal service providers, including eviction services,⁶ insurance adjusters,⁷ medical benefit processors⁸ and credit consulting services.⁹
- ER 1.2(a) (Scope of Representation and Allocation of

Authority between Client and Lawyer) requires a lawyer to abide by the client's decisions concerning the objectives of the representation and to consult with the client concerning them.

- ER 1.1 (Competence) requires a lawyer to provide competent representation through skill, thoroughness and preparation reasonably necessary for the representation.

There's nothing inherently unethical about accepting referrals from a foreclosure prevention service. But as the lawyer, you need to make sure you, not the referring agency, are the one exercising the independent legal judgment necessary on behalf of your client, and don't accept any part of the referring agency's charges as your fee.

One last admonition: Watch out for what the referring source is saying in its advertising and how it solicits customers. ER 8.4(a) prohibits a lawyer from doing through the acts of another what she cannot do herself. ER 7.1 prohibits false or misleading communications about the lawyer or the lawyer's services. ER 7.3 prohibits direct solicitation of a prospective client unless certain conditions are met. Ensure your referring source isn't simply a glorified lawyer referral service. 

Ethics
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endnotes

1. *Cincinnati Bar Association v. Mullaney*, 119 Ohio St. 3d 42 (2008). See also *Disciplinary Counsel v. Willard*, 123 Ohio St. 3d 15 (2009).
2. Ohio had not adopted the Model Rules of Professional Conduct at the time the events in *Mullaney* occurred, and the lawyers probably violated Arizona ER 1.5(b)'s requirements of a written fee agreement setting forth the rate of the fee and the scope of the representation.
3. Rule 42, ARIZ.R.S.C.T.
4. See Comment [1] to ER 5.3.
5. *In re Fleischman*, 933 P.2d 563 (Ariz. 1997).
6. Ariz. Ethics Op. 93-01 (Feb. 18, 1993).
7. Ariz. Ethics Op. 99-07 (June 1999).
8. Ariz. Ethics Op. 01-11 (Nov. 2001).
9. *In re Galbasini*, 786 P.2d 971 (Ariz. 1990).