

The State Bar of California  
**Senate Bill No. 94: Prohibition on Advance Fees; and Required Notice**  
**FAQs**

On October 11, 2009, SB 94 (Calderon) was chaptered. The legislation took effect immediately. The [full text](#) of the legislation can be found on the Official California Legislative Information Web site.

**Prohibition against Collection of Advance Fees**

The legislation prohibits the collection of advance fees for loan modifications, as specified. Among other provisions, new Civil Code Section 2944.7(a)(1) provides as follows:

“Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following: (1) 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.”

Civil Code Section 2944.7(d) provides that Section 2944.7 applies only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units.

Under new Business and Professions Code Section 6106.3(a), it constitutes cause for the imposition of discipline of an attorney for an attorney to engage in any conduct in violation of Civil Code Section 2944.7.

The State Bar’s interpretation of the new statutory language, in response to the three most common questions it has received, is set forth below. The State Bar’s Office of the Chief Trial Counsel will enforce the statutory language consistent with this interpretation.

*1. Is Civil Code Section 2944.7(a)(1) retroactive?*

Agreements entered into and advance fees collected prior to October 11, 2009 are not affected. Advance fees based on agreements entered into prior to October 11, 2009, but collected after October 11, 2009, must be fully refunded.

*2. Is it a violation of Civil Code Section 2944.7(a)(1) to collect an advance fee, place that fee into a client trust account, and not draw against that fee until the services have been fully performed?*

Yes. The statutory language of the prohibition uses the word “receive” and the plain meaning of that term is broad enough to encompass a lawyer’s receipt of advance fees into a trust account. Civil Code Section 2944.7(a)(1) makes it unlawful to “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,” whether the compensation is placed into the lawyer’s client trust account, general account or any other type of account.

*3. Is it a violation of Civil Code Section 2944.7(a)(1) to ask for or collect a “retainer”?*

Civil Code Section 2944.7(a)(1) makes it unlawful to “[c]laim, 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,” even if that compensation is called a “retainer.”

### **Required Notice to Borrower**

The legislation also requires that specified notice be provided to the borrower, as a separate statement, prior to entering into any fee agreement with the borrower. Among other provisions, new Civil Code Section 2944.6(a) provides as follows:

“Notwithstanding any other provision of law, any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, shall provide the following to the borrower, as a separate statement, in not less than 14-point bold type, prior to entering into any fee agreement with the borrower:

It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting [www.hud.gov](http://www.hud.gov).”

Civil Code Section 2944.6(b) provides that if loan modification or other mortgage loan forbearance services are offered or negotiated in one of the languages set forth in Civil Code Section 1632, a translated copy of the required statement must be provided to the borrower in that foreign language.

Civil Code Section 2944.6(e) provides that Section 2944.6 applies only to mortgages and deeds of trust secured by residential real property containing four or fewer dwelling units.

Under new Business and Professions Code Section 6106.3(a), it constitutes cause for the imposition of discipline of an attorney for an attorney to engage in any conduct in violation of Civil Code Section 2944.6.