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## **Initial Attorney Client Meeting Disclosures and Acknowledgment** (Mortgage Distress)

Date of meeting: \_\_\_\_\_.

Fee for Consultation: \_\_\_\_\_.

Duration of Consultation: \_\_\_\_\_.

Navigating your way through mortgage distress is both stressful and very complicated. Much of the stress is created due the complicated nature of the situation. The client finds himself / herself in a situation where he/she is having to deal with a number of different parties or people and the client is confronted with legal consequences to every decision he or she makes. Compounding the stress of the matter is the fact that the amount of the loan transactions is usually quite large. Due to the complexity of the subject matter, the number of people (or entities) involved, and the dollar amount of the transaction, a great deal of homework followed by a detailed analysis should be performed by the Attorney. This analysis should be performed before the attorney can provide the client with any reliable counseling or advice. This analysis normally requires far more time to complete than the time the attorney and the client spend together during the initial client meeting.

When counseling a client the Attorney uses the following variables to measure the client's alternatives: (i) Liability for a Deficiency Balance; (ii) Tax Liability; and (iii) The Client's capacity to pay toward housing.

### **Deficiency Balance**

When the client's home is worth less than the amount owed on the sum total of the loans encumbering the client's home then the client must concern himself / herself with the prospect of a deficiency. In such a situation the deficiency can be calculated using the following formula:

Loan Balance less the current value of the home = deficiency.

By way of example, if the client's home is worth \$600,000 and the client owes a total of \$800,000 on her home loans then there would be a deficiency of \$200,000.00. It is possible, under certain circumstances, that the client could become liable for this "deficiency" balance even if the client loses the home (to foreclosure, short sale, or otherwise).

### **Tax Liability**

When confronted with the prospect of a foreclosure the client is also confronted with the prospect of a potential tax liability (both to the IRS and the Franchise Tax Board). There are two components to this tax liability and they are: (i) capital gains tax; and (ii) forgiveness of debt tax. Under certain circumstances the client could have tax liability even though they lost the house (due to foreclosure, short sale, or otherwise). Like the deficiency balance, this tax liability could be a large dollar figure. The attorney is not an expert in taxation and the attorney strongly encourages the client to speak with a tax professional.

### **Client Capacity to Pay Toward Housing**

The attorney will be asking that the client prepare a financial worksheet showing what the client can afford to pay each month toward his/her cost of housing. This will be used in evaluating alternatives.

Sometimes the client's desire to stay in their home exceeds their concern for their potential liability for a deficiency balance and/or tax liability. These clients often ask that the attorney try and negotiate with the lender notwithstanding their exposure to a deficiency balance and/or tax liability. Should this situation arise the client acknowledges that the attorney will likely begin making written disclosures to the client advising the client of the potential risks and ask that the client sign subsequent acknowledgments denoting the clients understanding of the risks of the clients choices.

### **What client can expect from the initial meeting with the attorney**

Under California Law there are laws called "anti-deficiency" laws. These laws provide certain homeowners with protection from liability for a deficiency balance under certain circumstances. Much of these protections are dependent upon the loan transactions that the client has been involved in from the date of purchase of the residence through today. Other protections depend upon the type of foreclosure the client is facing. The analysis is complicated when the client has multiple loans encumbering his / her property. After the initial meeting with the client it is very unlikely that the Attorney will have sufficient information to provide the client with any specific advice as to his / her situation.

Compounding the complexity of the client's matter is the mere number of people that are involved in the underlying transactions giving rise to the client's mortgage distress. These people include: (i) the real estate professionals that sold the client the property; (ii) the real estate professionals that refinanced the property; (iii) the lenders for each loan; (iv) if the loans were sold then the successors in interest to the subject loans; (v) if the lenders are using a loan servicing company then the loan servicing companies for the subject loans; (vi) the trustee to the deed of trust as to each loan encumbering the client's property; etc.

Yet the client's matter gets even more involved when the client considers the tax ramifications to mortgage distress. There are typically two components to tax liability having to do with mortgage distress. The first component is capital gains tax and the second component is

forgiveness of debt. The tax ramifications depend upon the client's basis in the subject property. The forgiveness of debt component depends upon the use of the proceeds from each loan that the client has taken out on his / her property from the date of purchase to the present.

Based on the foregoing the Attorney is simply not going to be in a position after the initial client meeting to provide the client with any meaningful and specific legal advice other than a general discussion of how the foreclosure process works and what types of alternatives are typically available to most people. A specific analysis of the client's alternatives will require that the Attorney and the Client sign a written fee agreement and that the client satisfies all conditions to that agreement before the Attorney becomes obligated to render services for the client.

**A contract is required before attorney can represent the client.**

The client should not assume that the attorney has agreed to represent the client simply because the attorney has met with the client. Even if the client has met with the attorney on more than one occasion the client should not assume that the attorney has agreed to represent the client. To the contrary, until such time as the attorney and the client have entered into a formal fee agreement the attorney has not agreed to represent the client and the attorney has not agreed to perform any services on the client's behalf. This document does not constitute a fee agreement.

**All legal claims have time limits**

As a matter of law there are time limits to pursue different types of legal claims (also referred to as "legal theories", "causes of action"). These legal claims are the legal basis upon which the client is relying upon in support of their claim for damages or other relief. These time limits can be as short as six months and they can be as long as four years depending upon the specific legal claim(s) that may apply to the Client's case. Though rare, there are some legal claims that have time limits in excess of four years and there are some legal claims that have time limits for less than six months.

These time limits are very unforgiving. Client's frequently wait until the last minute before consulting an attorney and at times find themselves in a position where the time limit has already lapsed. Though the client may have a valid excuse for the delay, the excuse rarely provides the client with any relief from having missed the deadline imposed by the legal time limit. When this happens the client is frequently barred from pursuing their legal claim. There have been many instances where client's with really good cases have been precluded from pursuing their case because of their legal claims having been time barred (they blew the deadline imposed by the time limit).

Clients often ask the question as to what point in time do we start measuring the time limit. This is a very good question and the answer depends upon the specific legal claim(s) that apply. The starting point for measuring the time limit for legal claims could start at the time the client first became aware of the act(s) or omission(s) giving rise to the client's case. However, the starting point for measuring the time limit for other legal claims could start at the time that the client should have first become aware of the act(s) or omission(s) giving rise to the client's case. The latter does not require that the client have *actual knowledge* of the act or omission giving rise to the client's case. The client should understand that measuring these time limits can become very complicated and fact sensitive.

As previously stated, the attorney is unlikely to be in a position to perform a comprehensive legal evaluation of the client's case after this initial client meeting. To this end it is unlikely that the attorney will be capable of providing the client with a comprehensive list of all the legal

claims that may apply to the client's case nor will the attorney be capable of providing the client with a comprehensive list of all the time limits that may apply. With the foregoing in mind **the client should not delay in seeking legal assistance with their case. Time could very well be of the essence.**

**What does it mean if the attorney does not take the client's case?**

The client should not make any assumptions concerning the merits of the client's case if the attorney elects not to take the case and/or to not represent the client. The reason(s) behind the attorney declining the case could very well have nothing to do with the merits of the client's case.

The attorney represents more than one client at any given time. The attorney has a limited amount resources (time, manpower, money, technology, etc.) available toward his representation of clients. The attorney frequently looks at client cases and estimates the amount of resources he anticipates the client's case may require and compares this estimate to the attorney's existing case load. If the attorney believes that the client's case would place too much of a strain on the attorney's resources given his existing case load then the attorney will likely decline the case. This does not mean that the client does not have good case nor should the client draw any such conclusion simply because the attorney declines the case. To the contrary, it very well could be a situation where the client has a great case that may be attractive to other lawyers. If this lawyer declines the case he could be doing so simply because he presently lacks the resources to allocate to the client's matter.

**What should the client do if the attorney declines the case?**

The San Diego County Bar Association has a referral service that client's can telephone to obtain a referral to an attorney that may have experience in handling matters similar to the client's matter. This referral service is called the "Lawyer Referral & Information Service". Their telephone number is (800) 464-1529, or in the alternative, (619) 231-8585. If the attorney declines the client's case then the attorney strongly encourages the client to telephone this referral service and to discuss their case with another lawyer.

**Acknowledgment**

The Clients specifically represent and warrant that they have read each and all of the disclosures and provisions herein contained. The client further represents and warrants that he/she/they understands each of the disclosures made above and that the client was given an opportunity to obtain clarification from the attorney as to any questions the client may have had concerning any of the above disclosures.

**Clients**

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Print Name

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Street number and address

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\_\_\_\_\_  
City, State Zip

\_\_\_\_\_  
Phone number(s)

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Street number and address

\_\_\_\_\_  
City, State Zip

\_\_\_\_\_  
Phone number(s)

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

**Acknowledgement of Receipt of Copy**

By signing below the client(s) acknowledge that the client, and each of them, received a fully completed and executed copy of this document.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature