

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case Nos.: 11-N-13732-LMA; 11-O-12985
)	(11-O-13028; 11-O-13641;
DAVID KIYOSHI ARASE,)	11-O-14204; 11-O-16386;
)	11-O-17427) Cons.
Member No. 233705,)	
)	DECISION AND FURTHER ORDERS
A Member of the State Bar.)	
)	
)	

Introduction¹

In this disciplinary matter, respondent **David Kiyoshi Arase** stipulated to culpability in seven counts of professional misconduct including failing to timely file a compliance declaration conforming to the requirements of California Rules of Court, rule 9.20(c) (rule 9.20(c)) and six counts of willfully failing to promptly refund unearned fees. Respondent and the State Bar of California, Office of the Chief Trial Counsel (State Bar) stipulated to disposition and the State Bar Court approved the stipulation.

In June 2012, the California Supreme Court returned this disciplinary matter for further consideration of the recommended discipline in light of the applicable attorney discipline standards.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Thus, the sole issue in this matter is the level of discipline to be imposed. Respondent maintained that the stipulated discipline should be imposed, which required, among other things, that respondent be actually suspended for one year. The State Bar urged that disbarment is the appropriate disposition in this matter.

After further consideration of the recommended discipline in light of the applicable attorney discipline standards and case law and in view of the limited mitigating circumstances and the applicable aggravating circumstances, the court concludes that the original recommended discipline is insufficient to protect the public, preserve public confidence in the profession and maintain the highest possible professional standards for attorneys. Thus, the court recommends that respondent be disbarred from the practice of law in California and ordered to make specified restitution.

Significant Procedural History

On July 8, 2011, the State Bar filed a notice of disciplinary charges (NDC) in this matter. Thereafter on July 14, 2011, an Amended NDC was filed; respondent filed a response on August 23, 2011.

On October 25, 2011, respondent and the State Bar signed a Stipulation Re Facts, Conclusions of Law and Disposition in the above-captioned matter. The State Bar Court approved the stipulation on November 21, 2011. The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving was filed on November 22, 2011. The stipulation included the matter that was the subject of the NDC and six additional investigation matters, which were consolidated when the stipulation was filed.

On June 21, 2012, the Supreme Court issued order No. S199377 returning the stipulation “for further consideration of the recommended discipline in light of the applicable attorney

discipline standards. (*In re Silvertown* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)”

On September 7, 2012, the State Bar filed a motion requesting that the court issue an order permitting limited modification of the returned stipulation or withdrawal from the stipulation. The court denied the motion on October 5, 2012, but informed the parties that it would allow them to supplement the facts in the stipulation with additional facts at trial, provided that the additional facts would not contradict the facts in the stipulation.

Trial in this matter was held on October 10, 2012, and submitted for decision on that same date.

The State Bar was represented by Deputy Trial Counsel William Todd. Respondent was represented by Michael Daniel Michaels.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 2004, and has been a member of the State Bar of California at all times since that date.

Case No. 11-N-13732 – The Rule 9.20 Matter²

Facts

On March 1, 2011, the California Supreme Court issued disciplinary order No. S189043 (the Supreme Court Order) which, among other things, imposed an actual suspension on respondent for a minimum of two years and also ordered that he remain suspended until he has made specified restitution of more than \$120,000 to 40 clients and provided proof of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. The Supreme

² All references to Rule 9.20, formerly rule 955, refer to California Rules of Court, rule 9.20.

Court Order also included a requirement that respondent comply with California Rules of Court, rule 9.20 (rule 9.20) by performing the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court Order. Thus, under rule 9.20(c) the Supreme Court Order required respondent to file with the State Bar Court a rule 9.20 compliance declaration, no later than May 10, 2011.

Respondent filed his compliance declaration on May 9, 2011. The declaration, however, was ambiguous in relation to respondent's refund of unearned fees. He was, therefore, allowed to file an amended compliance declaration on May 13, 2011; but, that amended declaration was incomplete. Regarding the refund of unearned fees, respondent was supposed to have marked either the box next to language that states, "I refunded fees paid, any part of which had not been earned" or the box next to language that states, "As of the date upon which the order to comply with rule 9.20 was filed, I had earned all fees paid to me." If neither option was correct, respondent was required to attach an explanation.

Respondent attached an explanation which stated that he had refunded all fees except for those clients for whom restitution had been ordered. He also stated that he had not refunded anything to other clients who had made claims to the Client Security Fund.

On May 17, 2011, the Office of Probation sent a formal notice to respondent informing him that his compliance declaration had been rejected due to his failure to unequivocally state that he had returned all unearned fees. On May 24, 2011, respondent stated that he would be filing another compliance declaration shortly. But, as he did not do so, the State Bar filed the NDC on July 8, 2011. Only thereafter, on August 22, 2011, did respondent submit a revised declaration.

Respondent was confused because the Client Security Fund had sent him notices of payments it had made or would be making to numerous of his former clients. As a result

respondent was unsure as to which former clients he was required to directly reimburse for payment of unearned fees, as opposed to those who had been or would be paid by the Client Security Fund.³

Respondent knew that there were matters for payment to some of his former clients pending with the Client Security Fund and in investigation. But, he did not know how to address those issues in his compliance declaration. He made efforts to receive information from the Office of Probation and the deputy trial counsel, who had been assigned to his matter and his cases. In August 2011, the deputy trial counsel clarified the matter, explaining to respondent how the matters should be addressed. On August 22, 2011, respondent filed the compliance declaration.

Conclusions

The court finds that respondent is culpable of willfully failing to comply with his obligation under subdivision (c) of rule 9.20.

Rule 9.20(c) mandates that respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.”

The court recognizes that respondent was confused as to how to comply with rule 9.20, because of the fact that the Client Security Fund had sent him notices of payments it had made to numerous of his former clients. However, it was respondent’s responsibility to comply with all applicable requirements of rule 9.20, including the time requirements. Thus, if respondent was confused and unable to timely comply with the Supreme Court Order, he should have sought

³ Respondent correctly understood that he would be required to reimburse the Client Security Fund, and not the clients, to the extent of any payment from the fund to any of his former clients.

relief by filing a motion with the State Bar Court under California Rules of Court, rule 9.10(d) for an extension of time within which to file his compliance declaration.

Unlike some other contexts, the term “willful” in the context of rule 9.20 does not require bad faith or any evidence of intent. Whether respondent is aware of the requirements of rule 9.20 or of his obligation to comply with those requirements is immaterial. “Willfulness” in the context of rule 9.20 does not require actual knowledge of the provision which is violated. It is not necessarily even dependent on showing the respondent’s knowledge of the Supreme Court’s order requiring compliance. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342; *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 873-874.)

The evidence presented by the State Bar demonstrates that respondent did not file with the Clerk of the State Bar Court an affidavit in compliance with rule 9.20 by May 10, 2011, as required by the Supreme Court Order No. 189043. The fact that respondent eventually complied with his obligations under rule 9.20 does not avoid culpability for being late in that compliance. (*In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527 [respondent’s carelessness and confusion concerning the requirements of rule 955 did not obviate culpability of willful failure to file a compliance affidavit timely, where respondent did not seek relief based on good cause for his late filing].)

Thus, the court concludes that the State Bar has established by clear and convincing evidence that by failing to file the compliance affidavit within the time specified in the March 1, 2011 Supreme Court Order, respondent willfully failed to comply with rule 9.20.

Case No. 11-O-12985 – The Johannes Barrios Matter

Facts

On April 8, 2009, Johannes Barrios (Barrios) employed respondent to negotiate with his home mortgage lender to obtain a modification of Barrios's home mortgage loan. That same day, Barrios paid respondent an advanced fee of \$3,000.

Thereafter, respondent did no work on behalf of Barrios.

In May 2009, Barrios was informed by his lender that he would not qualify for a loan modification because he did not have regular income. Barrios telephoned respondent's office in May 2009, and demanded a full refund, thus terminating respondent's employment. Respondent has not refunded any portion of the \$3,000 to Barrios.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned.

The court finds that there is clear and convincing evidence that respondent, who did no work on Barrios's case, willfully failed to promptly refund any part of a fee paid in advance, in violation of rule 3-700(D)(2), by failing to return any of the unearned \$3,000 legal fee to Barrios.

Case No. 11-O-13028 – The Rohring Matter

Facts

On November 18, 2008, Jeffrey Rohring (Rohring) employed respondent to negotiate with his home mortgage lender to obtain a modification of Rohring's home mortgage loan. On that same date, Rohring signed an agreement for legal services with respondent. On November 20, 2008, Rohring paid respondent an advanced fee of \$5,000.

The agreement for legal services included a clause (the Clause), which provided that if respondent was unable to negotiate a plan on Rohring's behalf with his lender, respondent would refund the advanced fee to Rohring

On August 4, 2010, respondent closed his law office and stopped working on Rohring's case. Respondent had not obtained a mortgage relief plan acceptable to Rohring.

On January 25, 2011, an attorney for Rohring sent respondent a letter demanding a full refund of Rohring's \$5,000. To date, respondent has not refunded any portion of the \$5,000 to Rohring.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Respondent, who was retained to successfully negotiate a modification of Rohring's home mortgage loan as set forth in the Clause of the attorney fee agreement, closed his office on August 4, 2010, and stopped working on Rohring's case without having negotiated the loan modification as required under the terms of the fee agreement. By ceasing to perform any work on the Rohring case as of August 4, 2010, respondent effectively withdrew from representation of Rohring, thereby terminating his employment. Thereafter, on January 25, 2011, an attorney for Rohring sent a letter to respondent demanding a full refund of Rohring's \$5,000.

By failing to refund any portion of the \$5,000 unearned fee to Rohring upon termination of employment, respondent willfully failed to return any part of an unearned fee in violation of rule 3-700(D)(2).

Case No. 11-O-13641 – The Bell Matter

Facts

On February 25, 2009, Robert Bell and Renée Bell (the Bells) employed respondent to negotiate with the two lenders, which were holding a first trust deed and a second trust deed on

their home, for the purpose of obtaining reductions in the interest rates on the two loans. That same day, the Bells signed an agreement for legal services with respondent for each loan, and paid him an advanced fee of \$2,495 for the first trust deed and \$500 for the second trust deed.

Both of the agreements for legal services included a clause, which provided that if respondent was unable to negotiate a reduction in the interest rate, respondent would refund the advanced fee to the Bells.

On August 4, 2010, respondent closed his law office and stopped working on the Bells' case. Respondent did not obtain a reduction in interest rates or any other reduced payment plan acceptable to the Bells.

In March 2011, the Bells notified respondent's office that their home was scheduled for a trustee's sale on April 8, 2011. Respondent made no reply and the sale took place as scheduled.

Respondent has not refunded any portion of the advanced \$2,995 fee that he received from the Bells.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Respondent, who was retained to obtain reductions in the interest rates on each of the two loans, which were referenced in the two fee agreements that he and the Bells' had entered, closed his office on August 4, 2010, and stopped working on the case without obtaining the reduction in interest rate on either loan as required under the fee agreements.

By ceasing to perform work on the Bells' case as of August 4, 2010, respondent effectively withdrew from representation of the Bells, thereby terminating his employment.

The court finds that there is clear and convincing evidence that respondent, upon termination of employment, willfully failed to promptly refund any part of a fee paid in advance, in violation of rule 3-700(D)(2), by failing to return any portion of the \$2,995 to the Bells.

Case No. 11-O-14204 – The Polanco Matter

Facts

On January 31, 2009, Noe Polanco and Maria Polanco (the Polancos) employed respondent to negotiate with their home mortgage lender to obtain a modification of their home mortgage loan. That same day, the Polancos signed an agreement for legal services with respondent and paid him an advanced fee of \$3,500.

The agreement for legal services included a clause which provided that if respondent was unable to negotiate a reduction in the interest rate, he would refund the advanced fee to the Polancos.

On April 14, 2010, the Polancos sent respondent an e-mail advising him that their house was in foreclosure and demanding a refund if nothing could be done. Respondent sent a reply that same day that a member of his staff was negotiating with the lender. The foreclosure sale was delayed until June 7, 2011, but respondent did not succeed in negotiating a reduction in the loan interest rate.

On August 4, 2010, respondent closed his law office and stopped working on the Polancos' case. Respondent did not obtain a reduction in interest rate or any other reduced payment plan acceptable to the Polancos.

Respondent has not refunded any portion of the advanced \$3,500 attorney fee to the Polancos.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

The Polancos advised respondent in their April 14, 2010 e-mail to him that their house was in foreclosure and demanded a refund of the fee they had paid him, if nothing could be done to obtain a reduction in their loan interest rate. Thus, when the negotiations, which respondent

had entered with the Polancos' lender, were unsuccessful and it was established that the lender would not reduce the interest rate on the Polancos' loan, respondent's employment terminated pursuant to the instructions in the Polancos' April 14th e-mail, as well as under the terms of the attorney-client fee agreement. Clearly, by August 4, 2010, at the latest, respondent ceased working on the Polancos' case and no reduction in the interest rate on their loan had been obtained.

Accordingly, the court finds that there is clear and convincing evidence that respondent, upon termination of employment, willfully failed to promptly refund any part of the fee, which he had not earned, in violation of rule 3-700(D)(2).

Case No. 11-O-16386 – The Preciado Matter

Facts

On December 8, 2008, Eric Preciado and Rene Preciado (the Preciados) employed respondent to negotiate with their home mortgage lender to obtain a modification of their home mortgage loan. On that same date, the Preciados signed an agreement for legal services with respondent and paid him an advanced fee of \$3,495.

The agreement for legal services included a clause which provided that if respondent was unable to negotiate a plan on the Preciados' behalf with their lender, he would refund the advanced fee. Respondent did not obtain a mortgage relief plan acceptable to the Preciados.

On August 4, 2010, respondent closed his law office and stopped working on the Preciados' case. Subsequent attempts by the Preciados to contact respondent were unsuccessful.

Respondent has not refunded any portion of the \$3,495 attorney fee to the Preciados.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Respondent, who was retained to obtain a modification of the Preciados' home mortgage loan as set forth in the fee agreement that he and the Preciados had entered, closed his office on August 4, 2010, and stopped working on the case without obtaining the loan reduction.

By ceasing to perform work on the Preciados' case on August 4, 2010, respondent effectively withdrew from representation of the Preciados, thereby terminating his employment.

The court finds that there is clear and convincing evidence that respondent, upon termination of employment, willfully failed to promptly refund any part of a fee paid in advance, in violation of rule 3-700(D)(2), by failing to return any portion of the \$3,495 unearned fee to the Preciados.

Case No. 11-O-17427 – The Taylor Matter

Facts

On December 12, 2008, Gary J. Taylor (Taylor) employed respondent to negotiate with the two lenders holding a first trust deed and a second trust deed on his home in order to obtain reduced monthly payments on the two loans. That same day, Taylor signed an agreement for legal services for the two loans, and paid respondent an advanced fee of \$3,500.

The agreement for legal services included a clause which provided that if respondent was unable to negotiate a plan with both lenders, he would refund the advanced fee.

Respondent did not obtain a mortgage relief plan acceptable to Taylor for either loan.

On December 4, 2009, Taylor sent respondent an e-mail terminating his services and demanding a full refund of his \$3,500. Respondent received the e-mail; but, he did not reply.

On March 10, 2010, Taylor obtained a default judgment against respondent for \$6,560 in small claims court. Respondent received notice of entry of the judgment, but he has not yet paid any part of it.

Conclusions

(Rule 3-700(D)(2) [Failure to Return Unearned Fees])

By not refunding to Taylor the \$3,500 unearned fee, upon termination of his employment, respondent failed to refund promptly any part of a fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Aggravation⁴

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has two prior disciplines.

1. On March 1, 2011, the California Supreme Court filed an order (S189043) that suspended respondent from the practice of law for three years, stayed, and that placed him on probation for three years, on condition that he be actually suspended for a minimum of the first two years of probation and will remain suspended until he makes specified restitution,⁵ and until he has provided proof of his rehabilitation, fitness to practice and learning and ability in the general law. In *In the Matter of David K. Arase*, State Bar Court case Nos. 09-O-12160 et al. (*Arase I*), respondent stipulated to misconduct in 54 cases in which he was hired to obtain loan modifications for his clients. He was found culpable of collecting illegal fees, failing to return unearned fees, engaging in the unauthorized practice of law in other states, and failing to cooperate with the State Bar. In aggravation, respondent's misconduct significantly harmed clients and evidenced a pattern of accepting fees from clients and then failing to return unearned

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁵ The restitution ordered in Supreme Court order No. S189043 totaled \$121,759.49.

fees. In mitigation, the parties stipulated that respondent had been practicing law less than four years at the time the misconduct began and his relative inexperience warranted consideration. Additional mitigation was found based on respondent taking objective steps that demonstrated remorse and recognition of wrongdoing and his making substantial restitution payments to former clients.

2. On July 27, 2011, in *In the Matter of David Kiyoshi Arase*, Supreme Court case No. S193229; State Bar Court case No. 10-O-09495 (*Arase II*), the Supreme Court ordered that respondent be suspended from the practice of law for one year, stayed the execution of that period of suspension, and placed him on probation for three years, subject to certain conditions, including paying restitution to his client. Respondent misconduct involved a violation of one count of failing to return unearned fees in the amount of \$6,400.⁶ In aggravation, respondent had a prior record of discipline. In mitigation, respondent was candid and cooperative during the proceeding. The court, recognizing respondent's relative inexperience, awarded him additional mitigating credit based on his having practiced law for less than four years at the time his misconduct began and based on the fact that he took objective steps demonstrating recognition of wrongdoing and remorse by closing his loan modification practice and by no longer accepting new loan modification cases after June 27, 2009. (Respondent, however, did try to assist some clients with their matters until August 4, 2010).

The parties stipulated that the misconduct in *Arase II* and the misconduct in *Arase I* arose out of the same course of misconduct and occurred during the same time period. They also stipulated that if the two prior disciplinary matters been filed at the same time, they would have resulted in one instance of discipline.

⁶ Respondent has been ordered as a condition of his probation to make restitution to his client in the amount of \$6,400.

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent misconduct evidences multiple acts of misconduct. In five of the client matters in the instant case, respondent accepted fees from homeowners promising to provide them with a refund if he did not negotiate a payment plan acceptable to the homeowners. Respondent then failed to return the fees, which he had not earned. In the sixth client matter, there is no evidence that respondent made a promise to provide the client with a refund, if he failed to negotiate a payment plan. However, as in the other five client matters, respondent accepted a fee from a client, did not earn the fee, and then failed to return any portion of the unearned fee to the client.

The State Bar argues and the parties stipulated that the misconduct in the five matters exhibited a pattern of accepting fees from homeowners in exchange for a promise to provide them with a refund, if he did not negotiate a payment plan acceptable to the homeowners, and then failed to return the fees although no acceptable payment plan was negotiated. The court does not so find.

While the court does not find that respondent's six instances of failing to refund unearned fees in the "O" cases" at issue in the instant matter amount to a pattern of misconduct, it does find that the six instances evidence repeated, similar acts of misconduct, i.e., the promise to obtain a loan modification, the failure to do so, and the refusal to refund unearned fees to the client.⁷ Such repetitive, similar acts of misconduct constitute very serious aggravation. (See, *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555.)

⁷ As it has already been found in *Arase I* and *Arase II*, that respondent's misconduct, involving his acceptance of fees from clients and the failure to return those unearned fees, was an aggravating circumstance demonstrating a pattern of misconduct, it would be improper to again find that respondent's six acts of misconduct in the instant matter constitute a new and separate pattern of misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent's misconduct harmed the clients, the public and the administration of justice. His vulnerable clients were desperate to keep their homes. (See, Exhibits 5, 6, 7, and 8.) Respondent's failure in the six "O" client matters to return the unearned fees, which amounted to a total of \$21,490,⁸ significantly harmed his clients.

The clients have been deprived of their funds by respondent, who did not earn the fees he withheld. Some of the clients have faced and are still facing financial hardship. The Bells are filing for bankruptcy. (Exhibit 5.) The Polancos's home was foreclosed and they are filing for bankruptcy. (Exhibit 6.) The Preciados are facing foreclosure on their home. Rene Preciado wrote in her client impact statement that the stress of being unable to contact respondent's firm which "disappeared" resulted in "stress, worry, and hardship" on her family and on her health. (Exhibit 7.) Gary Taylor wrote that he is behind in paying his property taxes and that the unearned fees that respondent has failed to return could have been used for that purpose. Taylor stated that the \$3,500 that he paid respondent was "all that [he] had." (Exhibit 8.) By depriving his clients of the fees, which he did not earn, respondent significantly harmed his clients.

Mitigation

Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)

The parties stipulated that respondent has been candid and cooperative as evidenced by his entering into this stipulation to resolve all seven cases, which are at issue in the instant matter

⁸ On page 12 of the Stipulation under the heading "FINANCIAL CONDITIONS – RESTITUTION" it is stated that the principal amount owing to the Bells is \$2,495. However, the facts as set forth on page 9 of the Stipulation in paragraphs 16 and 21 establish that the Bells paid respondent an advanced fee of \$2,495 for the first deed of trust regarding their first loan and an advanced fee of \$500 for the second deed of trust regarding their second loan. It is clear that the amount shown on page 12 of the Stipulation is incorrect and that the \$500 advanced fee paid by the Bells in relation to the second deed of trust was incorrectly omitted in calculating the total amount of the unearned fees that respondent failed to pay to the Bells.

before any disciplinary charges had to be filed for the six new “O” matters, and as evidenced by his admission of culpability in all seven cases.

The court, however, finds that although respondent entered the stipulation, the misconduct to which he stipulated is easily provable. Thus, respondent is accorded only slight mitigating credit for entering the stipulation in this matter.

Good Character (Std. 1.2(e)(vi).)

The testimony of respondent’s two character witnesses does not represent a wide range of references. Moreover, neither of respondent’s two character witnesses was aware of the full extent of respondent’s misconduct. Thus, respondent’s evidence of good character merits only minimal weight in mitigation. (See, *In the Matter of Esau* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 131, 136 [minimal weight afforded to character testimony where respondent presented testimony from only three witnesses, which did not constitute a wide range of references and where two witnesses did not become aware of the full extent of respondent’s disciplinary proceedings until called to testify and the third did not become aware of respondent’s disciplinary record until three months prior to the hearing.])

Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)

The parties stipulated that respondent closed his loan modification practice and did not accept any new loan modification cases after June 27, 2009. The court finds respondent’s actions to be inadequate, given respondent’s failure to notify several of his clients that he was closing his office and leaving them no way to contact him, as evidenced by the client impact statements admitted into evidence in the instant matter. Given the surrounding circumstances, respondent is given no credit in mitigation based on his decision not to accept additional loan modification cases after June 27, 2009, and for the closure of his practice.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court also looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

In these two consolidated matters, respondent's misconduct involved failing to return unearned fees and failing to comply with rule 9.20.

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standard 2.10 is the applicable standard relating to respondent's culpability for violating rule 3-700(D)(2). Standard 2.10 provides that violations of any provisions of the Business and Professions Code or Rules of Professional Conduct not specified in the standards must result in reproof or suspension depending upon the gravity of the misconduct or harm to the victim, with due regard to the purposes of imposing discipline.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety.

(*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urged that respondent be disbarred from the legal profession. Respondent maintained that the discipline as set forth in the November 22, 2011 stipulation, including a one-year actual suspension from the practice of law would be appropriate.

The court rejects respondent's contentions and agrees with the State Bar's recommendation.

In the six "O" cases, the gravamen of respondent's misconduct is his failure to return unearned fees. Respondent's distressed clients entrusted their money to him in exchange for legal services which he contracted to perform. Not only did respondent fail to perform the services for which he was retained, but, he did not pay any of his clients the unearned fees that they had advanced to him.

Failing to return unearned fees is regarded most seriously by the Supreme Court. As the Court has stated, "Surely the legal profession is more than a mere "money getting trade" [citation]; it at least requires the rendition of services for any payment received." (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 449.) The court's observed in *In the Matter of Trillo* that attorney Trillo's " "[t]aking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses." (*In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59, 69.) Unfortunately, the court's observation is equally as applicable to respondent's conduct in the instant matter as it was to Trillo's.⁹

⁹ The fee agreements, which respondent entered into with his clients in *Arase I*, *Arase II* and in five of the six "O" client matters in the instant case, contained a clause that provided if respondent was unable to negotiate a loan modification plan with the lender on behalf of his

Respondent caused significant harm to vulnerable and desperate clients. By failing to return the unearned fees that had been advanced to him in the instant matter, respondent deprived his six clients of a total of \$21,490 – a not insubstantial amount.

While respondent technically has two prior records of discipline, the misconduct in *Arase I* and *Arase II* and the misconduct at issue in the client matters in the instant proceeding arose out of the same course of misconduct and took place at the same time. Thus, the court will consider *Arase I* and *Arase II* as one prior record of discipline. Standard 1.7(a) provides that when an attorney has one prior record of discipline, “the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.”

Here, the correct analysis requires that (1) the court consider the totality of the findings in respondent’s prior matters, i.e., *Arase I*, *Arase II*, and the findings in the six “O” cases in the current proceeding and (2) determine what that discipline would have been had all the misconduct in those matters been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

Additionally, the court must add to the discipline that should be imposed for respondent’s violations of rule 3-700(D)(2) in the six “O” cases to the discipline that must be imposed for his willful violation of rule 9.20.

client, respondent would refund the advanced fee to the client. But, in *Arase I*, *Arase II* and the instant matter, he failed to perform the services for which he was retained and did not return to his clients a total of \$149,649.49 in unearned attorney fees that had been advanced to him.

The standards, however, do not set forth a specific guideline regarding the imposition of discipline to be imposed in matters regarding violations of rule 9.20. Thus, the court looks to rule 9.20, itself, for guidance in determining the appropriate sanction for a violation of that rule.

Rule 9.20(d) states in pertinent part: “A suspended member’s willful failure to comply with the provisions of this rule is cause for disbarment or suspension and for revocation of any pending probation.”

It is well-established that a willful violation of rule 9.20 deserves strong disciplinary measures because of the rule’s critical prophylactic function. Disbarment is the usual discipline ordered by the Supreme Court for such violations. A respondent’s willful failure to comply with rule 9.20(c) is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131.) Such failure undermines its prophylactic function in ensuring that all concerned parties learn about an attorney’s suspension from the practice of law. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.)

Here, respondent failed to meet his obligation and strictly comply with rule 9.20. Respondent’s failure to strictly comply with the Supreme Court order requiring him to timely comply with rule 9.20 indicates an unwillingness to take seriously the professional obligations and rules of court imposed on California attorneys, although he had been given opportunities to do so.

In the present case, respondent violated the rules of professional conduct and failed to comply with rule 9.20, a serious act of misconduct. Additionally, only minimal to slight credit in mitigation has been accorded to respondent in this matter, while significant aggravating circumstances have been found, particularly the harm caused to clients. Respondent’s misconduct coupled with his failure to take seriously his ethical and professional obligations (as

manifested by his delay of more than 3 months after the actual due date to file a satisfactory compliance declaration), suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical and professional responsibilities.

Thus, having considered the evidence, the standards, and relevant law, the court concludes that disbarment is merited under rule 9.20(d), standard 1.6(a), and applicable case law.

Recommendations

It is recommended that respondent **David Kiyoshi Arase**, State Bar Number 233705, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

Restitution

The court recommends that respondent be ordered to make restitution to the following payees:

(1) Johannes Barrios in the amount of \$3,000 plus 10 percent interest per year from May 31, 2009;

(2) Jeffrey Rohring in the amount of \$5,000 plus 10 percent interest per year from August 4, 2010;

(3) Robert and Renée Bell in the amount of \$2,995 plus 10 percent interest per year from August 4, 2010;

(4) Noe Polanco and Maria Ortega-Polanco in the amount of \$3,500 plus 10 percent interest per year from August 4, 2010;

(5) Eric and Rene Preciado in the amount of \$3,495 plus 10 percent interest per year from August 4, 2010; and

(6) Gary J. Taylor in the amount of \$3,500 plus 10 percent interest per year from December 31, 2009.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order

The order filed on November 22, 2011, approving the parties' Stipulation Re Facts, Conclusions of Law and Disposition, in the above-entitled matter is hereby **VACATED**.

The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving, which was filed on November 22, 2011, is hereby converted to a stipulation as to facts and conclusions of law only, and State Bar Court staff is directed to remove the Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving, filed on November 22, 2011, from the State Bar's website.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by

rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: December _____, 2012

LUCY ARMENDARIZ
Judge of the State Bar Court