FILED MAY 24, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case Nos.: **11-O-14880-RAH**
	)	(12-O-10045;
ERIC VAUGHN TRAUT,	)	12-O-11041)
	)	
Member No. 146644,	)	**DECISION**
	)	
A Member of the State Bar.	)	
	)	

Introduction[1]

In this contested disciplinary proceeding, respondent Eric Vaughn Traut is charged with seven counts of misconduct in three client matters: (1) violating loan modification law; (2) charging and collecting an illegal fee; (3) failing to return unearned fees; and (4) failing to promptly pay client funds.

This court finds, by clear and convincing evidence, that respondent is culpable of most of the alleged misconduct. In view of respondent's misconduct and the evidence in aggravation and mitigation, particularly his 20 years of practice without any prior record of discipline, significant community work, compelling good character evidence, lack of client harm, good faith belief, and recognition of wrongdoing, the court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of suspension be stayed, and that he be placed on probation for one year.

[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.

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar), initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on October 26, 2012. Respondent filed a response on November 20, 2012.

The parties filed a stipulation as to facts on February 19, 2013.

Four days before trial, on February 22, 2013, respondent through his attorney Ellen A. Pansky, arguing under the doctrine of judicial estoppel,[2] filed a request[3] for judicial notice of a March 31, 2011 State Bar's reply brief in an unrelated civil matter before the federal court. In response, the State Bar filed a motion in limine to exclude that reply brief from evidence at trial.

The court finds that the elements of judicial estoppel have not been met in that (1) there was no final adjudication on the merits since that civil matter was decided on a demurrer with leave to amend, no amendment was filed, and thus the court dismissed it without leave to amend; and (2) the State Bar's position that Civil Code § 2944.7 refers to only loan modifications and not to any mortgage or foreclosure-related service was not inconsistent with this proceeding (the State Bar has never contended that advance fees for loan modifications were permitted). Furthermore, the State Bar's reply brief is irrelevant to this disciplinary matter. (Rules Proc. of State Bar, rule 5.104(C).) Therefore, the court hereby finds that judicial estoppel is not appropriate in this matter and denies respondent's request for judicial notice of that pleading. The court also denies State Bar's motion in limine as moot.

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[2] Judicial estoppel prevents a party from contradicting previous declarations made during the same or a later proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.

[3] Respondent incorrectly cited to rule 5.230 of the Rules of Procedure of the State Bar. That rule applies to proceedings under Business and Professions Code section 6007, subdivisions (c)(1) through (c)(3), and not to this disciplinary proceeding.

A two-day trial was held on February 26-27, 2013. Deputy Trial Counsel Agustin Hernandez and Nada M. Alnajafi represented the State Bar. Attorney Ellen A. Pansky represented respondent. This matter was submitted on February 27, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 11, 1990, and has been a member of the State Bar of California at all times since that date.

Case No. 11-O-14880 – Spitz Matter; Case No. 12-O-11041 – Waller Matter

In both Spitz and Waller matters, respondent was hired to obtain loan modifications.

Background on Legislation Regulating Loan Modification (SB 94)[4]

In 2009, state laws were enacted to protect homeowners facing foreclosures. California legislators sought to curb abuses by "a cottage industry that has sprung up to exploit borrowers who are having trouble affording their mortgages, and are facing default, and possible foreclosure, if they are unable to negotiate a loan modification or any other form of mortgage loan forbearance with their lender." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, pp. 6-7.)

On October 11, 2009, Senate Bill No. 94 (SB 94) became effective, providing two safeguards for borrowers who employ the services of someone to help with a loan modification: (1) a requirement for a separate notice to borrowers that it is not necessary to use a third party to negotiate a loan modification (codified as Civ. Code, § 2944.6);[5] and (2) a proscription against

[4] The background description of California Senate Bill number 94 (SB 94) is taken from the review department's opinion in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 225-226.

[5] Civil Code section 2944.6 requires that before entering into a fee agreement, a person attempting to negotiate or arrange a loan modification must provide the borrower the following information in 14-point font "as a separate statement:"

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

charging pre-performance compensation, i.e., restricting the collection of fees until all loan modification services are completed (codified as Civ. Code, § 2944.7).[6] The new legislation was designed to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.) A violation of either Civil Code provision constitutes a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), and is cause for imposing attorney discipline. (§ 6106.3.)

Background Facts

Within a month after the passage of SB 94, respondent began investigating the possibility of offering loan modification services to his clients. He had some uncertainty as to the meaning of the payment provisions of the statute. As such, before preparing the retainer agreements with Jane Spitz and Leisa Waller, respondent contacted experienced ethics counsel to help him understand the proper method and timing of obtaining payment. His retainer agreements were reviewed by this expert, who advised respondent that the retainer agreements, as drafted, complied with SB 94. Respondent corroborated this opinion by seeking the advice of another

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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.

[6] The relevant portion of Civil Code section 2944.7 reads:

(a) 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.

expert, Julia Greenfield, who advised that the legislative intent of SB 94 allowed attorneys to unbundle mortgage loan modification services.[7] Respondent relied on the experts he consulted in deciding the method he would be compensated in loan modification cases.

Respondent's work in the Spitz and Waller matters was done in phases, and payment was made after completion of the work involved for each of these individual phases. However, payment was taken before completion of *each and every* service respondent contracted to perform. At the time he performed these services, SB 94 had been enacted less than 18 months and no court had yet interpreted the meaning of SB 94 in general, nor specifically regarding the payment provisions.

Facts – Spitz Matter

On September 21, 2010, Jane Spitz ("Spitz") employed respondent to provide loan modification services on a mortgage loan secured by Spitz's residential property. On that date, Spitz and respondent entered into a written fee agreement. Pursuant to the fee agreement, respondent agreed to provide all of the necessary loan modification services to Spitz, in incremental payments, for a total fee of $3,000.

On September 21, 2010, respondent charged and collected $1,500 in fees from Spitz. On that date, respondent had not fully performed each and every service he had contracted to perform or represented that he would perform for Spitz. On November 30, 2010, respondent charged and collected $750 in fees from Spitz. On that date, respondent had not fully performed each and every service he had contracted to perform or represented that he would perform for Spitz. Spitz paid respondent, and respondent received from Spitz, a total of $2,250 in legal fees.

[7] Ms. Greenfield identified herself as an expert witness for the State Bar of California on the subject of loan modifications and SB 94. She advised respondent that the law drew a distinction between real estate brokers and attorneys, where the latter was not proscribed from receiving advance payment after performing contracted phases of work.

On July 12, 2011, Spitz filed a complaint with the State Bar against respondent.

On or about October 22, 2012, respondent refunded $1,500 to Spitz. On October 26, 2012, respondent refunded $750 to Spitz.

Conclusions

Count One - (§ 6106.3 subd. (a) [Violation of Civil Code section 2944.7, subd. (a)])

Section 6106.3, subdivision (a) provides that an attorney's conduct in violation of Civil Code section 2944.6 or 2944.7 constitutes cause for the imposition of discipline. By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid by a borrower, and demanding, charging, collecting and receiving $2,250 from Spitz prior to fully performing each and every service he had contracted to perform or represented that he would perform, in violation of Civil Code section 2944.7, subdivision (a)(1), respondent willfully violated section 6106.3, subdivision (a).

Count Two - (Rule 4-200(A) [Illegal Fee])

Rule 4-200(A) provides that an attorney must not charge, collect or enter into an agreement for an illegal or unconscionable fee. By charging and collecting advanced fees after October 11, 2009, prior to performing each and every service that he contracted to perform in violation of Civil Code section 2944.7, subdivision (a)(1), respondent entered into an agreement for charging or collecting an illegal fee in willful violation of rule 4-200(A).

Count Three - (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. By failing to promptly provide Spitz with a full refund until October 26, 2012, more than a year after her complaint to the State Bar, respondent failed to refund promptly any part of a fee paid in advance that has not been earned in willful violation of rule 3-700(D)(2).

Facts – Waller Matter

On or about February 14, 2011, Leisa Waller ("Waller") employed respondent to provide loan modification services on a mortgage loan secured by a residential property. On that date, Waller and respondent entered into a written fee agreement. Pursuant to the fee agreement, respondent agreed to provide all of the necessary loan modification services in incremental payments for a total fee of $3,500.

On February 14, 2011, respondent charged and collected $1,500 in advanced fees from Waller. On that date, respondent had not fully performed each and every service he had contracted to perform or represented that he would perform for Waller.

On January 23, 2012, Waller filed a complaint with the State Bar against respondent.

On October 22, 2012, respondent refunded Waller $1,500.

Conclusions

Count Five - (§ 6106.3 subd. (a) [Violation of Civil Code section 2944.7(a)])

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid by a borrower, and demanding, charging, collecting and receiving $1,500 from Waller prior to fully performing each and every service he had contracted to perform or represented that he would perform, in violation of Civil Code section 2944.7, subdivision (a)(1), respondent willfully violated section 6106.3, subdivision (a).

Count Six - (Rule 4-200(A) [Illegal Fee])

By charging and collecting advanced fees after October 11, 2009, prior to performing each and every service that he contracted to perform in violation of Civil Code section 2944.7, subdivision (a)(1), respondent entered into an agreement for charging or collecting an illegal fee in willful violation of rule 4-200(A).

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

By failing to provide Waller with a full refund until October 22, 2012, 10 months after her complaint to the State Bar, respondent failed to refund promptly any part of a fee paid in advance that has not been earned in willful violation of rule 3-700(D)(2).

Case No. 12-O-10045 – Loy Matter

Facts

On April 23, 2007, Terry Loy ("Loy") employed respondent to represent him in a personal injury matter that resulted from an automobile accident that occurred on March 17, 2007 (the "Loy matter"). Respondent agreed to represent Loy on a contingency fee basis of 33⅓ percent.

On November 9, 2009, respondent settled the Loy matter for $15,000 with USAA, the insurance carrier for the adverse party, and for $85,000 with Loy's insurance carrier, State Farm Insurance, pursuant to Loy's underinsured motorist coverage. In November 2009, respondent received the settlement checks from both USAA and State Farm Insurance. Each settlement check was promptly deposited into respondent's Client Trust Account ("CTA"). The $15,000 USAA settlement check was properly disbursed.

The Dispute with Rawlings Company

With respect to the $85,000 settlement check from State Farm Insurance, respondent began to negotiate a medical lien, the amount of which was disputed. Loy had received medical treatment using his personal health policy with Aetna. Rawlings Company was Aetna's subrogation firm. Rawlings was asserting a lien against the settlement amounts, which Loy was disputing, claiming it was based on improper or duplicate billings. In addition, Loy contended that they were seeking subrogation for a medical condition caused from a preexisting injury, not

caused by the accident. As such, Loy contended, Rawlings had no right to seek subrogation against the settlement, but rather, it should be paid from the medical policy.

Michelle Atkins from respondent's office testified that she made several contacts with Rawlings Company to try to reduce or eliminate the lien. These negotiations occurred over a period of several months, made much more complicated by Rawlings' continual revision of the amounts it was demanding. (See chart, below.) Ms. Atkins' testimony reflected a broad knowledge of the facts of this case and the legal rights of each of the parties.[8] Further, she credibly testified as to the interactions among Aetna, Loy and respondent's office. According to the credible testimony of Atkins, Loy was very difficult to communicate with, and would not return telephone calls for long periods of time, sometimes months, during which she would have to put her negotiations on hold with Rawlings. When she did speak with Loy, he never requested a partial distribution or expressed any dissatisfaction with her or the firm, until well into 2011. Further, despite Loy's testimony to the contrary, he never asked to speak to the bookkeeper for the firm.[9]

Aetna's demands, made through Rawlings, rose and fell repeatedly during these negotiations, as set forth below:

Date	**Amount**	**Reference**
November 2009	$29,231	Exhibit L
January 2010	$22,308	Exhibit 13
March 2010	$21,459	Exhibit 15
January 7, 2011	$55,837	Exhibit CC

[8] Michelle Atkins had been an employee of respondent for over 21 years.

[9] The court did not find Loy to be credible in his historical description of his relations with respondent's office. As an example, on cross-examination, Loy stated that he has 200 emails to respondent that he did not give to the State Bar, all of which show that he tried to get into contact with respondent. Respondent and his staff denied this assertion. The court also finds it not credible that he would not bring such important evidence to the attention of the State Bar.

January 24, 2011	$17,364	Exhibit 43
September 8, 2011	$17,761	Exhibit 22

Although the lien amounts remained a "moving target," Loy was always adamant that he should not have to pay for the lion's share of the claimed lien, but that it should simply be paid under his medical policy with Aetna. In January 2011, respondent offered to settle the claim for $5,425, and sent Aetna a check in that amount. In this correspondence, he sent Aetna a "color-coded" set of billings prepared by Loy, marking those charges that were unrelated to the accident, duplicated from other billings, or from a preexisting condition. This offer was rejected and the check returned. On August 26, 2011, respondent again forwarded this set of color-coded billings to Rawlings, with an offer to resolve the lien with a payment of $5,203.86.

On September 8, 2011, Loy demanded that respondent disburse to him the funds not subject to the lien. At the time, respondent, by mistake, did not recognize that some of Loy's funds were still being held in trust and that he had $32,830.32 in funds that could have been distributed to Loy in January 2011.[10] Immediately upon seeing the amounts owed to Loy, respondent paid Loy the funds he owed; plus on November 27, 2012, he paid an additional amount of $9,000 for the loss of use of the funds between January 2011 and November 2012.[11]

Respondent disbursed part of the settlement funds in the Loy matter on September 12, 2011, as follows:

[10] Respondent had in place an effective system to prevent this type of problem from occurring. However, he did not notice the excess funds had not yet been distributed. This was not a reflection of a failure to balance his client trust fund or other similar inattention to his duties in managing a trust account. Rather, he simply made a mistake in not following the system his firm had effectively used in the past. He has since implemented further procedures to assure this mistake does not repeat itself in the future. (See exhibit JJ.) As noted below, the parties have stipulated that the funds were always held in his CTA.

[11] The delay was approximately 13 months. On a principal amount of $32,830.32, this payment represents an annual interest of more than 25 percent. In essence, respondent more than made Loy whole for the delay.

$28,333.00	Attorney Fees
$6,075.00	Partial Reimbursement to Medical Lien Holder
$32,830.32	Terry Loy
$67,238.32	Total Disbursements

Respondent withheld $17,761.68 ($85,000 - $67,238.32), the balance of undisbursed funds pending resolution of the Aetna lien.

On December 29, 2011, Loy terminated respondent's employment. At that time, there was only the one outstanding medical lien held by Aetna through Rawlings.

On February 9, 2012, after terminating respondent, Loy settled the Aetna lien himself for $4,900. On February 13, 2012, respondent sent Loy a check for $4,900 made payable to The Rawlings Company and another check for $12,861.68 ($17,761.68 - $4,900) made payable to Loy.

Throughout the entire period set forth above, from December 2009 until disbursement to Loy in September 2011 and February 2012, the settlement funds received on behalf of Loy were held in respondent's CTA.

Conclusions

Count Four - (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive.

Loy requested payment of the amounts held in trust over and above that which Rawlings claimed as its lien on September 8, 2011.[12] Respondent paid the amounts demanded on

[12] It was stipulated at trial that Exhibit 28, the undated letter demanding the "non-lien" portion of the fees, was sent on September 8, 2011.

September 12, 2011. Loy settled the claim with Aetna on February 9, 2012. Thereafter, the final payments were made to Aetna and Loy on February 13, 2012.

Despite his protestations to the contrary, Loy did not continually demand payment of the amounts not subject to the lien because he was aware that Rawlings continually changed its position as to the amount of its lien, despite the efforts of respondent and his assistant, Ms. Atkins, to pin down the exact amount of the lien.

For a violation of rule 4-100(B)(4) to occur, there must be a request by the client, followed by a failure to comply with that request. In this case, there were no delays by respondent after the requests were made by Loy. Respondent promptly paid, as requested by the client, the settlement funds in his possession which the client was entitled to receive. As such, respondent did not violate rule 4-100(B)(4). This count is, therefore, dismissed with prejudice.

Aggravation[13]

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

Respondent committed multiple acts of misconduct. He violated the loan modification law, collected an illegal fee, and failed to promptly refund unearned fees in two client matters.

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

There is no clear and convincing evidence that respondent caused any significant harm. The clients were not harmed financially or otherwise. As soon as respondent discovered the delay of payment to Loy, he recognized the error and immediately paid back far more than what he was obligated to pay – an additional $9,000, which represented more than 25 percent interest on the principal amount. (See *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State

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

Bar Ct. Rptr. 716.) In the Spitz and Waller matters, respondent had fully reimbursed the fees to the clients.

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Respondent's lack of a prior record of discipline in 20 years of practice at the time of his misconduct is a significant mitigating factor. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41 [attorney's practice of law for more than 17 years with no prior record of discipline to be a significant mitigating factor].)

Good Faith (Std. 1.2(e)(ii).)

It is well-settled that respondent "may not rely on the opinion of another attorney as a defense to violating the rules or sections governing attorney ethics." (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of "fellow attorney" no defense to wrongdoing].) Thus, although he relied on the opinions of two experts who told him that unbundling mortgage loan modification services were allowed, respondent was found culpable of violating the loan modification laws. But, the court may consider his good faith reliance as a mitigating factor if his beliefs were both honestly held and reasonable. In other words, any good faith on the part of the attorney is relevant to mitigation rather than culpability. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138.)

Here, respondent relied on the advice of counsel and experts in determining whether his payment arrangements were acceptable. Given that the statute was brand new when he sought the advice of these experts, respondent honestly and reasonably believed that he could work on the Spitz and Waller matters in phases and collected fees accordingly. When he finally realized that he could not unbundle these services and collect fees before completing all services,

respondent refunded the full amount to his clients. Thus, respondent's good faith belief is a mitigating factor under the circumstances.

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

Respondent's candor and cooperation with the State Bar during investigation and proceedings, including entering into a stipulation as to facts and admitting to some misconduct is given some weight in mitigation.

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

Respondent presented extensive evidence of his good character by way of testimony and declarations. The witnesses, consisting of one judge, five attorneys, and one accountant, have known respondent for many years. Each was aware of the charges filed against him. Favorable character testimony from employers and attorneys is entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because judges and attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

Judge Robert J. Polis, a judge for 22 years, rated respondent as a lawyer in the "top one or two percent of all attorneys he has had appear before him." He opined that "in the realm of honesty and reputation for integrity in the community, and in his genuine caring from each and every client no matter what the economic value of the case, Eric is truly at the top of the pack."

Without exception, the witnesses were effusive in their support for respondent and their evaluations of his honesty, trustworthiness, integrity, dedication, and professionalism. They attested to his excellent reputation in the legal community and believe that he is one of the most honest, competent and ethical attorneys they have known. They also praised his commitment to

the community and his generous devotion to mentoring new lawyers, speaking to law students on the subjects of professionalism and civility, and speaking at trial practice seminars in several states.

Respondent is a member of the Banyard Inn of Court and is currently its Inn Liaison to the other three Orange County Inns of Court. Respondent was also the President of the Orange County Trial Lawyers Association in 2002. He served as President of the Lex Romana (Italian Lawyers Association) from 2005 through 2006. He has been Chair of the Orange County Bar Association College of Trial Advocacy's semi-annual program since 2002. He was President of the Orange County Chapter of the American Board of Trial Advocates (ABOTA.) He has been a member of the Board of Directors of the Orange County Bar Foundation and in 2014, is scheduled to become its President.

Respondent's record of community service and contributions to the legal community is entitled to significant weight as a mitigating factor.

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

SB 94 was enacted to protect the public from loan modification scams and to prevent fraud against vulnerable and financially distressed homeowners. Here, there is no evidence that respondent committed any fraud or scam against his clients. Respondent started to provide loan modification services to help his existing clients who were in trouble with their mortgages. They consisted of only about five percent of his caseload. Before he began, he consulted with two experts to ensure his practice was proper and ethical. Unbeknownst to him, SB 94 proscribed unbundling of the services. When he learned that his loan modification practice was in violation of the law, he stopped and refunded his clients, even though he had tirelessly represented those clients.

Unfortunately, he had already violated the technical elements of the statute by collecting fees before he had completed the loan modification services. Respondent recognized his mistake, albeit after the fact. His recognition of wrongdoing is a mitigating factor and such misconduct is highly unlikely to reoccur.

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.)

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.

Standard 2.10 provides that violations of any provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval 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.) Although 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 urges that respondent should be actually suspended for 90 days, citing to standard 2.2(b), which provides that commingling or another violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

However, because respondent is not found culpable of violating rule 4-100(B)(4), standard 2.2(b) is inapplicable.

Respondent argues that a reproval is sufficient. He states that he went to great lengths to handle client matters properly and he is not the type of the attorneys that SB 94 intended to regulate. He notes that he became involved with loan modifications to help his existing clients who were losing their homes and had performed the work on their behalf. He contends he acted in absolute good faith and was not aware that he had violated the statute.

A recent case involving loan modification law practice provides some guidance in recommending an appropriate level of discipline in this matter. In *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, the attorney was found culpable of violating mortgage loan modification laws in eight client matters. He only had one factor in mitigation (good character), which the court assigned only modest mitigating credit. But his three factors in aggravation were significant – multiple acts of misconduct, significant harm, and lack of remorse. The attorney took advantage of his clients' financial desperation and exploited his fiduciary position by repeatedly charging upfront fees for loan modification services that the new laws prohibited. For years he failed to provide full refunds to his clients. Particularly egregious was his denial of any wrongdoing and refusal to accept any responsibility for his misconduct. The attorney knew about the loan modification laws and was aware of the State Bar ethics alert posted on the State Bar's website, informing the public and members of the State Bar that SB 94 prohibits attorneys from charging or collecting legal fees for loan modification services prior to the completion of those services. Yet, he purposely ignored the warnings, made a calculated

business decision to subvert the public protection purposes of SB 94, and collected illegal fees for his loan modification services. Given his multiple violations of loan modification laws designed to protect the public and his lack of insight into his misconduct, Taylor was suspended for two years, stayed, and placed on probation for two years, with an actual suspension of six months and until he made restitution to the clients he harmed.

In this matter, respondent's misconduct and aggravating factors are far less serious than those in *Taylor* and are therefore distinguishable. Respondent did not cause harm to his clients. He did not exploit his clients' financial desperation by repeatedly violating loan modification statutes designed to protect the consumer. Rather, his intent was to help his clients. Moreover, respondent's mitigation is far more compelling than *Taylor'*s one modest mitigating factor. Respondent was not aware that he was violating the statute based upon his good faith reliance on two experts. When he recognized his wrongdoing and mistake, he provided full refunds to Spitz and Waller. And he paid Loy an additional $9,000. His character witnesses were aware of, and understood the discipline charges, and nevertheless, lauded his good character and community work. Finally, respondent has no prior record of discipline in more than 20 years of practice. Therefore, the State Bar's recommended 90 days' actual suspension would be unduly harsh.

The court is mindful that the proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

"As always, [the court looks] to the standards and decisional law to recommend the fairest discipline." (*In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. 221, 236.)

Standard 2.10 provides for reproval or suspension, depending on the gravity of the offense or harm to the victim. Because there was no consequential client harm and the offense

was mitigated by good faith, the court believes that a period of actual suspension would be unnecessary to protect the public.

In arriving at an appropriate discipline, the court balances all relevant factors, including mitigating circumstances, on a case-by-case basis. (*In re Young* (1989) 49 Cal.3d 257, 266.) In light of the presence of compelling mitigation, including respondent's 20 years of practice without prior discipline, cooperation with the State Bar, demonstration of excellent character, significant community work, good faith, and recognition of wrongdoing, any period of actual suspension would not further the objectives of attorney discipline and would be punitive in nature. Accordingly, the court concludes that a one-year stayed suspension and one-year probation would be appropriate under the facts and circumstances in this case.

Recommendations

It is recommended that respondent Eric Vaughn Traut, State Bar Number 146644, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that respondent be placed on probation[14] for a period of one year subject to the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

2. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar

[14] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

4. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

7. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Exam

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

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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.

Dated: June _____, 2013

RICHARD A. HONN
Judge of the State Bar Court