

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 09-TE-14031-RAH
)	
CHRISTOPHER LEE DIENER)	DECISION AND ORDER OF INACTIVE
)	ENROLLMENT (BUS. & PROF. CODE
Member No. 187890)	SECTION 6007, SUBDIVISION (c)(1))
)	
<u>A Member of the State Bar.</u>)	

1. INTRODUCTION

This matter is before the court on the verified application of the Office of the Chief Trial Counsel of the State Bar of California (Office of the Chief Trial Counsel) seeking to involuntarily enroll respondent Christopher Lee Diener (respondent) as an inactive member of the State Bar pursuant to Business and Professions Code section¹ 6007, subdivision (c)(1) and rule 461 of the Rules of Procedure of the State Bar of California (Rules of Procedure).

The Office of the Chief Trial Counsel was represented by Deputy Trial Counsel Rizamari C. Sitton. Respondent was represented by attorney Ellen A. Pansky. A hearing was held on September 8, 2009. This matter was submitted for decision, following the filing of supplemental documentation, on September 22, 2009.

After reviewing and considering this matter, the court finds that respondent's conduct poses a substantial threat of harm to his clients or the public, and respondent is ordered

¹ Future references to section(s) are to this source.

involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(1).

2. JURISDICTION

Respondent was admitted to the practice of law in California on May 20, 1997, and has been a member of the State Bar at all times since.

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 6007, subdivision (c) authorizes the court to order an attorney's involuntary inactive enrollment upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public. In order to find that an attorney's conduct poses a threat of harm, the following three factors must be shown: (1) the attorney has caused or is causing substantial harm to his clients or the public; (2) the injury to the attorney's clients or the public in denying the application will be greater than any injury that would be suffered by the attorney if the application is granted or, alternatively, there is a reasonable likelihood that the harm will continue;² and (3) there is a reasonable probability that the Office of the Chief Trial Counsel will prevail on the merits of the underlying disciplinary matter. (*Conway v. State Bar* (1989) 47 Cal.3d 1107; *In the Matter of Mesce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 658, 661.)

Respondent was given notice of this proceeding pursuant to rule 461 of the Rules of Procedure. The application is based on matters not yet the subject of disciplinary charges pending in the State Bar Court. (Rules Proc. of State Bar, rule 461(a)(3).) The court's findings of fact are based on clear and convincing evidence.

² But where the evidence establishes a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shifts to the attorney to show that there is no reasonable likelihood that the harm will reoccur or continue.

A. General Background of Respondent's Loan Modification Practices

With the recent decline in the real estate market, more and more distressed homeowners are searching for relief from their existing home mortgage loans. Many of these homeowners have turned to loan modification companies for help. These companies generally represent that they can help homeowners navigate the uncertain waters of loan modification.

The business of loan modification has become more prevalent in the attorney community because attorneys may charge advanced fees for loan modification services, while non-attorneys often may not. It was for this reason, that respondent ventured into the realm of loan modification. In or about fall 2008, respondent decided to expand his civil litigation practice to include residential loan modifications.

In December 2008, respondent contracted with Home Relief Services (HRS), an existing home loan modification company, to expand his practice to include clients seeking residential loan modifications. Beginning in December 2008, respondent went to HRS one or two days a week to review client files and supervise the handling of the Diener Law Firm's home loan modification clients.³

On or about this same time period, respondent also developed some form of relationship with various other existing loan modification companies including the National Mortgage Counseling Group, the Mortgage Modification Network, and EQI.

Generally, clients seeking loan modification would contact HRS or one of the other aforementioned companies. Representatives from these companies would tell the clients that they are affiliated with the Diener Law Firm. The Diener Law Firm would then accept representation of the clients and receive all advanced fees.

³ In December 2008, the Diener Law Firm consisted of respondent, as named partner, and at least one associate attorney.

Many of these clients signed retainer agreements with the Diener Law Firm. According to these retainer agreements, the Diener Law Firm was retained to negotiate with the clients' lenders regarding the modification, restructuring, and/or reduction of the clients' real estate loan. These retainer agreements, however, included additional language requiring the Diener Law Firm to hire HRS or another loan modification company to actually negotiate with the clients' lenders.

While there were some differences in the handling of the individual client matters (as discussed below), many similarities existed. In the vast majority of these client matters, the clients became dissatisfied with the apparent lack of performance of the Diener Law Firm and their affiliated loan modification companies. Often the client would then make repeated efforts to obtain a status update from the Diener Law Firm and their loan modification company. Typically, if the client reached a live person at the Diener Law Firm, they received a generic assurance that their file was being worked on. On many occasions, clients left messages or requested follow-up information. But such requests were regularly ignored by the Diener Law Firm. After weeks or months of little or no communication, the clients terminated the services of the Diener Law Firm and demanded a refund. The Diener Law Firm typically ignored or unilaterally denied these refund requests.

Between April and July 2009, the Diener Law Firm's residential loan business moved between four different locations. There is no indication in the record that respondent informed his clients of these office changes. In fact, several clients didn't learn that respondent had moved until they attempted to call or visit one of his prior offices.

On July 23, 2009, the Orange County District Attorney's Office executed a search warrant relating to the Diener Law Firm's residential loan modification business. Many of

respondent's residential loan modification files were seized by the Orange County District Attorney's Office. These files have not been returned to respondent.

B. Client Matters

The evidence before the court comes primarily by way of declaration. (Rules Proc. of State Bar, rule 465(a).) The Office of the Chief Trial Counsel and respondent raised numerous objections to the opposing side's declarations. These objections were ruled upon at the hearing on September 8, 2009. The declarations currently in evidence reflect the changes resulting from the court's evidentiary rulings.

The Office of the Chief Trial Counsel submitted 18 declarations in support of its application for respondent's involuntary inactive enrollment (application). Out of these 18 declarations, 14 are from individual clients, 2 are from mortgage brokers who referred clients to respondent, and the last 2 are from real estate broker David Arnold and Office of the Chief Trial Counsel investigator John Noonan.

Respondent submitted his own declaration and three others, supporting his opposition to the application. In his declaration, respondent directly addressed the majority of the client declarations presented by the Office of the Chief Trial Counsel.⁴ But respondent demonstrated little independent recollection of these clients' matters. Instead, much of his declaration was based on the electronic data contained in the Encompass software that HRS and the Diener Law Firm used to backup their loan-modification client files.⁵ The Encompass records, however, are cursory and incomplete. In addition, after considering the many discrepancies between the Encompass records and the declaratory and documentary evidence submitted by the Office of the

⁴ Respondent did not address the individual declarations of Sabina Akther, April Anderson, and Kylie Kavanagh.

⁵ As noted *ante*, the hard copies of respondent's client files were seized by the Orange County District Attorney on July 23, 2009.

Chief Trial Counsel, the court has determined that the Encompass records contain many factual inaccuracies. Accordingly, the court finds the Encompass records to be generally unreliable.

Respondent's second declaration is from Caroline Timoteo (Timoteo). Timoteo's declaration, much like respondent's, is based on the unreliable Encompass records. In addition, Timoteo's credibility is diminished by the fact that she is still employed by respondent, and has a vested interest in the outcome of this proceeding. Accordingly, the court finds that Timoteo's declaration lacks credibility.

Respondent's remaining two declarations are from his attorney, Ellen A. Pansky. These declarations relate to the judicial proceedings involving the California Attorney General's request for injunctive relief against respondent, among others. While the superior court documents attached to these two declarations have been admitted into evidence, the court finds that they add little to the present proceeding. For one thing, the superior court proceedings are based on their own unique rules and procedures. Further, the superior court has yet to conduct a hearing or rule on the Attorney General's request for a preliminary injunction against respondent. Consequently, respondent's superior court proceedings are of little value to the present proceeding.

1. The Sabina Akther Matter

In March 2009, Sabina Akther (Akther) resided in Corona, New York. On or about March 9, 2009, Akther called the Diener Law Firm in an effort to get her home interest rate lowered.⁶ A representative from the Diener Law Firm advised Akther that she could get her interest rate lowered and that they offered a 100% money back guarantee if her loan was not modified.

⁶ Akther located the Diener Law Firm through an internet search.

On March 17, 2009, Akther and her husband submitted a payment of \$1,895 to the Diener Law Firm via a bank account debit for advanced attorney's fees. Following that date, Akther contacted the Diener Law Firm on numerous occasions in an effort to learn the status of her loan modification. Akther never received further information regarding the status of her loan modification from the Diener Law Firm.

In or about mid-April 2009, Akther called and spoke to a representative of the Diener Law Firm. This representative told Akther that her lender would contact her directly to give her the details of the loan modification.

In late April 2009, Akther called her lender and learned that they had not received any telephone calls or other correspondence from the Diener Law Firm.

Between late April and early June 2009, Akther began calling the Diener Law Firm's toll free telephone number at least 15 times per week. Akther reached a live person approximately 40% of the times she called; however, they were never able to provide her with an update on the status of her loan modification. Approximately 60% of the times she called, Akther left messages on the voicemail system requesting an update on the status of her loan modification. No one from the Diener Law Firm ever returned any of these messages.

In early June 2009, Akther left at least six messages on the Diener Law Firm's voice message system requesting a full refund of the advanced fees she paid. Akther, however, never received a refund of any portion of the \$1,895 she paid in advanced fees.

Akther eventually learned that the office handling her case was no longer in business. Respondent constructively withdrew from representation of Akther by failing to communicate with her and failing to perform the services for which he was retained.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];⁷
- b. Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)⁸ [Failure to Perform with Competence];⁹
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees];¹⁰ and
- d. Rule 3-700(A)(2) [Improper Withdrawal from Employment].¹¹

2. The April Anderson Matter

In early 2009, April Anderson (Anderson) resided in Reno, Nevada. Anderson had fallen behind in her home loan payments and therefore sought the services of a home loan modification company.

In or about January 2009, Anderson was referred to the Diener Law Firm by the National Mortgage Counseling Group (NMCG). In January 2009, Anderson called the Diener Law Firm. A representative from the Diener Law Firm advised Anderson that they could help her modify her loan, and that they would refund 100% of the fee if they were unable to modify her loan.

On January 15, 2009, Anderson entered into written agreements with both the National Mortgage Counseling Group and the Diener Law Firm to provide loan modification services in

⁷ Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

⁸ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

⁹ Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

¹⁰ Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned.

¹¹ Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights.

exchange for an advanced fee of \$2,990. This agreement contained a paragraph stating, among other things, that if NMCG is unable to obtain modification of Anderson's residential loan then the Diener Law Firm will refund all funds Anderson paid to the Diener Law Firm.

On February 23, 2009, the Diener Law Firm withdrew \$2,990 from Anderson's checking account.

In March and April 2009, Anderson received at least 25 calls and voicemails from her lender seeking payment of the past-due loan. A representative from the Diener Law Firm told Anderson to sit tight and not to answer her lender's telephone calls because the Diener Law Firm was working on her loan modification.

On April 27, 2009, Anderson attempted to call the Diener Law Firm, but was told by the receptionist who answered the phone that the Diener Law Firm had closed, and that the Diener Law Firm had "dumped" its files onto another law firm.

In early May 2009, Anderson spoke to her lender. The lender told Anderson that the Diener Law Firm faxed them some pay stubs, but they never received any telephone calls or a loan modification proposal from the Diener Law Firm.

On May 19, 2009, Anderson received notice from her lender that the trustee set a sale date for her home of June 9, 2009. Anderson filed bankruptcy to stop the foreclosure, and has since hired another law firm to represent her to her lender.

Anderson did not receive a refund of any portion of the fees paid to Diener. Respondent constructively withdrew from representation of Anderson by failing to communicate with her regarding the closure of his office and failing to perform the services for which he was retained.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];
- b. Rule 3-110(A) [Failure to Perform with Competence];
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees]; and
- d. Rule 3-700(A)(2) [Improper Withdrawal from Employment].

3. The Connie Bush-Adu Matter

Connie Bush-Adu (Bush-Adu) resided in Stone Mountain, Georgia. In early 2009, Bush-Adu fell behind in her home loan payments and received a telephone solicitation from a company called Mortgage Modification Network (MMN).

The representative from MMN told Bush-Adu that she could get her payments lowered, and that if they couldn't, then they would refund the entire \$2,495 fee. MMN required that Bush-Adu make a down payment in the amount of \$1,395.

Bush-Adu signed a written contract with MMN on or about January 5, 2009. Although MMN's logo was prominently placed at the top of each page, the contract made no mention of MMN. Instead, the contract was between Anderson and a company identified as US Loan Mod Processing, a division of HRS.

At the request of the MMN representative, Bush-Adu purchased two money orders payable to the Diener Law Firm. These money orders totaled \$1,395. Bush-Adu made this payment on March 13, 2009.

In late March and early April 2009, Bush-Adu had several conversations with representatives from MMN. One of the MMN representatives informed Bush-Adu that they contacted her lender and were unable to obtain a loan modification. Bush-Adu therefore completed and submitted the Diener Law Firm's refund request form.

Bush-Adu did not receive a response to her refund request. Bush-Adu called MMN and the representative informed Bush-Adu that she had attempted to call respondent regarding Bush-

Adu's refund request, but that she had been unable to reach him. The MMN representative informed Bush-Adu that there was nothing MMN could do to get the refund. She suggested that Bush-Adu contact respondent directly, and provided Bush-Adu with respondent's cell phone number.

In early April 2009, Bush-Adu reached respondent on his cell phone. He did not know anything about her case and said he would look into it and get back to her. Respondent, however, did not get back to Bush-Adu. Therefore, she called him at least seven times in April 2009. She reached respondent approximately three times and during each of those conversations she requested a full refund of her advanced fees. When Bush-Adu reached respondent's voicemail she left him messages requesting a full refund.

On April 28, 2009, Bush-Adu faxed and mailed a letter to MMN and the Diener Law Firm requesting a full refund. Respondent did not refund Bush-Adu's \$1,395 fee for mortgage modification, and currently refuses to refund Bush-Adu's fee due to his assertion that Bush-Adu breached the client retainer agreement.

In April 2009, Bush-Adu was informed by her home loan lender that they had no records of any contact with the Diener Law Firm on her behalf. It is unknown, however, whether Bush-Adu's lender had records of any contact with HRS or MMN.

Bush-Adu was able to resolve the problem with her lender on her own in June 2009.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charge:

- a. Section 6068, subdivision (m) [Failure to Communicate].

4. The Manuel Galvan Matter

Manuel Galvan (Galvan) resided in La Puente, California. In late 2008, Galvan owned three properties. Each of these properties had a home loan that was two months in arrears.

Galvan sought the help of HRS. A representative at HRS informed Galvan that they worked with the Diener Law Firm, and that respondent would personally represent Galvan in negotiating loan modifications with the lenders. The HRS representative also told Galvan that respondent could obtain a loan modification on all his properties which would bring the loan accounts current and make the payments more affordable.

On December 9, 2008, Galvan hired HRS and the Diener Law Firm to obtain loan modifications on his three properties. On December 18, 2008, Galvan paid HRS \$3,750.

On or about March 2, 2009, Galvan was instructed by a representative of the Diener Law Firm to make an additional payment of \$1,540. The Diener Law Firm then debited that amount from Galvan's checking account.

In early April 2009, Galvan hadn't heard anything about his loan modifications. He attempted to call the Diener Law Firm, but received no response. He therefore went to the Diener Law Firm's office at 9150 Irvine Center Drive, Irvine, California. There he met with a representative of the Diener Law Firm who assured Galvan that the Diener Law Firm was working on his file and would get back to him.

But Galvan was still concerned about his loan modifications. He therefore called his lenders to check the status of his loan modifications. His lenders informed him that they had not been contacted by the Diener Law Firm or HRS.

From April to June 2009, Galvan called the Diener Law Firm at least once a week. If Galvan was able to reach someone, he was told everything was okay and that they were working on his file. On several occasions, Galvan left a message, but didn't receive a return call.

In early June 2009, Galvan discovered that respondent's office at 9150 Irvine Center Drive had closed. Galvan received no prior notification of the closure. Galvan obtained respondent's office and cell phone numbers. Galvan called these numbers but received no response.

Respondent has not responded to any of Galvan's inquiries about his loan modification and has not refunded any fees. Galvan therefore hired another company to assist him with his loan modifications.

By failing to communicate with Galvan, failing to perform any of the services for which he was retained, and failing to advise Galvan of the closure of his office, respondent constructively withdrew from representation of Galvan.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];
- b. Rule 3-110(A) [Failure to Perform with Competence];
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees]; and
- d. Rule 3-700(A)(2) [Improper Withdrawal from Employment].

5. The Evelyn Jimenez Matter

Evelyn Jimenez (Jimenez) resided in Chicago, Illinois. In early 2009, Jimenez was behind in her home loan payments and was facing foreclosure. After seeing a commercial on television, Jimenez called a toll-free number and was told that someone would soon call her to discuss loan modification options.

About an hour later, Jimenez received a call from an individual who identified himself as a representative from HRS and the Diener Law Firm. The representative told Jimenez that for an

up-front fee of \$2,495 they could assist her with loan modification, and that if they could not modify her loan, then the fee would be refunded.

On March 5, 2009, the Diener Law Firm debited \$2,495 from Jimenez's checking account.¹² Jimenez was also provided with an attorney-client fee agreement which she initialed and faxed back to the Diener Law Firm. This agreement contained a paragraph stating, among other things, that if HRS is unable to obtain modification of Jimenez's residential loan, then the Diener Law Firm will refund all funds Jimenez paid to the Diener Law Firm pursuant to this agreement.

Between mid-March and late April 2009, Jimenez called the Diener Law Firm at least once each day. Jimenez never reached a live person. Most of the time Jimenez left a voicemail requesting a status update on her loan modification. Jimenez never received a response to any of her voicemail messages.

In late April 2009, Jimenez called the Diener Law Firm and left at least one message requesting a full refund. Jimenez has received no response to her case status inquiries, and has received no refund of the advanced fees she paid.¹³

Jimenez is now working with her lender to resolve her past-due balance.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

¹² In respondent's declaration, he states that the Diener Law Firm was retained on or about March 26, 2009. The court finds this assertion is not credible considering that Jimenez's attorney-client fee agreement was signed on March 2, 2009, and her checking account was debited \$2,495 to the Diener Law Firm on March 5, 2009.

¹³ In respondent's declaration, he states that loan modification packets were ultimately sent on Jimenez's behalf on or about June 28, 2009. Respondent doesn't address his failure to return Jimenez's repeated voicemail messages and doesn't explain the gap in time between when respondent was actually retained and when Jimenez's loan modification packets were finally sent. Respondent also cannot say what, if any, resolution occurred in the Jimenez matter.

- a. Section 6068, subdivision (m) [Failure to Communicate]; and
- b. Rule 3-700(D)(2) [Failure to Refund Unearned Fees].

6. The Kylie Kavanagh Matter

Kylie Kavanagh (Kavanagh) resided in Imperial Beach, California. In November 2008, Kavanagh received a telephone call from a representative of NMCG. The NMCG representative told Kavanagh that they work with respondent, and that respondent would negotiate with her lender to achieve both a lower payment and principle reduction on her home mortgage.

Having received a layoff notice, Kavanagh agreed to hire NMCG and the Diener Law Firm. Kavanagh signed an attorney-client fee agreement with the Diener Law Firm on January 8, 2009. This agreement contained a paragraph stating, among other things, that if NMCG is unable to obtain modification of Kavanagh's residential loan, then the Diener Law Firm will refund all funds Kavanagh paid to the Diener Law Firm.

On January 23, 2009, the Diener Law Firm charged Kavanagh's credit card \$3,995, as an advanced fee.

By early April 2009, Kavanagh had received no information from NMCG, so she called to inquire about the status of her loan modification. A NMCG representative advised Kavanagh that the Diener Law Firm was negotiating with her lender and working on a loan modification.

Kavanagh grew suspicious and called her lender. Kavanagh was informed that NMCG had four conversations with her lender and then the file was closed. Kavanagh also learned that her lender had not had any contact with respondent.

Kavanagh sought a refund from NMCG, but they refused. She then found respondent's telephone number on the internet. In early May 2009, Kavanagh tried calling respondent directly several times. She left messages asking for a return call, asking for the status of her loan

modification, and asking for a refund of all fees. Kavanagh received no response from respondent, and respondent has not refunded any portion of her fee.

Respondent constructively withdrew from representation of Kavanagh by failing to communicate with her and failing to perform the services for which he was retained.

Kavanagh contacted her lender and was able to work out a loan modification on her own.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];
- b. Rule 3-110(A) [Failure to Perform with Competence];
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees]; and
- d. Rule 3-700(A)(2) [Improper Withdrawal from Employment].

7. The Marvin Charles Lefler Matter

Marvin Charles Lefler (Lefler) resided in Escondido, California. In early February 2009, Lefler contacted HRS regarding a home loan modification. Lefler learned that HRS was affiliated with the Diener Law Center. The HRS representative informed Lefler that the loan modification fee was 100% refundable if they “cannot modify the loan for any reason.”

On February 18, 2009, the Diener Law Firm withdrew \$2,595 from Lefler’s checking account.

From April 1 to May 1, 2009, Lefler attempted to contact someone at the Diener Law Firm, but his phone calls were never returned. On April 15, 2009, Lefler attempted to access the website for HRS. A message on HRS’s website stated that HRS was no longer in business, but that clients will continue to be represented by the Diener Law Firm.

Respondent did not to perform the loan modification services for which he was retained,¹⁴ and failed to refund any portion of Lefler's \$2,595 fee. Respondent constructively withdrew from representation of Lefler by failing to communicate with him and failing to perform the services for which he was retained.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];
- b. Rule 3-110(A) [Failure to Perform with Competence];
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees]; and
- d. Rule 3-700(A)(2) [Improper Withdrawal from Employment].

8. The Anabel Martinez Matter

Anabel Martinez (Martinez) resided in San Leandro, California. In February 2009, she and her husband fell behind in their home loan payments. Martinez contacted HRS. The HRS representative informed her that HRS worked in partnership with the Diener Law Firm. The HRS representative also told Martinez that respondent would get her loan modified or she would receive a full refund.

On February 1, 2009, Martinez and her husband signed an attorney-client fee agreement with the Diener Law Firm. This agreement contained a paragraph stating, among other things, that if HRS is unable to obtain modification of Martinez's residential loan, then the Diener Law Firm will refund all funds Martinez paid to the Diener Law Firm pursuant to this agreement.

¹⁴ Respondent's Encompass records reflect only that Lefler retained the Diener Law Firm on February 18, 2009, and that a client file was opened nearly a month and a half later, on March 30, 2009.

On February 19, 2009, the Diener Law Firm debited \$1,595 from Martinez's bank account.

On April 13, 2009, Martinez called HRS and no one answered the phone. Martinez went to the website and learned that HRS had closed and all HRS files were transferred to the Diener Law Firm.

From mid to late April 2009, Martinez and her husband attempted to call the Diener Law Firm at least 10 times each week. They were unable to reach a live person, so they left voicemails requesting either a status update or a full refund. Martinez and her husband never received a response.

In or about late April or early May 2009, Martinez stopped calling the Diener Law Firm because the phone number had been disconnected. Martinez's repeated unanswered requests for a refund constituted a termination of respondent's services.

In or about mid-April 2009, Martinez contacted her lender and resolved the problem on her own. After Martinez had several conversations with her bank, they credited her account for the amount that had been paid to the Diener Law Firm.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate]; and
- b. Rule 3-700(D)(2) [Failure to Refund Unearned Fees].

9. The Nadal Oris Matter

Nadal Oris (Oris) resided in Naples, Florida. On or about March 18, 2009, Oris, who was behind on his loan payments, contacted HRS. The HRS representative told Oris that respondent would be able to get his payment reduced.

Oris signed an attorney-client fee agreement. Oris was unable to pay HRS the entire fee of \$1,595, so they allowed him to make payments. On April 1, 2009, the Diener Law Firm debited \$500 from Oris' credit union account.

On or about April 14, 2009, Oris searched the internet and located several complaints against the Diener Law Firm and HRS. This caused Oris to cancel his authorization for the Diener Law Firm's second \$500 debit from his checking account. Oris called HRS a few times between April 15 and May 1, 2009, and was told that HRS would refund the \$500 that Oris paid to the Diener Law Firm. But Oris didn't receive the refund.

By canceling his second payment and seeking a refund, Oris effectively terminated the services of the Diener Law Firm.

In May 2009, Oris started calling the Diener Law Firm. Oris called the Diener Law Firm at least 100 times between May 1 and July 3, 2009. Oris left several messages for respondent, but he did not return any of Oris' calls.

According to respondent's declaration, he refunded Oris's \$500 sometime after August 11, 2009. Respondent failed to provide the court with a copy of the refund check or the date it was provided to Oris.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate]; and
- b. Rule 3-700(D)(2) [Failure to Timely Refund Unearned Fees].

10. The Gregory Overstreet Matter

Gregory Overstreet (Overstreet) resided in Theodore, Alabama. In early 2009, Overstreet and his wife fell behind in their home loan payments. On February 17, 2009, Overstreet entered

into an agreement with a company called EQI.¹⁵ EQI was to represent Overstreet in his loan modification.

Overstreet authorized EQI to debit a \$3,500 advanced fee from his checking account. But this fee was instead withdrawn from his checking account by the Diener Law Firm on February 26, 2009. While the relationship between respondent and EQI remains unclear, respondent acknowledges that he was retained to work on Overstreet's loan modification.

On April 21, 2009, Overstreet received an email from an EQI representative informing him that his loan modification file had been "entrusted" to the Diener Law Firm in February 2009. This email further advised Overstreet that customer support for the Diener Law Firm should be communicating with him as to the status of his file; but, if this is not the case, then he should contact "[his] attorney" - respondent.

From April 21 to May 29, 2009, Overstreet called either the Diener Law Firm or respondent's cell phone at least three times each week. Overstreet was never able to speak to a live person, but left a voice message every time he called. In these voice messages, Overstreet requested either a status update on the loan modification or a full refund. In addition, Overstreet emailed respondent's customer support email address approximately once a week requesting a status update. The Diener Law Firm never responded to any of Overstreet's voice messages or emails.

In or about June 2009, an EQI representative called Overstreet and advised him that his case was transferred to another company that would help him modify his loan. Respondent has not refunded any of the \$3,500 fee.

¹⁵ There is no indication in the record what, if anything, the initials EQI stand for.

The Diener Law Firm did not perform any meaningful work on Overstreet's loan modification. Respondent, however, now claims that he is "ready and willing to complete the work on Mr. Overstreet's matter."

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];
- b. Rule 3-110(A) [Failure to Perform with Competence]; and
- c. Rule 3-700(D)(2) [Failure to Refund Unearned Fees].

11. The Peggy Simeroth Matter

Peggy Simeroth (Simeroth) resided in Clipper Mills, California. In early February 2009, Simeroth watched a television show about loan modifications. Following the show, Simeroth called the toll-free number. Shortly thereafter, she received a call from a HRS representative. The HRS representative informed Simeroth that HRS worked with the Diener Law Firm, and that if they were unable to obtain a loan modification, then Simeroth would receive a full refund.

On February 26 and March 13, 2009, Simeroth paid a total of \$2,000 to the Diener Law Firm. After making these payments, Simeroth received no further information regarding the status of her loan modification.

On May 11, 2009, Simeroth called HRS and learned that it was no longer in operation. That same day, Simeroth was able to contact respondent on his cell phone. Respondent told Simeroth that he knew nothing about her case, but agreed to return her call with an update. Respondent did not call Simeroth back as promised.

In respondent's declaration he states that Simeroth's file was submitted and an HRS staff member called Simeroth's lender on or about April 21, 2009.¹⁶ Respondent does not explain what, if any, work was performed on Simeroth's matter following April 21, 2009. Respondent speculates that Simeroth's loan modification was still pending more than three months later, on July 23, 2009.

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charge:

- a. Section 6068, subdivision (m) [Failure to Communicate].

12. The Tony Wood Matter

Tony Wood (Wood) resided in Graham, North Carolina. In early 2009, Wood saw a television advertisement for HRS and the Diener Law Firm. Wood hired HRS to modify loans on two of his properties.

On March 2, 2009, Wood signed an attorney-client fee agreement with the Diener Law Firm. This agreement contained a paragraph stating, among other things, that if HRS is unable to obtain modification of Wood's residential loan, then the Diener Law Firm will refund all funds Wood paid to the Diener Law Firm pursuant to this agreement.

On March 2, 2009, Wood wire-transferred \$1,600 to the Diener Law Firm. On March 19, 2009, Wood wire-transferred an additional \$1,590 to the Diener Law Firm.

Approximately three weeks after hiring HRS, Wood began calling to get the status of his modification. Wood was initially told by a HRS representative that his matter was being worked on. Wood continued to call and email HRS. When he was able to reach someone, they would

¹⁶ Respondent's declaration contains a typographical error listing this date as February 21, 2009.

tell him that they were working on his case. Eventually, in April 2009, the phone number for HRS was disconnected.

Wood therefore began calling the Diener Law Firm. Between the end of April and June 11, 2009, Wood called and asked to speak with respondent approximately 20 to 25 times. Respondent did not answer or return any of Wood's phone calls.

Wood was informed by his lenders that they never received a modification proposal from HRS or the Diener Law Firm. On June 3, 2009, Wood sent a letter to respondent requesting a refund. Respondent did not respond to Wood's letter.¹⁷

Legal Conclusions

Pursuant to section 6007, subdivision (c)(2)(C), the court finds that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail as to the following charges:

- a. Section 6068, subdivision (m) [Failure to Communicate];and
- b. Rule 3-700(D)(2) [Failure to Refund Unearned Fees].

13. The Tim Preisser Matter

Tim Preisser (Preisser) resided in Mount Vernon, Ohio. On January 26, 2009, Preisser and his wife saw a television commercial for loan modification services. Preisser called the toll-free number and spoke to a HRS representative. The HRS representative informed Preisser that respondent would be negotiating Preisser's loan modification.

Preisser hired HRS and the Diener Law Firm to handle their loan modification. On January 26, 2009, Preisser signed an attorney-client fee agreement with the Diener Law Firm. This agreement contained a paragraph stating, among other things, that if HRS is unable to obtain modification of Preisser's residential loan, then the Diener Law Firm will refund all funds

¹⁷ In his declaration, respondent states that his staff called Wood's lender on June 26, 2009, and was informed that Mr. Wood had unilaterally instructed his lender to no longer work with the Diener Law Firm. This date, however, is more than three weeks after Wood sent a letter to respondent requesting a refund.

Preisser paid to the Diener Law Firm pursuant to this agreement. Preisser paid the Diener Law Firm a total of \$1,595.

On March 3, 2009, Preisser's lender received a modification package from HRS. On March 31, 2009, Preisser received a loan modification from the lender holding his second mortgage. Preisser's payment increased because his lender added his arrears to the loan. Based on his conversation with a HRS representative, Preisser expected that his second mortgage would instead be eliminated.

On March 31, 2009, Preisser called and spoke to respondent. Respondent told Preisser that second mortgages don't usually get modified, and that Preisser was fortunate to have the balance added to the loan.

On April 2, 2009, Preisser faxed a refund request to HRS and the Diener Law Firm. On April 6, 2009, Preisser called and spoke to respondent. Respondent told Preisser that HRS performed substantial work and that Preisser would not receive a refund.

Legal Conclusions

The evidence currently before the court establishes little more than a fee dispute. Respondent and HRS did perform some services for Preisser, however, these services did not meet Preisser's expectations. Accordingly, the court finds there is not a reasonable probability that the Office of the Chief Trial Counsel will prevail on any disciplinary charges in the Preisser matter.

14. The William Youse Matter

William Youse (Youse) resided in Sun City, California. On February 6, 2009, Youse hired the Diener Law Firm to represent him in a loan modification. On March 10, 2009, Youse paid the Diener Law Firm \$1,595.

As of April 7, 2009, Youse's lender had not yet received any loan modification documents from the Diener Law Firm other than Youse's authorization for the Diener Law Firm to negotiate on his behalf.

On April 27, 2009, Youse faxed a letter to HRS and the Diener Law Firm demanding a refund of the fees Youse paid. That same day, the Diener Law Firm contacted Youse and told him that his file had already been submitted to his lender. Youse agreed to wait for the decision of his lender.

According to respondent's declaration, Youse's loan modification was approved by his lender on August 5, 2009. Pursuant to Youse's lender, Youse was notified of his receipt of the loan modification proposal and has already completed his first payment.

Legal Conclusions

Based on the evidence currently before the court, there is not a reasonable probability that the Office of the Chief Trial Counsel will prevail on any disciplinary charges in the Youse matter.

15. The Caroline Lee and Cathy Yi Matters

Caroline Lee (Lee) and Cathy Yi (Yi) were Las Vegas mortgage brokers. Lee and Yi referred several clients to HRS.¹⁸ In or about January 2009, Lee and Yi requested that the Diener Law Firm provide refunds to their clients. After receiving no response, Lee and Yi traveled to the offices of the Diener Law Firm in Irvine, California. Lee and Yi confronted respondent and the parties had a verbal altercation. On behalf of their clients, Lee and Yi demanded that respondent produce an accounting and evidence of any work performed on behalf of their clients.

¹⁸ The evidence indicates that Lee and Yi entered into a consulting agreement with HRS. Respondent's knowledge of and involvement in this consulting agreement is unclear. The Office of the Chief Trial Counsel does not allege, and the court does not find, that respondent engaged in an improper financial arrangement with non-lawyers.

It is not clear from the record what work was performed for Lee's and Yi's clients, or if any of these clients ever received an accounting.

Legal Conclusions

The Office of the Chief Trial Counsel did not provide the court with declarations from any of Lee's and Yi's clients. The court finds the evidence provided in Lee's and Yi's declarations and supporting documents to be insufficient to establish that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail on any disciplinary charges in the Lee and Yi matters.

4. DISCUSSION

As mentioned earlier, section 6007, subdivision (c)(2) lays out three factors for determining whether an attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or the public.

The first factor is whether the attorney has caused or is causing substantial harm to his clients or the public. Here, respondent promised to help troubled homeowners - many of whom were in arrears or on the brink of foreclosure - modify their home loans and maintain financial stability. Instead, he took their precious scarce money and time and offered little to nothing in return. In fact, due to their loss of money and time, many of respondent's clients ended up in a worse position than they were when they originally turned to respondent for help. Accordingly, the court finds that the Office of the Chief Trial Counsel has established, by clear and convincing evidence, that respondent has caused substantial harm to his clients.

The second factor is whether the attorney's clients or the public are likely to suffer greater injury from the denial of the involuntary inactive enrollment than the attorney is likely to suffer if it is granted, or whether there is a reasonable likelihood that the harm will reoccur or continue. The evidence before the court demonstrates that the harm respondent caused his

clients continues to this day. Despite the present proceedings, there is no indication in the record that respondent has made any effort to refund his unearned fees in the vast majority of the aforementioned cases.

In addition, when the evidence establishes a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shifts to respondent to demonstrate that there is no reasonable likelihood that the harm will reoccur or continue. (Section 6007, subdivision (c)(2)(B).) Here, respondent has engaged in a pattern of client neglect including failing to perform, failing to communicate, failing to refund unearned fees and improperly withdrawing from representation in 12 separate client matters. Respondent's misconduct began in December 2008 and continues to this day.

Therefore, the burden shifts to respondent to establish that there is no reasonable likelihood that the present harm will reoccur or continue. To this extent, the court finds respondent has not met this burden. While he has made some self-serving assertions that he is willing to resume working on various clients' files, there is little indication in the record that respondent has actually sought to effectuate completion of the vast majority of the work he was retained to perform. In addition, respondent's assertion that he will no longer accept loan modification clients does not alleviate the threat of future harm. For his assertion is little more than a promise; and, as the evidence before the court indicates, respondent has a track record of not keeping his promises. Accordingly, the court finds that: (1) respondent has not met his burden; and (2) there is a reasonable likelihood that respondent's harm will reoccur or continue.

The third factor is whether there is a reasonable probability that the Office of the Chief Trial Counsel will prevail on the merits of the underlying disciplinary matter. As noted *ante*, the court has found that there is a reasonable probability that the Office of the Chief Trial Counsel will prevail on over 30 counts in 12 client matters.

Hence, the court finds that each of the factors prescribed by Business and Professions Code section 6007, subdivision (c)(2) has been established by clear and convincing evidence.¹⁹ The court concludes that respondent's conduct poses a substantial threat of harm to his clients and the public. Consequently, he should be enrolled involuntarily inactive.

5. ORDER

Accordingly, **IT IS ORDERED** that respondent Christopher Lee Diener be enrolled as an inactive member of the State Bar of California, pursuant to Business and Professions Code section 6007, subdivision (c)(1) effective three days after service of this order by mail. (Rules Proc. of State Bar, rule 466(b).) State Bar Court staff is directed to give written notice of this order to respondent and to the Clerk of the Supreme Court of California. (Bus. & Prof. Code, § 6081.)

IT IS FURTHER ORDERED that:

1. Within 30 days of the effective date of the involuntary inactive enrollment, respondent must:

- a. Notify all clients being represented in pending matters and any co-counsel of his involuntary inactive enrollment and his consequent immediate disqualification to act as an attorney and, in the absence of co-counsel, notify the clients to seek legal advice elsewhere, calling attention to the urgency in seeking the substitution of another attorney or attorneys in his place;
- b. Deliver to all clients being represented in pending matters any papers or other property to which the clients are entitled, or notify the clients and any co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to the urgency of obtaining the papers or other property;

¹⁹ As previously noted, respondent was given proper notice of this proceeding pursuant to rule 461 of the Rules of Procedure. (See Rules Proc. of State Bar, rule 466(b)(1).)

- c. Refund any part of any fees paid in advance that have not been earned; and
- d. Notify opposing counsel in pending matters, or in the absence of counsel, the adverse parties, of his involuntary inactive enrollment, and file a copy of the notice with the court, agency or tribunal before which the matter is pending for inclusion in the respective file or files;

2. All notices required to be given by paragraph 1 must be given by registered or certified mail, return receipt requested, and must contain respondent's current State Bar membership records address where communications may thereafter be directed to him;

3. Within 40 days of the effective date of the involuntary inactive enrollment, respondent must file with the Clerk of the State Bar Court an affidavit showing that he has fully complied with the provisions of paragraphs 1 and 2 of this order. The affidavit must also contain respondent's current State Bar membership records address where communications may thereafter be directed to him; and

4. Respondent must keep and maintain records of the various steps taken by him in compliance with this order so that, upon any petition for termination of inactive enrollment, proof of compliance with this order will be available for receipt into evidence. Respondent is cautioned that failure to comply with the provisions of paragraphs 1 - 4 of this order may constitute a ground for denying his petition for termination of inactive enrollment or reinstatement.

Dated: October _____, 2009

RICHARD A. HONN
Judge of the State Bar Court