

FILED JANUARY 24, 2012

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of ) Case Nos.: **10-O-05171-RAP**  
) **(10-O-05585; 10-O-06472;**  
) **10-O-07710; 10-O-10241;**  
**SWAZI ELKANZI TAYLOR,** ) **10-O-11186; 11-O-10610)**  
)  
**Member No. 237093,** ) **DECISION**  
)  
)  
A Member of the State Bar. )

**I. INTRODUCTION**

In this contested, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges respondent SWAZI ELKANZI TAYLOR with a total of twenty-six counts of misconduct in seven separate matters in which respondent represented homeowners seeking modifications of their home mortgage loans or to refinance their homes.<sup>1</sup>

The State Bar is represented by Deputy Trial Counsel Riza Sitton. Respondent is represented by Attorney Kevin Geary.

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<sup>1</sup> Originally, in the notice of disciplinary charges (NDC), the State Bar charged respondent with twenty-seven counts of misconduct in eight separate client matters. However, on the motion of the State Bar at the start of trial, the court dismissed case number 10-O-08992 without prejudice in the interest of justice. Former case number 10-O-08992 contained one count of misconduct (i.e., count number twenty-seven in the NDC) and involved a single client matter.

For the reasons set forth *post*, the court finds respondent culpable on 17 of the 26 counts of charged misconduct. Having considered the facts and the law, the court will recommend, among other things, that respondent be placed on two years' stayed suspension and three years' probation on conditions, including a six-month suspension.

## **II. PROCEDURAL HISTORY**

The State Bar initiated this proceeding by filing the NDC against respondent on May 26, 2011. Thereafter, respondent filed a response to the NDC on June 20, 2011.

A 16-day trial was held on September 26 through 30; October 3, 4, 5, 6, 11, 12, 17, 20, 21, and 26; and November 2, 2011. The court took the case under submission for decision at the end of trial on November 2, 2011.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on June 1, 2005. Respondent has been a member of the State Bar of California since that time.

### **B. Charged Misconduct**

#### **Overview**

Since his admission in 2005, respondent has practiced primarily real estate law except for a year in which respondent worked for a criminal defense firm.

In about 2008, respondent started his own practice, concentrating in the area of real estate, including home mortgage loan modifications. Eventually, he formed and was in charge of a firm known as Taylor Mortgage Lawyers (TML), which was comprised of a small number of lawyers, case managers, and administrative staff.

In the course of doing business, respondent (and TML) entered into a business relationship with the web-based company LowerMyBills.com. According to the record in the

present State Bar Court disciplinary proceeding, someone seeking a modification of a home mortgage loan or a lower monthly house payment can obtain relevant information by going to one of LowerMyBills.com's websites and entering his or her personal information (e.g., his or her name, address, telephone number, e-mail address, etc.) and mortgage loan information (e.g., lender's name, outstanding loan balance, interest rate, past due amounts, current amount owed, taxes, etc.). After the party enters the requested information, a message pops up on the party's computer screen stating that a real-estate professional from LowerMyBills.com will contact the party with information.

After a party enters the requested information, LowerMyBills.com sends the information by e-mail to a mortgage consultant or attorney with whom LowerMyBills.com has a relationship. When LowerMyBills.com sent respondent a party's information, respondent paid LowerMyBills.com a referral fee of about \$2. Each of the complaining witnesses in the present State Bar Court disciplinary proceeding was referred to respondent by LowerMyBills.com.<sup>2</sup> In addition, each of the complaining witnesses was seeking either a home-mortgage-loan modification or to refinance his or her home mortgage loan.

When respondent received a referral from LowerMyBills.com, he would review the party's information and evaluate the potential client's needs to determine if TML could assist the potential client and then forward the potential client's information to one of TML's case managers for handling. Soon thereafter, the case manager would send an introductory e-mail to the party and place telephone calls to the party in an attempt to retain the party as a TML client.<sup>3</sup>

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<sup>2</sup> Some of the complaining witnesses in this proceeding could not recall LowerMyBills.com's full/exact name.

<sup>3</sup> One TML case manager considered the signing-up of a client to be a sale for which he was allegedly paid a commission. However, no other evidence regarding commissions was presented and there is no clear and convincing evidence establishing that case managers were paid commissions.

The case manager's e-mail also directed the party to TML's website, which, among other things, informed the potential client of a free consultation.

During discussions with the potential clients, either by e-mail or telephone, the TML case managers collected various personal information from the potential client and details regarding the potential client's home-mortgage-loan problem. Of course, because each of the complaining witnesses in this proceeding was referred to TML by LowerMyBills.com, the case managers were already in possession of most of that information. The case manager then took all the collected information back to respondent, and respondent told the case managers to accept the cases and how much to charge each client. Thereafter, the case managers contacted the potential clients and informed them of respondent's (i.e., TML's) decisions.

#### **California Senate Bill Number 94**

Before October 11, 2009, if a prospective client seeking home-mortgage-loan-modification services agreed to respondent's fee, respondent routinely required the client pay the entire fee in advance before respondent performed any service for the client. Presumably, nothing proscribed such a practice before October 11, 2009.

On October 11, 2009, California Senate Bill Number 94 (2009 Reg. Sess.) (SB 94)<sup>4</sup> became effective. One relevant portion of SB 94 prohibits those who provide home-mortgage-loan-modification services for a profit, such as respondent (and TML), from negotiating, arranging, or otherwise offering to perform such modifications services for borrowers/mortgagors and demanding, charging, collecting, or receiving any compensation for such services before fully performing each and every service that was contracted for or

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<sup>4</sup> SB 94 is now codified at Civil Code, sections 2944.6 and 2944.7

represented to be performed.<sup>5</sup> Thus, after October 11, 2009, respondent (and TML) could no longer lawfully charge, collect, or accept an advanced fee or any other form of compensation for performing any home-mortgage-loan-modification services for borrowers/mortgagors until after respondent (or TML) had performed *all* of the agreed upon or represented services.

Without question, respondent was required to evaluate and alter his business model to reflect the changes mandated by SB 94. Respondent claims to have contacted many sources -- including the State Bar's Ethics Hotline, various legislative offices, and other members of the legal community who also perform home-mortgage-loan-modification services -- to determine the effect of SB 94 on his practice.<sup>6</sup> Moreover, respondent admits that, around October 2009, he learned, from a warning published on the State Bar's website, that the State Bar interprets SB 94 as prohibiting an attorney from collecting or accepting any compensation for representing borrowers/mortgagors in home-mortgage-loan-modification matters until after the attorney had

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<sup>5</sup> The full text of section 2944.7, subdivision (a) states as follows:

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

- (1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.
- (2) Take any wage assignment, any lien of any type on real or personal property, or other security to secure the payment of compensation.
- (3) Take any power of attorney from the borrower for any purpose.

<sup>6</sup> Respondent asserts that the State Bar's Ethics Hotline gave him contradictory information on the subject.

performed *all* of the agreed upon services.<sup>7</sup> Nonetheless and notwithstanding the plain language to the contrary in SB 94 (Civ. Code, § 2944.7, subd. (a)(1); footnote 5, *ante*), respondent purportedly received advice from other home-mortgage-loan-modification attorneys that he could “unbundle” the legal services he provides to his home-mortgage-loan-modification clients and then charge and collect a fee for each “unbundled” service as soon as it was completed without violating SB 94.

In most of the seven home-mortgage-loan matters that are the subject of this disciplinary proceeding, respondent performed and then charged and collected legal fees for the following two services, which respondent claims are “unbundled” services: (1) preparation of a financial analysis report; and (2) preparation of a lender package.

#### **Financial Analysis Reports**

At or near the inception of his representation in the seven client matters that are the subject of this proceeding, respondent charged the clients’ \$1,800 or more, depending on the complexity of the case, for preparation of what respondent refers to as a “financial analysis report.” The financial analysis reports consist of a single sheet of paper. The top-half of the paper contains the client’s personal and home mortgage loan information. Almost all of the information contained in the top-half of each report was either supplied to TML by LowerMyBills.com or obtained from the clients by various TML case managers during the first few client interviews. In some cases, respondent searched various websites to determine the correct property taxes and title information on a property. However, almost all the information contained in the top half of the report was obtained directly from the client. The information was either orally given to a case manager or sent to a case manager by e-mail by the client. The case

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<sup>7</sup> Of course, the State Bar's interpretation of SB 94 is not binding on either this court or the Supreme Court.

manager would write down most of the needed information. There is little or no analysis to be performed by the case manager or respondent in preparation of the top half of the report.

The bottom half of the report lists difference interest rates, loan amounts, and the income levels needed to obtain a home loan modification at a specific interest rate. The listed interest rates vary by a point, from 2 percent to 5 percent. There is no information given for any interest rate between one point and 2½ percent. Based on the financial analysis report, a client would have to guess what income level was needed to qualify for a loan at 2½ percent. Furthermore, anyone with access to the internet can determine the cost of a mortgage loan at a particular interest rate and amount of the loan simply by using a website's mortgage calculator.

Lastly, the financial analysis report also lists the amount of income needed to qualify for a loan at a specific interest rate and loan amount. Based on government requirements and bank requirements in home loan modification matters, a borrower's monthly mortgage payment should be about 31 percent of his or her monthly income. According to respondent, this information is not available on any internet site, other than perhaps a federal government website. In addition, respondent claims that the 31percent amount listed in the financial analysis reports that TML prepares for its clients is a number he specially prepares for each client, based on his experience and personal knowledge of home-loan-modification practices, and not based on an exact 31percent amount. Respondent, however, fails to explain how a simple computation of 31 percent of a client's income is an analysis.

Furthermore, according to respondent, the financial analysis report provides a client with a "snapshot" of his or her financial condition at that time related to a proposed home loan modification. This snapshot can be used by the client to determine if they want to proceed with a home-loan modification.

All but one witness in this matter received the financial analysis report by U.S. mail or e-mail without any discussion or explanation information in the report by a TML attorney or case manager.

Respondent and one TML case manager testified that after gathering a client's information, it took between 15 to 30 minutes to prepare the financial analysis report. The top part of the report was filled in on the computer with the client's personal information. Previously, respondent had an office employee prepare an Excel spreadsheet on the computer with the different interest rates, loan amounts, and income needed to qualify for the loan. Once the top half of the report had been entered into the computer, the person preparing the report would hit a certain key and the bottom half of the report would appear instantly. The bottom half of the report was virtually identical in every report.

Respondent argues that it took longer than 15 to 30 minutes to prepare a financial analysis report since the case manager or attorney had to obtain the client's personal information, which could be time consuming, and on occasion some data had to be obtained from internet data bases. The court finds this argument unconvincing and without merit.

Almost all, if not all, of the personal information found in the top half of a financial analysis report was obtained by the case manager at the beginning of the intake process to determine if a respondent is willing to accept the case. The personal information is basic information any attorney would need to know when handling a home-loan-modification matter, financial analysis report or not. In essence, respondent is repackaging the personal information obtained from a client in the initial client interview process, placing the repackaged information in a report, and then billing the client for information already known to the client. Complete the bottom half of the report with a touch of a computer key and a financial analysis report is prepared, for a fee of at least \$1,800.

Clearly, the fee for preparation of the financial analysis report is disproportion to its value to the client; there are no novel or difficult questions of law involved in the report's preparation; respondent's acceptance of employment in the matter did not preclude him from other employment; the results obtained were of no real value to the clients; the clients had no prior relationship with respondent; and, at the time respondent was retained he had been practicing law for about four years and had no reputation in the legal field of home-mortgage-loan modification. Clearly, by charging between \$1,800 to \$2,000 for the preparation of the financial analysis reports, respondent charged an unconscionable fee.

After a potential client agreed to the legal fee for services as quoted by the case manager, and before the financial analysis report is prepared, the case manager would inquire as to how the client would pay for the services. All the witnesses in this matter paid by credit card. The case manager would obtain the client's credit card number, the type of credit card, the expiration date, and the CVV number on the back of the credit card. The CVV card number is required for vendors who forward a charge on a credit card without an impression of the card or an electronic swipe of the card most of the time. This event occurred when the client agreed to respondent's fee and before the client received a copy of respondent's retainer agreement.

In all but one of the cases in this matter, the case manager would quote a fee (1) for the preparation of the financial analysis report and (2) for preparation of a demand package to be submitted to the client's mortgage lender or lenders. The case manager would usually explain to the client that the client's credit card would be credited only when the work agreed upon in each step was completed. In other words, once the financial analysis report was prepared, respondent would place a charge on the client's credit card company. Respondent did not attempt to contact any of the witnesses in this matter before placing a charge on their credit card for the preparation of the financial analysis report.

Respondent's testimony concerning who prepared the financial analysis reports was contradictory. Initially, respondent testified that only he or another TML attorney was permitted to prepare the reports. However, after a TML case manager revealed that he prepared financial analysis reports for review by an attorney, respondent testified that he or another TML attorney either prepared the reports or reviewed the reports prepared by a case manager.

In some cases, within hours of respondent receiving a client's credit card information, TML would send an e-mail to the client attaching a copy of the report, a copy of TML's retainer agreement, and other documents and then place a charge on the client's credit card for the preparation of the financial analysis report.

The State Bar alleges that respondent appropriated client funds under false pretenses by obtaining a client's credit card information and advising the clients that such information is required before TML would begin services, and assured the client that fees would not be withdrawn from the account until a service had been completed as specified in the employment agreement, and then thereafter withdrawing fees prior to any service being performed.

The court finds that when the clients gave TML's case managers their credit card information they were aware that TML would be preparing a financial analysis report and that they would be billed on their credit card for the service. Although the record indicates contradictory testimony from clients and case managers concerning this issue, the court finds that there is no clear and convincing evidence to support a finding of culpability.

In addition, the State Bar alleges that respondent misrepresented a material term of a contract by informing the clients during the negotiations of the employment agreements that each installment of fees would be collected only after a service has been completed as specified in the written agreement, and then collected a fee prior to any service being performed for the client.

Again, the court finds that during the negotiation of the employment agreement the clients were aware that TML would be preparing a financial analysis report and the client would be billed on their credit card for the service. Although the record indicates contradictory testimony from clients and case managers concerning this issue, the court finds that there is no clear and convincing evidence to support a finding of culpability.

The court finds there is no clear and convincing evidence that respondent or TML informed clients that they needed the client's credit card number or bank account number and authorization number to electronically withdraw respondent's fees before TML would begin services. Although the record indicates contradictory testimony from clients and case managers concerning this issue, the court finds that there is no clear and convincing evidence to support a finding of culpability.

The court finds that, by charging and collecting legal fees for preparation of a financial analysis report prior to fully performing each and every service respondent had contracted to perform or represented that he would perform, respondent willfully violated Civil Code Section 2944.7 and Business and Professions Code section 6106.3.

#### **Respondent's Retainer Agreement**

Respondent's retainer agreement (retainer) is a six-page document detailing the scope of representation to a client by respondent.

Civil Code Section 2944.6, subdivision (a) provides that any person who performs any home-mortgage-loan-modification services for borrowers/mortgagors for a fee or other compensation must provide the following notice to a borrower/mortgagor *as a separate statement in not less than 14-point bold type before entering into any fee agreement with the borrower:*

**It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your**

**mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting [www.hud.gov](http://www.hud.gov).<sup>8</sup>**

Instead of properly giving the required notice in a separate statement in 14-point bold type in accordance with the clear and plain language of Civil Code Section 2944.6, subdivision (a), respondent placed the required notice on the second page of his retainer. Also, on page 2 of the retainer, under section 3, respondent lists the legal services to be provided; the total amount of the retainer; and the payment schedule. The payment schedule in five of the seven client matters in this proceeding consisted of two parts: (1) financial analysis report; and (2) preparation of lender package. In two matters, the payment schedule consisted of four parts: (1) financial analysis report; (2) preparation of lender package; (3) negotiator/committee review; and (4) lender plan. The cost for each listed service is listed under the service heading.

Page 6 of the retainer is divided into a top-half and bottom-half. The top-half of page 6 lists the payment details, included type of payment, i.e. check, Visa, MasterCard, AMEX, card number; expiration date; signature of policy holder. Also listed is a section for additional services, usually preparation of lender package and the cost for the service.

Starting in the middle of page 6 and enclosed by black lines is the following statement: “this retainer relationship will not commence until the retainer is signed and accepted by ATTORNEY.” Directly under this section and continuing to the bottom of the page are the signatures lines.

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<sup>8</sup> This quote from Civil Code section 2944.6, subdivision (a) is in 14-point bold type.

TML case managers did not send a copy of the retainer to a client until after the client had indicated that he or she was retaining respondent. The case manager would then obtain the client's credit card information. After a financial analysis report was promptly prepared, the case manager would send the retainer to the client by e-mail with the financial analysis report and various other documents. In other words, the clients were not given a copy of the retainer agreement until after they had retained TML to represent them and had given TML their credit card information. In some cases, respondent had already charged the client's credit card for the preparation of the financial analysis report before the client received a copy of the retainer.

Respondent argues that placing the disclosure mandated by Civil Code Section 2944.6, subdivision (a) on page 2 of his retainer meets the statute's requirement of informing the client by "separate statement." In addition, respondent argues that by placing the mandated disclosure on TML's website and advising clients to review the website meets the statute's requirement of informing a client by "separate statement." Respondent's arguments are meritless.

Often times, respondent (and TML) entered into an attorney-client relationship with his clients before sending them a copy of his retainer agreement. Respondent admits that an attorney-client relationship was formed when one of TML's case managers and a prospective client orally agreed to the representation, and the case manager accepted the client's credit card information. Because many, if not all, of respondent's clients did not receive a copy of respondent's retainer agreement before the formation of the attorney-client relationship, it is clear that placing the required disclosure on page 2 did not meet the requirements in Civil Code section 2944.6, subdivision (a).

Furthermore, the statute mandates that the attorney provide a separate statement to the potential client, not placing a separate statement on a website. Moreover, the e-mails TML sent to its clients inviting them to review TML's website did not specifically inform the client that a

separate statement mandated by law is available on TML’s website for their review. Clients would have to search TML’s entire website and then, if they even found the statement, would have to decide for themselves if the separate statement was relevant.

The court finds that respondent’s calculated business decision to place the mandated separate statement on page 2 of his retainer agreement and on his website fall far short of meeting clear and unequivocal requirements of the statute.

**Case Number 10-O-05585 – The Castro Matter – Counts One through Four**

On about October 23, 2009, Roseane Castro retained TML to provide home-mortgage-loan-modification services with respect to her home. Around the same time, respondent charged Castro a flat fee of about \$3,500 to be collected in four installments, each of which would be collected when respondent (or TML) completed four alleged “unbundled” services. The “unbundled” services to be performed and the amount of fees to be collected when each service is completed are as follows”

Financial Analysis:	\$1,750
Preparation of Lender Package: <sup>9</sup>	750
Negotiator/Committee Review:	500
Lender Plan	<u>500</u>
<u>Total</u>	<u>\$3,500</u>

In addition, on about October 23, 2009, TML case manager Luis Ugriles provided Castro with a written retainer agreement. That agreement expressly provides that the retainer relationship will not begin until the agreement is accepted and signed by the attorney. Even though Castro signed the agreement on about October 25, 2009, respondent did not sign it until the next day (i.e., October 26, 2009).

On October 23, 2009, TML electronically drafted \$1,750 on Castro’s credit card as payment for the preparation and completion of a financial analysis report for Castro. Castro’s

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<sup>9</sup> Respondent uses the terms “lender demand package” and “demand package” interchangeably with the term “lender package.”

bank statement October 2009, however, shows that the \$1,750 payment was not posted to Castro's account (i.e., withdrawn) until October 26, 2009. On October 26, 2009, TML prepared Castro's financial analysis report using the detailed information that Castro provided to case manager Urgiles. On October 26, 2009, TML sent a copy of the financial analysis report to Castro by e-mail, which Castro received that same day. At the time, Castro had no problem with TML taking the \$1,750 from her credit card.

After speaking with case manager Urgiles and reviewing the documents TML sent her, Castro had confidence in TML and believed that TML would aggressively represent her. Over the next few weeks, Castro was in contact with Urgiles and sent various additional documents to TML. Then, the communication suddenly stopped. When Castro contacted Urgiles to inquire about the status of her case, Urgiles told her that the lender demand package had been prepared and sent to her lender. Castro was upset because she was not given the opportunity to review the package before it was sent to the lender, but was nonetheless glad that it had been sent. Urgiles sent Castro a copy of the demand package, which was dated November 6, 2009. Urgiles informed Castro that they would have to wait for the bank to make a decision.

After waiting for a few weeks without being informed of a bank decision, Castro attempted to contact Urgiles, but learned that Urgiles was no longer employed by respondent/TML.

When Castro contacted her home mortgage lender, she was told that the lender could not process her demand package because it did not have a legible copy of her pay stubs. The next day, Castro telephoned TML and spoke with the TML attorney who had prepared her demand package. Castro told the attorney that new, legible copies of her pay stubs had to be sent to the lender. The attorney agreed to send legible copies of Castro's pay stubs to the lender.

On November 21, 2009, TML withdrew \$250 from Castro's credit card with Castro's permission. Then, on about November 23, 2009, TML withdrew \$500 more from Castro's credit card with Castro's permission. The \$250 and \$500 withdrawals were in payment for preparation of the demand package in her matter.

On about December 3, 2009, Castro again contacted the lender and learned that TML had never sent the lender new, legible copies of her pay stubs. Castro contacted TML about her demand package on numerous occasions in December 2009, but did not receive any reports.

On about December 31, 2009, Castro's lender closed its file on the demand package that TML sent on her behalf. Castro contacted the lender again on about January 4, 2010, and was told for the first time that the lender had closed her demand package file. No one at TML contacted Castro to inform her that the bank had closed her file. Yet, on about January 4, 2010, TML withdrew another \$500 from Castro's credit card for negotiator/committee review. Castro was not aware of the withdrawal.

There were several e-mails and phone conversations between Castro and TML personnel in January 2010. And, in early February 2010, Castro terminated TML's employment. Soon thereafter, respondent sent Castro a \$500 refund.

***Count One –Business and Professions Code Section 6106<sup>10</sup>- Moral Turpitude***

In count one, the State Bar charges respondent with willfully violating section 6106, which prohibits an attorney from committing an act involving moral turpitude, dishonesty, or corruption. Whether an attorney's conduct involves moral turpitude and violates section 6106 is a question of law for the court. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 109.) Even though the term "moral turpitude" is defined very broadly (e.g., *id.* at p. 110), the Supreme Court and the review department have always required a certain level of evil intent, guilty knowledge,

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<sup>10</sup> Except as otherwise indicated, all further references to "section/s" are to this source.

or willfulness before holding that an attorney's conduct involves moral turpitude. At a minimum, gross negligence is required. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241, and cases there cited.)

The State Bar charges that respondent violated section 6106 by (1) misrepresenting, to Castro, a material term in the retainer agreement, (2) appropriating Castro's funds under false pretenses, and (3) deliberately lying to Castro by falsely telling her that her loan modification application was still pending with her lender in January 2010.

The record fails to establish any of the three charged violations by clear and convincing evidence. At best, the record suggests (but does not establish) that respondent negligently breached his retainer agreement with Castro by charging and collecting \$1,750 from Castro before TML completed the financial analysis. Even if respondent breached the retainer agreement, it would not establish that his initial representations regarding that agreement were deliberately false or that he deliberately misappropriated \$1,750 from Castro's credit card. (Cf. *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 694 [failure to keep promise of future action itself is not proof of dishonesty]; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 12 [failure to keep promise of future action itself is not proof of fraudulent intent].)

Furthermore, the record fails to clearly establish that Castro's home mortgage lender ever notified respondent or TML that it had closed the file on Castro's demand package.

Accordingly, the record fails to clearly establish that respondent violated section 6106 when he told Castro that her matter was still pending with her lender after the lender had closed her file.

In sum, count one is DISMISSED with prejudice.

***Count Two – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.6 or 2944.7 is Grounds for Discipline***

In count two, the State Bar charges that respondent willfully violated section 6106.3, subdivision (a), which provides that it is cause for discipline for an attorney to engage in conduct that violates any part of Civil Code sections 2944.6 and 2944.7 (as noted *ante*, portions of SB 94 are codified in Civil Code sections 2944.6 and 2944.7). In count two, the State Bar charges that respondent willfully violated section 6106.3, subdivision (a) by violating Civil Code section 2944.7, subdivision (a). As also noted *ante*, Civil Code section 2944.7, subdivision (a), prohibits an attorney from collecting or accepting any compensation for representing borrowers/mortgagors in home-mortgage-loan-modification matters until after the attorney has performed *all* of the contracted or represented services.

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a) by (1) charging and collecting \$1,750 from Castro for the financial analysis when respondent (or TML) had not completed the demand package, the negotiator/committee review, or the lender plan; (2) charging and collecting \$750 from Castro for the demand package when respondent (or TML) had not completed the negotiator/committee review or the lender plan; and (3) charging and collecting \$500 from Castor for the negotiator/committee review before respondent (or TML) had completed all of the agreed upon services (e.g., the lender plan).

***Count Three – Rules of Professional Conduct, Rule 4-200(A)<sup>11</sup> -- Unconscionable Fee***

In count three, the State Bar charges that respondent willfully violated Rule 4-200(A), which provides that an attorney shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Specifically, the State Bar charges that respondent willfully violated rule 4-200(A) when he charged and collected “from Castro . . . \$1,750 for a one-page document

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<sup>11</sup> Unless otherwise indicated, all further references to “rule/s” are to this source.

entitled 'Financial Analysis' which was merely a summary of Castro's personal income, assets and liabilities, information that was provided by Castro herself, and which did not contain any degree of analysis." The record clearly establishes the charged violation. The alleged "financial analysis" was of very little, if any, value to Castro. Respondent's \$1,750 fee for his so called "financial analysis" is not only excessive and exorbitant; it is shocking and unconscionable.

***Count Four – Section 6068, Subdivision (m) – Failure to Inform Client of Significant Development***

In count four, the State Bar charges respondent with violating section 6068, subdivision (m), which provides that it is the duty of an attorney to keep his clients reasonably informed of significant developments in matters in which the attorney agrees to provide legal services. Specifically, the State Bar charges that respondent willfully violated section 6068, subdivision (m) "By not informing Castro that her loan modification application had been denied on or about December 18, 2009. However, as noted *ante*, the record fails to establish either (1) that Castro's mortgage lender told respondent that it had closed its file on Castro's demand package or that respondent otherwise had actual knowledge that the lender had closed its file on Castro's package. Accordingly, the record cannot establish, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (m) by not telling Castro that her loan modification had been denied on about December 18, 2009. Thus, count four is DISMISSED with prejudice.

**Case No. 10-O-10241 – The Sukin Matter – Counts Five through Seven**

On about December 26, 2009, Alan Sukin retained TML to provide home-mortgage-loan-modification services with respect to the two loans secured by mortgages on his home. At about the same time, respondent charged Sukin a flat fee of approximately \$3,600, which would be collected in four installments when respondent (or TML) completed each of four alleged

“unbundled” services. The “unbundled” services to be performed and the amount of fees to be collected when each service is completed are as follows:

Financial Analysis:	\$1,600
Preparation of Lender Package:	1,000
Negotiator/Committee Review:	500
Lender Plan	<u>500</u>
<u>Total</u>	<u>\$3,600</u>

Also, on about December 26, 2009, Sukin gave TML senior case manager and Attorney David Morrison his credit card information authorizing TML to electronically withdraw respondent’s fees. On that same day, Sukin returned an executed retainer agreement to TML. The retainer agreement authorized TML to withdraw only \$1,600 from Sukin’s credit card for the preparation of a financial analysis report. And, on about December 28, 2009, respondent electronically collected and received \$1,600 from Sukin’s credit card for TML’s preparation of a financial analysis report. Thereafter, on about January 4, 2010, TML sent a copy of the financial analysis report to Sukin.

Over the course of the next few weeks, Sukin had numerous contacts with TML, exchanging information and documents pertaining to his possible home-mortgage-loan modification. Then, on February 8, 2010, respondent electronically collected and received \$1,000 from one of Sukin’s credit cards. Sukin claims that he was surprised by and did not authorize this withdrawal, but was notified on his home computer that the transaction had occurred. Sukin also claims that he thereafter immediately cancelled the credit card. Sukin disputed the charge with his bank, but his dispute was eventually denied by the bank.

Over the course of the next several months, Sukin continued to have numerous contacts with TML, exchanging information and documents pertaining to his possible home-mortgage-loan modification. However, Sukin never questioned respondent about the \$1,000 charge respondent made to Sukin’s credit card on February 8, 2010.

On about May 25, 2010, TML submitted a lender demand package to Sukin's home-mortgage-loan lender, but the lender required additional documents, which Sukin gathered and submitted them to TML over a period of about two weeks.

On about June 30, 2010, respondent electronically collected and received a payment of \$500 from Sukin's credit card. Sukin testified that he was unaware of this transaction at the time it was made and that he filed a dispute over the charge with his bank, but the bank eventually denied it. Sukin, however, again never questioned respondent concerning the \$500 charge to Sukin's credit card.

On about September 1, 2010, Jessica from TML informed Sukin that Sukin's lender had denied his request for a home loan modification. Thereafter, on September 30, 2010, respondent electronically collected and received a second \$500 payment from Sukin's credit card. Sukin again testified that he was not aware of this transaction when it was made and that he filed a dispute over the charge with his bank, but the bank eventually denied it. Sukin, however, again never questioned respondent about this second \$500 charge to his credit card.

On about October 5, 2010, Sukin spoke with respondent, and respondent recommended that Sukin file a lawsuit against Sukin's lender because the lender did not abide by certain laws. Sukin agreed to respondent's \$3,000 fee for filing a lawsuit against the lender, which respondent electronically collected and received from Sukin's account on about October 14, 2010. Respondent did not prepare or provide Sukin with a written fee agreement with respect to the lawsuit against Sukin's lender.

According to Sukin, Sukin disputed respondent's \$3,000 charge as being unauthorized, but the bank denied Sukin's dispute. And Sukin never questioned respondent about the \$3,000 charge respondent made to his credit card.

After weeks of back and forth with TML staff members, TML forwarded a draft civil complaint to Sukin on about December 18, 2010. Even though Sukin received the draft, he did not look at all of the documents.

On December 20, 2010, TML sent Sukin another draft of the civil complaint, including exhibits. Sukin, admits that he received these documents, but claims that some of the documents were blurry. Sukin does not recall if there were any instructions for him to follow concerning this version of the complaint and its exhibits. Specifically, Sukin does not recall whether TML instructed him to sign the verification that was attached to the complaint and to return it to TML for filing.

Sukin did not hear back from TML about the lawsuit, but he spoke with respondent on the telephone in January 2011. Respondent was upset because Sukin filed a complaint against respondent (and TML) with the State Bar. Sukin testified that, at that point, he had had enough and did not go forward with the lawsuit against the lender.

***Count Five – Section 6106 -- Moral Turpitude***

In count five, the State Bar charges respondent with willfully violating section 6106, which prohibits an attorney from committing acts involving moral turpitude, dishonesty, or corruption. Specifically, the State Bar charges that respondent violated section 6106 by (1) misrepresenting, to Sukin, a material term in the retainer agreement and (2) appropriating Sukin's funds under false pretenses. The record fails to establish either of the two charged violations by clear and convincing evidence. Accordingly, count five is DISMISSED with prejudice.

***Count Six – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.6 or 2944.7 is Grounds for Discipline***

In count six, the State Bar charges that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). As noted *ante*,

Civil Code section 2944.7, subdivision (a), prohibits an attorney from collecting or accepting any compensation for representing borrowers/mortgagors in home-mortgage-loan-modification matters until after the attorney has performed *all* of the contracted or represented services.

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a) by (1) charging and collecting \$1,600 from Sukin for the financial analysis report before respondent (or TML) had completed all of the agreed upon services (e.g., the lender demand package, the negotiator/committee review, and the lender plan); (2) charging and collecting \$1,000 from Sukin for the demand package before he (or TML) had completed the negotiator/committee review and the lender plan; and (3) charging and collecting \$500 from Sukin for the negotiator/committee review before he (or TML) and completed the lender plan.

***Count Seven – Rule 4-200(A) -- Unconscionable Fee***

In count seven, the State Bar charges that respondent willfully violated Rule 4-200(A), which provides that an attorney shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Specifically, the State Bar charges that respondent willfully violated rule 4-200(A) when he charged and collected “from Castro . . . \$1,600 for a one-page document entitled ‘Financial Analysis’ which was merely a summary of Sukin’s personal income, assets and liabilities. . . , and which did not contain any degree of analysis.” The record clearly establishes the charged violation. Respondent's \$1,600 fee for the so called “financial analysis report” is not only excessive and exorbitant; it is shocking and unconscionable.

**Case No. 10-O-05171 – The Ramirez Matter – Counts Eight through Eleven**

On about March 15, 2010, Marie Ramirez and her daughter, Bianca Quiroz, visited the office of TML and met with TML case manager Sean Markie. Ramirez hired TML to provide home-mortgage-loan-modification services with respect to a loan that was secured by a mortgage

on her home. Respondent charged a flat fee of about \$3,800 with the first \$1,000 to be paid by Ramirez immediately. Ramirez provided case manager Markie with her credit card information to pay for TML's legal services.

The services TML was to perform and the costs are as follows:

Financial Analysis Report:	\$1,900
Preparation of Lender Package:	<u>1,900</u>
Total	<u>\$3,800</u>

Shortly after the meeting with case manager Markie, Ramirez had misgivings about retaining TML and decided to terminate TML's services. Ramirez relied on Quiroz to notify TML of the termination. Quiroz did not notify TML of the termination until the evening of March 16, 2010, when she sent an e-mail to TML case manager Markie informing him that she needed to stop the process and would send someone to pick up the documents that she and Ramirez left with Markie.

On March 16, 2010, before Quiroz sent the e-mail to Markie terminating TML's services, TML sent a revised financial analysis report to Quiroz and to Ramirez by e-mail. Ramirez claims that she did not look at any e-mails from TML after she decided to terminate TML's services.

According to Ramirez, sometime in late March 2010, she became aware that TML had collected and received \$1,000 from her credit card account. Ramirez spoke with case manager Markie, who informed Ramirez that she owed TML additional money for preparation of the financial analysis report.

Ramirez disputed the \$1,000 payment to TML with her bank, and her bank credited \$1,000 to her account in April 2010.

***Count Eight – Section 6106 - Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent, in willful violation of section 6106, misrepresented a material term in the retainer agreement to Ramirez or Quiroz; appropriated Ramirez's funds under false pretenses; or threatened to withdraw additional funds from Ramirez's credit card if Ramirez terminated TML's services. Thus, count eight is DISMISSED with prejudice.

***Count Nine – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.6 is Grounds for Discipline***

In count nine, the State Bar charges that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.6, subdivision (a). Civil Code section 2944.6, subdivision (a) mandates that any person who performs any home-mortgage-loan-modification services for borrowers/mortgagors for a fee or other compensation must provide, as a separate statement in not less than 14-point bold type, the notice that is quoted *ante* and which begins: "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."

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.6, subdivision (a) by failing to provide Ramirez and Quiroz, as a separate notice, the notice mandated by Civil Code section 2944.6, subdivision (a).

***Count Ten – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a) by charging and collecting \$1,000 from Ramirez for the financial analysis report before respondent (or TML) had completed all of the agreed upon services (e.g., the lender demand package).

***Count Eleven – Rule 4-200(A) – Unconscionable Fee***

The record clearly establishes that respondent willfully violated rule 4-200(A) when he charged Ramirez (and Quiroz) \$1,900 and when he collected \$1,000 of that fee from Ramirez. Respondent's \$1,900 fee for a so called “financial analysis report” is not only excessive and exorbitant; it is shocking and unconscionable.

**Case No. 10-O-06472 – The Croxton Matter – Counts Twelve through Fourteen**

On about April 21, 2010, James Croxton hired TML to provide home-mortgage-loan-modification services on a loan secured by a mortgage on his home. Respondent charged Croxton a flat fee of \$3,900, to be collected in two installments, with each installment to be paid after a specified service had been performed and completed. The services and costs were as follows:

Financial Analysis Report:	\$1,950
Preparation of Lender Package:	<u>1,950</u>
Total	<u>\$3,900</u>

On about April 21, 2010, Croxton gave TML case manager Karitza Kihm his personal credit card information and information pertinent to his home-mortgage-loan modification. That same day, respondent electronically collected and received approximately \$500 from Croxton. Then, on about April 22, 2010, respondent electronically collected and received approximately \$1,300 from Croxton.

Also, on about April 22, 2010, Croxton and his wife, returned executed copies of TML’s retainer agreement to TML. After retaining TML, Croxton expected that his mortgage loan lender would stop making telephone calls to Croxton and his wife and would instead communicate with TML. However, according to Croxton, the lender continued to telephone him and his wife. During one conversation, the lender told Croxton that it had never heard of respondent. Croxton spoke with respondent, who purportedly apologized to Croxton.

Nevertheless, Croxton became concerned and started to think about asking for his money back from respondent.

About a week later, Croxton called his lender and was told that respondent had still not contacted the lender. Croxton decided to terminate respondent's services. And, on about May 4, 2010, Croxton faxed and mailed respondent a letter terminating respondent's employment and asking respondent to refund 90 percent of the \$1,800 in fees that respondent had charged on Croxton's credit card.

On May 5, 2010, respondent mailed a letter to Croxton withdrawing from representation in Croxton's matter and refunding \$500 in fees to Croxton. Croxton disputed respondent's charges on his credit card with his bank, but failed to follow through with the dispute.

***Count Twelve – Section 6106 – Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent misrepresented a material term in the retainer agreement to Croxton or appropriated Croxton's funds under false pretenses in willful violation of section 6106. Thus, count twelve is DISMISSED with prejudice.

***Count Thirteen – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). Respondent willfully violated Civil Code section 2944.7, subdivision (a) when he charged Croxton \$1,950 and when he collected \$1,800 of that fee from Croxton without performing all of the contracted or represented services (e.g., the lender package).

***Count Fourteen – Rule 4-200(A) – Unconscionable Fee***

The record clearly establishes that respondent willfully violated rule 4-200(A) when he charged Croxton \$1,950 and collected \$1,800 of that fee from Croxton. Respondent's \$1,950 fee

for the so called “financial analysis report” is not only excessive and exorbitant; it is shocking and unconscionable.

**Case No. 10-O-07710 – The Sears Matter – Counts Fifteen through Eighteen**

On or about April 23, 2010, Thomas Sears hired TML to provide home-mortgage-loan-modification services on a loan secured by a mortgage on his home. Respondent charged Sears a flat fee of approximately \$3,900, to be collected in two installments, each installment to be paid after a specified service had been performed and completed. The services to be performed and the cost for each service is as follows:

Financial Analysis:	\$1,950
Preparation of Lender Package:	<u>1,950</u>
Total	<u>\$3,900</u>

On about April 23, 2010, TML case manager Richard Kurzer spoke with Sears on the telephone and obtained Sears’s credit card information to electronically withdraw respondent’s fees for legal services. Case manager Kurzer also obtained documents and information from Sears concerning his home loan modification. Kurzer told Sears that he would be sending Sears a retainer agreement and other documents to Sears. According to Kurzer, he informed Sears that the first step in the process was the financial analysis report and that Sears wanted to go forward and agreed to the charge on his credit card.

Later in the evening on April 23, 2010, Sears claims to have sent an e-mail to case manager Kurzer terminating TML’s services and asking for a refund of all advanced fees. Sears presented a string of e-mail messages between him and Kurzer, which contains a manually typed inclusion that bears no e-mail identification information. Sears claims that his wife typed the message on the e-mail string. Sears also asserts that he saw the message being sent, but it did not record the message because his computer died. Respondent, however, denies receiving the

e-mail. In sum, there is no reliable evidence that the e-mail Sears claims to have sent to Kurzer was ever sent to or received by Kurzer or respondent.

On April 24, 2010, respondent electronically collected and received approximately \$1,950 from Sears' credit card account. Also, on April 24, 2010, Sears contacted his bank and attempted to have the \$1,950 charge cancelled. Sear also cancelled the credit card. However, the charge had already been processed. Ultimately, Sears's bank reversed the charges and returned \$1,950 to Sears's account.

On about April 26, 2010, TML sent a financial analysis report to Sears by e-mail. Sears was not pleased with the content of the financial analysis report, finding it meaningless to his matter. Sears claims that he spoke with case manager Kurzer about a week later and "reaffirmed" with Kurzer that he had terminated TML's services. Kurzer denies the claim and testified that he was not aware that Sears terminated TML until about a month later in May 2010.

***Count Fifteen – Section 6106 – Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent misrepresented a material term in the retainer agreement to Sears or appropriated Sears's funds under false pretenses in willful violation of section 6106. Thus, count fifteen is DISMISSED with prejudice.

***Count Sixteen – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.6 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.6, subdivision (a). Respondent willfully violated Civil Code section 2944.6, subdivision (a) by failing to provide Sears, as a separate notice, the notice mandated by Civil Code section 2944.6, subdivision (a) in not less than 14-point bold type before entering into his fee agreement with Sears.

***Count Seventeen – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). Respondent willfully violated Civil Code section 2944.7, subdivision (a) when he charged and collected \$1,950 from Sears for the financial analysis report before he performed all of the contracted or represented services (e.g., the lender package).

***Count Eighteen – Rule 4-200(A) – Unconscionable Fee***

The record clearly establishes that respondent willfully violated rule 4-200(A) when he charged and collected a \$1,950 fee from Sears for a financial analysis report. Respondent's \$1,950 fee for the so called “financial analysis report” is not only excessive and exorbitant; it is shocking and unconscionable.

***Case No. 10-O-08922 – The Harris/Torres Matter – Counts Nineteen and twenty***

On about April 30, 2010, Wesley Harris and Eloisa Torres hired TML to provide home-mortgage-loan-modification services with respect to a loan secured by a mortgage on their home. Torres gave TML case manager Jason Hollen their credit card information and signed a written authorization for electronic withdrawals. Torres also provided case manager Hollen with information and documents concerning her and Harris’s home loan issues -- Harris and Torres were about 16 months behind in making their monthly payments, and their home was in foreclosure.

Respondent charged Harris and Torres a flat fee of \$4,000 to be collected in two installments with each installment to be paid after a specified service had been performed. The services to be performed and the costs were as follows:

Financial Analysis Report:	\$2,250
Preparation of Lender Package:	<u>1,750</u>
Total	<u>\$4,000</u>

On April 30, 2010, Harris and Torres executed and returned, to TML, respondent's retainer agreement. And, on about May 3, 2010, respondent electronically collected and received two payments totaling \$2,250 from Harris and Torres. Harris and Torres never received a financial analysis report from TML. Even though respondent testified that a report was prepared and sent to them, the court finds that there is no credible evidence in the record to support respondent's claim.

On about May 20, 2010, TML purportedly sent a demand package to Harris and Torres's home-loan lender. And, on about May 24, 2010, respondent electronically collected and received an additional \$1,750 in fees from Harris and Torres.

On June 2, 2010, Harris and Torres filed a bankruptcy petition to forestall the lender's foreclosure on their home. When Harris informed TML case manager Hollen that they had filed for bankruptcy protection, Hollen informed her that TML could not go forward on their loan modification.

On about July 5, 2010, Harris and Torres terminated respondent's services and requested a refund of all advanced fees. Respondent, however, refunded only \$250 in fees to Harris and Torres.

***Count Nineteen – Section 6106 – Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent misrepresented a material term in the retainer agreement to Harris or Torres or that respondent appropriated Harris's or Torres's funds under false pretenses in willful violation of section 6106. Thus, count nineteen is DISMISSED with prejudice.

***Count Twenty – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). Respondent willfully violated Civil Code section 2944.7, subdivision (a) when he charged and collected two payments totaling \$2,250 from Harris and Torres without performing all of the contracted or represented services.

**Case No. 10-O-11186 – The Kapadia Matter – Counts Twenty-One through Twenty-Three**

On about April 2, 2010, Harshadrai Kapadia contacted TML case manager Richard Kurzer by telephone concerning a home loan modification. Kapadia and Kurzer had previously spoken over the telephone on March 26, 2010. During the conversation, Kurzer informed Kapadia that TML could handle his matter for a fee of about \$3,800, to be paid in two installments of \$1,900 each. One \$1,900 installment for preparation of a financial analysis report, and the other \$1,900 installment for preparation of a lender package.

Kapadia supplied Kurzer with a credit card number, expiration date, and CVV number to pay for legal services. Kurzer testified that Kapadia agreed to go forward and retain TML to handle his home loan modification. Kapadia denies that he agreed to go forward and instead wanted time to think about it.

On about April 4, 2010, respondent electronically collected and received approximately \$1,400 from Kapadia. Kapadia claims he was unaware that his credit card would be charged \$1,400. Kurzer claims that Kapadia agreed to the charge during their previous telephone conversation.

On about April 5, 2010, Kurzer e-mailed a copy of a financial analysis report to Kapadia. Kapadia claims he deleted the e-mail without opening it. Kapadia called his bank and discovered

that his credit card was charged \$1,400 by respondent. Kapadia disputed the charge with bank. Eventually, his dispute was denied by the bank.

Kapadia filed for fee arbitration with TML concerning the \$1,400 charge to his credit card. Kapadia's claim was denied at fee arbitration because Kapadia failed to provide evidence that the \$1,400 was not returned to him by the bank during the dispute process.

***Count Twenty-One – Section 6106 – Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent misrepresented a material term in the retainer agreement to Kapadia, that respondent appropriated Kapadia's funds under false pretenses, or that respondent collected a fee to which Kapadia did not consent and respondent did not earn and thereby misappropriated Kapadia's funds in willful violation of section 6106. Thus, count twenty-one is DISMISSED with prejudice.

***Count Twenty-Two – Rule 4-200(A) – Unconscionable Fee***

The record clearly establishes that respondent willfully violated rule 4-200(A) when he collected a \$1,400 fee from Kapadia for a financial analysis report. Respondent's \$1,400 fee for the so called "financial analysis report" is not only excessive and exorbitant; it is shocking and unconscionable.

***Count Twenty-Three – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). Respondent willfully violated Civil Code section 2944.7, subdivision (a) when he collected \$1,400 in fees from Kapadia without having performing all of the contracted or represented services.

**Case No. 11-O-10610 – The Bonneville Matter – Counts Twenty-Four through Twenty-Six**

On about April 19, 2010, Rick Bonneville and his wife Pam (collectively the Bonnevvilles) spoke on the telephone with TML case manager Bayo Ajigbotafe about home-mortgage-loan-modification services for the loan secured by a mortgage on their home. According to Mr. Bonneville, the Bonnevvilles were looking to refinance their home loan through their current lender, while case manager Ajigbotafe mentioned a home-loan modification. The telephone call lasted about two hours.

During this conversation, case manager Ajigbotafe mentioned that the fee for legal services would be about \$3,600, which was okay with Mr. Bonneville at the time. However, Mr. Bonneville testified that he was unaware that the fee consisted of two \$1,800 payments. Ajigbotafe asked Mr. Bonneville for his credit card number as payment for legal services. Mr. Bonneville gave Ajigbotafe his credit card information and information on his home loan and mortgage needed to process his matter.

Mr. Bonneville gave Ajigbotafe the wrong expiration date for his credit card. A short time later, Ajigbotafe telephoned and spoke with Mrs. Bonneville, who gave Ajigbotafe the correct credit card expiration date. According to Mr. Bonneville, he was not aware that his credit card would be immediately charged \$1,800 by respondent, but was to be used to check the Bonnevvilles' credit rating.

According to Mr. Bonneville, after receiving a copy of TML's retainer agreement on April 19, 2010, he and his wife decided not to retain TML. The retainer agreement contained the Bonnevvilles' credit card information, including the CVV number. The retainer also indicates that the only other service TML was to perform was the preparation of the lender package for \$1,800.

Mr. Bonneville believes that his wife called TML and notified TML that the Bonneilles did not wish to establish a relationship with TML. The record, however, does not establish that Ms. Bonneville ever contacted TML and terminated the Bonneilles relationship with TML.

In addition, on April 19, 2010, Ajigbotafe e-mailed a copy of a financial analysis report to the Bonneilles. Thereafter, on about April 20, 2010, respondent electronically collected and received approximately \$1,800 from the Bonneilles credit card account for the financial analysis report.

On April 20, 2010, Mr. Bonneville sent an e-mail to Ajigbotafe, informing him that the Bonneilles did not want to complete the transaction and to cancel any service yet to be rendered because they were not satisfied with the paper work sent to them by e-mail.

The Bonneilles never signed a retainer agreement with TML. However, the language of their April 20, 2010, e-mail to Ajigbotafe expressly states that they were cancelling any service “yet to be rendered . . . ,” which strongly suggests that the Bonneilles knew that TML had already been rendered services for them. In addition, the Bonneilles provided Ajigbotafe with their credit card number, expiration date, and CVV number before receiving a copy of TML’s retainer agreement, were aware of the fees for TML services, and had received a completed financial analysis report.

When the transaction between the Bonneilles and TML is viewed as a whole, there is no clear and convincing evidence that respondent or an employee/agent of respondent, committed an alleged act of moral turpitude by misleading the Bonneilles during the negotiations of TML employment contract; or by advising the Bonneilles that fees would not be withdrawn from their credit card until the services have been completed, and thereafter withdrawing the fees prior to any service being performed.

The Bonneviles disputed the \$1,800 respondent collected on their credit card, but their bank denied their dispute.

***Count Twenty-Four – Section 6106 - Moral Turpitude***

The court finds that there is no clear and convincing evidence that respondent misrepresented a material term in the retainer agreement to the Bonneviles, that respondent appropriated the Bonneviles funds under false pretenses, or that respondent collected a fee to which the Bonneviles did not consent and respondent did not earn and thereby misappropriated the Bonneviles' funds in willful violation of section 6106. Thus, count twenty-four is DISMISSED with prejudice.

***Count Twenty-Five – Rule 4-200(A) – Unconscionable Fee***

The record clearly establishes that respondent willfully violated rule 4-200(A) when he charged and collected an \$1,800 fee from the Bonneviles for a financial analysis report. Respondent's \$1,800 fee for the so called “financial analysis report” is not only excessive and exorbitant; it is shocking and unconscionable.

***Count Twenty-Six – Section 6106.3, Subdivision (a) – Violating Civil Code Section 2944.7 is Grounds for Discipline***

The record clearly establishes that respondent willfully violated section 6106.3, subdivision (a) by willfully violating Civil Code section 2944.7, subdivision (a). Respondent willfully violated Civil Code section 2944.7, subdivision (a) when he charged and collected \$1,800 in fees from the Bonneviles without having performing all of the represented services.

**IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES**

**A. Mitigation**

Even though respondent does not have a prior record of discipline, he is not entitled to any mitigating credit for his lack of prior discipline because he had been admitted to practice for

only about four years before his misconduct began. (*In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837.)

The record establishes that respondent has proven by clear and convincing evidence the following factor in mitigation. (Rule Proc. of State Bar, tit. IV, Stds for Atty. Sanctions of Prof Misconduct,<sup>12</sup> std. 1.2(e).) Respondent presented the testimony of 11 credible witnesses who testified to his good character. The witnesses were from a wide range of the legal and general communities. Four of his witnesses are attorneys. (Std. 1.2(e)(vi).)

## **B. Aggravation**

The record establishes the following four factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

Respondent's present misconduct evidences multiple acts of misconduct. (Std. 1.2(b)(ii).) Respondent was found culpable on seventeen counts of misconduct involving seven separate client matters.

Respondent's misconduct caused significant client harm. In most of the seven client matters, respondent was able to keep the unconscionable fees he collected from his clients and thereby depriving them of their funds at a time when the funds were desperately needed (e.g., to keep their homes from foreclosure). (Std. 1.2(b)(iv).)

Respondent has demonstrated indifference toward rectification or atonement for the consequences of his misconduct because he has not made restitution for his unconscionable fees. (Std. 1.2(b)(v).)

“The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Respondent

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<sup>12</sup> Future references to standards or std. are to this source.

expressed no remorse for his misconduct and continues to deny any wrongdoing. In addition, respondent asserted meritless defenses and unreasonably insists that his financial analysis report was an “unbundled” legal service of significant value to his clients. In sum, the record clearly establishes that respondent lacks insight into the wrongfulness of his conduct. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958.) Respondent’s lack of insight is particularly troubling because it suggests that misconduct will reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.)

## V. DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and the available sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards call for the imposition of a minimum sanction ranging from reproof to disbarment. (Stds. 2.7 and 2.10.) The most severe sanction is found at standard 2.7 which recommends a six-month actual suspension from the practice of law, irrespective of mitigating circumstances. Notwithstanding its clear language to the contrary, the six-month minimum actual suspension set forth in standard 2.7 is not strictly applied. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994-996.)

It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court and this

court are] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, even though the standards are not binding, they are entitled to great weight (*In re Silverton* (2005) 36 Cal.4th 81, 92) and should be followed in the absence of a compelling reason that justifies a lesser level of discipline.

In seven separate client matters, respondent has been found culpable of multiple violations of rule 4-200(A) and section 6106.3, subdivision (a). Furthermore, underlying each of those culpability findings is respondent’s calculated business decision to implement a new business model for operating his law practice in a manner that subverted the clear public protection purposes of SB 94.

The State Bar urges that respondent be disbarred. Respondent argues that no discipline should be imposed in this matter, but he presents no compelling reason that would justify the court recommending a lesser degree of discipline than six-month actual suspension called for in standard 2.7. While respondent presented good character testimony from 11 credible witnesses, the aggravating circumstances outweigh the single mitigating circumstance.

When an attorney charges a fee that is “ ‘so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action. . . .’ ” (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402.) Nonetheless, the State Bar’s insistence that respondent be disbarred is not well taken because, inter alia, in all seven client matters respondent’s unconscionable fees were voluntarily paid and because respondent has not been found culpable of engaging in any act involving moral turpitude, dishonesty, or corruption. (Cf. *id.* at pp. 402-403.) Nonetheless, significant discipline is warranted because of respondent’s overreaching in charging his clients exorbitant fees for

financial analysis reports that were almost useless and because of respondent's failure to comply with the public protection provisions in SB 94.

An authoritative review of the level of discipline imposed in past unconscionable fee cases is set forth in *In the Matter of Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at pages 996-998. As the review department aptly noted in *Van Sickle*, the vast majority of unconscionable fee cases were decided before the standards were implemented in 1986 and imposed a wide range of discipline varying from three months' actual suspension to disbarment. (*Id.* at p. 995, fn. 20.)

After considering the evidence and the law and balancing the relevant factors, the court concludes that the appropriate discipline recommendation for the found misconduct is two years' stayed suspension and three years' probation on conditions, including a six-month suspension. Moreover, the court concludes that it is also appropriate to recommend that respondent be required to make restitution with interest not just for the unconscionable fees he collected from his clients, but for all the fees he collected in willful violation of section 6106.3, subdivision (a) and Civil Code section 2944.7, subdivision (a).

## **VI. RECOMMENDED DISCIPLINE**

This court recommends that respondent **SWAZI ELKANZI TAYLOR**, State Bar number 237093, be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that he be placed on probation for a period of three years subject to the following conditions:

1. Taylor is suspended from the practice of law for the first six months of probation.
2. Taylor is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all of the conditions of this probation.
3. Within 30 days after the effective date of the Supreme Court order in this proceeding, Taylor must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with Taylor's assigned probation deputy to discuss these terms and conditions of

probation. Upon the direction of the Office of Probation, Taylor must meet with the probation deputy either in-person or by telephone. Thereafter, Taylor must promptly meet with the probation deputy as directed and upon request of the Office of Probation.

4. Taylor is to maintain, with the State Bar's Membership Records Office in San Francisco and Office of Probation in Los Angeles, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). In addition, Taylor is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Taylor's home address and telephone number are not to be made available to the general public unless his home address is also his official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Taylor must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.
5. Taylor is to submit written quarterly reports to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10, and October 10 of each year. Under penalty of perjury under the laws of the State of California, Taylor must state in each report whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Taylor is to submit a final report containing the same information during the last 20 days of his probation.

6. Subject to the assertion of any applicable privilege, Taylor is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.
7. Within the first year of his probation, Taylor is to attend and satisfactorily complete the State Bar's Ethics School; and to provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Taylor's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)
8. Respondent must make the following restitution and provide satisfactory proof of payment to the State Bar's Office of Probation in Los Angeles no later than one year after the effective date of the Supreme Court order in this proceeding. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

- a) Respondent must pay restitution to Roseane Castro in the amount of \$2,500 plus 10 percent interest per annum from October 23, 2009 (or the Client Security Fund to the extent of any payment from the fund to Roseane Castro, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
  - b) Respondent must pay restitution to Alan Sukin in the amount of \$3,100 plus 10 percent interest per annum from December 28, 2009, (or to the Client Security Fund to the extent of any payment from the fund to Alan Sukin, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
  - c) Respondent must pay restitution to James Croxton in the amount of \$1,300 plus 10 percent interest per annum from April 21, 2010 (or to the Client Security Fund to the extent of any payment from the fund to James Croxton, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
  - d) Respondent must pay restitution to Wesley Harris and Elosia Torres in the amount of \$2,000 plus 10 percent interest per annum from May 3, 2010 (or the Client Security Fund to the extent of any payment from the fund to Wesley Harris or Elosia Harris, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
  - e) Respondent must pay restitution to Harshadrai Kapadia in the amount of \$1,400 plus 10 percent interest per annum from April 4, 2010 (or the Client Security Fund to the extent of any payment from the fund to Harshadrai Kapadia, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
  - f) Respondent must pay restitution to Richard Bonneville and Pam Bonneville in the amount of \$1,800 plus 10 percent interest per annum from April 20, 2010 (or the Client Security Fund to the extent of any payment from the fund to Richard Bonneville or Pam Bonneville, plus interest and costs, in accordance with Business and Professions Code section 6140.5).
9. This probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of this probation, if Taylor has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for two years will be satisfied and that suspension will be terminated.

## **VII. PROFESSIONAL RESPONSIBILITY EXAMINATION**

The court further recommends that respondent SWAZI ELKANZI TAYLOR be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of his passage of that

examination to the State Bar's Office of Probation in Los Angeles within one year after the effective date of the Supreme Court's disciplinary order in this matter. Failure to pass the MPRE within the specified time may result, without further hearing, in actual suspension until passage. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see Cal. Rules of Court, rule 9.10(b).)

### **VIII. CALIFORNIA RULES OF COURT, RULE 9.20 & COSTS**

The court further recommends that SWAZI ELKANZI TAYLOR be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>13</sup>

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: January 24, 2012.

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**RICHARD A. PLATEL**  
Judge of the State Bar Court

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<sup>13</sup> Taylor is required to file a rule 9.20(c) compliance affidavit even if he has no clients to notify *on the date the Supreme Court files its order in this proceeding*. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) The failure to comply with rule 9.20 almost always results in disbarment in the absence of compelling mitigation.