

PUBLIC MATTER - DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 10-O-05171 (10-O-05585;
)	10-O-06472; 10-O-07710; 10-O-08922;
SWAZI ELKANZI TAYLOR,)	10-O-10241; 10-O-11186; 11-O-10610)
)	
A Member of the State Bar, No. 237093)	OPINION
<hr/>)	[As Modified January 9, 2013]

The Office of the Chief Trial Counsel (State Bar) has charged Swazi Elkanzi Taylor with misconduct involving loan modifications cases. After 16 days of trial, the hearing judge dismissed moral turpitude charges for fraud and misrepresentation, but found that Taylor had charged illegal *and* unconscionable fees in eight client matters. The hearing judge reasoned that Taylor made a “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 [new loan modification laws].” After finding three factors in aggravation (multiple acts of misconduct, significant harm, and indifference) and only one factor in mitigation (good character), the hearing judge recommended discipline, including six months’ actual suspension subject to three years’ probation and restitution payments totaling \$12,100.

The State Bar seeks review, asserting that the hearing judge erred by dismissing the moral turpitude charges. It urges us to find additional aggravation for uncharged misconduct and to assign less mitigating weight to Taylor’s good character evidence. The State Bar requests that Taylor be disbarred or, at a minimum, that his actual suspension be increased. Taylor did not

seek review but asks that he be exonerated on all counts because this case involves mere fee disputes that should be resolved by fee arbitration.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find that Taylor collected illegal, but not unconscionable, fees in all eight client matters, and that the State Bar failed to prove moral turpitude. We adopt the hearing judge's aggravation and mitigation findings. Given Taylor's multiple violations of loan modification laws designed to protect the public and his lack of insight into his misconduct, a six-month actual suspension is necessary to serve the goals of attorney discipline. We affirm the hearing judge's recommended discipline, but reduce the probation period from three to two years since this is Taylor's first disciplinary matter. We also recommend that Taylor remain suspended until he makes restitution for all of the illegal fees he collected.

I. BACKGROUND AND OVERVIEW

A. Taylor's Background in Real Estate Law

Taylor was admitted to practice law in California in 2005. Initially, he performed contract work for a mortgage company and a law corporation that served as an intermediary between mortgage holders and borrowers to negotiate borrower relief such as workouts, deeds in lieu of foreclosure, and approvals of short sales. In October 2008, during the national foreclosure crisis, Taylor and another attorney formed a real estate law firm. That partnership dissolved by May 2009, and Taylor became the principal of his current firm, Taylor Mortgage Lawyers (TML). TML specializes in loan modifications, short sales, foreclosure negotiations, unlawful detainers, and bankruptcy cases.

Taylor has worked on hundreds of loan modification matters. Over time, he gained practical knowledge about the business practices of mortgage lenders, including which ones were likely to complete loan modifications. Despite his efforts to negotiate with lenders, the loan

modifications often failed and Taylor would seek alternative relief for his clients such as a short sale, favorable mortgage terms, or damages against lenders for faulty practices. Taylor described the loan modification process as difficult to navigate and “analogous to the story of *Goldilocks and the Three Bears*. The household income necessary to qualify for mortgage relief mustn’t be too much or too little, but must be just right.”

B. Legislation Regulating Loan Modification

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

On October 11, 2009, California Senate Bill number 94 (SB 94) became effective, providing two safeguards for borrowers who employ the services of someone to help with a loan modification: (1) a requirement for a separate notice to borrowers that it is not necessary to use a third party to negotiate a loan modification (codified as Civ. Code, § 2944.6);¹ and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of

¹ Civil Code section 2944.6 requires that before entering into a fee agreement, a person attempting to negotiate or arrange a loan modification must provide the borrower the following information in 14-point font “as a separate statement:”

It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for 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.

fees until all loan modification services are completed (codified as Civ. Code, § 2944.7).² The new legislation was designed to “prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant.” (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.) A violation of either Civil Code provision constitutes a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), and is cause for imposing attorney discipline. (Bus. & Prof. Code, § 6106.3.)³

C. Taylor’s Revisions to his Retainer Agreement

Before and after SB 94 passed, Taylor charged a flat fee for his legal services, including loan modifications. If a loan modification failed, Taylor arranged a separate fee agreement for additional services. When the new laws took effect, Taylor added the mandatory language concerning the lack of necessity to use the services of a third party as specified in Civil Code section 2944.6, subdivision (c), to his retainer agreements in 14-point bold type print. Clients were required to initial this provision. Taylor also added the mandatory language in 16-point font on a prominent spot on TML’s website, and e-mailed potential clients an introduction to TML that directed them to this website.

² The relevant portion of Civil Code section 2944.7 reads:

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

(1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

³ Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code.

Taylor further revised his retainer agreement with respect to his fees. Despite the new laws, Taylor thought that he could “unbundle” his legal advice and real estate consulting services in loan modification cases and charge separately for each service after it was performed. He claimed that outside sources confirmed his belief, including other attorneys, people in the legislative offices involved with SB 94, and a panel of attorneys who presented a seminar at the 2010 State Bar Annual Meeting.

However, in October 2009, around the time the new laws came into effect, Taylor viewed an ethics alert posted on the State Bar’s website that clearly contradicted his theory that he could unbundle services. He testified that he was “surprised to read that the State Bar was basically saying that SB 94 completely outlawed the loan modification practice where you received any money prior to a loan mod being finalized.” Consequently, he talked to colleagues about the ethics alert and they told him that “the law doesn’t say that.” He also called the State Bar Ethics Hotline, which did not offer any advice about the ethics alert. Taylor’s testimony about the opinions he received from others is uncorroborated. Ultimately, Taylor decided to unbundle his services within loan modification cases and collect for each service separately.

D. The Referral Website

In seven of the eight client matters at issue, Taylor received contact information from an internet website called LowerMyBills.com, a referral service he no longer uses. A party seeking a loan modification would enter information into the website and it would be forwarded to Taylor for a \$2 referral fee. A TML case manager or attorney would then follow up by e-mail or telephone, introduce the potential client to the firm, discuss possible mortgage relief, and collect personal and financial information before representation was confirmed. The case manager presented the potential client’s information to Taylor or another TML attorney, who would input

the financial information of the prospective client into a spreadsheet to generate a one-page document known as TML's financial analysis.

E. The Financial Analysis (FA)

The FA listed various possibilities, such as the interest rate and length of the loan a client might expect to qualify for based on the client's financial circumstances. Taylor and his staff initially spent several hours developing the FA that was used in each potential client's case. Preparing the FA in each case often took hours because the case manager had to talk to the potential client several times to obtain accurate information. The case manager maintained logs reflecting these conversations. After Taylor received the client's financial information, he would verify it by checking tax records, real estate estimates, and title histories through internet databases.

Taylor presented Martin Andelman, an expert in mortgage loan modification calculations, to testify about the FA.⁴ Andelman stated that during the time period covered in the Notice of Disciplinary Charges (NDC), Taylor's FA produced calculations that required the use of expensive proprietary software not readily available to the public. He opined that although inputting a client's financial information into Taylor's FA program might be done quickly, gathering and confirming such information could take hours and involved "a lot more time than people think." Andelman explained the difficulty of obtaining financial information from distressed homeowners, who often do not readily know accurate details about their mortgages, income, or taxes. He also viewed qualifying for certain loan modifications as involving particularly sensitive determinations that could require hundreds of questions. Overall,

⁴ Andelman received an MBA in finance from Pepperdine University in 1994, and a Masters Degree in market research and consumer behavior from University of Missouri in 1991. He is an expert in all aspects of loan modification, writes a blog with over 6,000,000 readers, has authored 525 in-depth articles on the foreclosure crisis, and has reviewed over 4,000 mortgage modifications.

Andelman believed that gathering the information for and producing the FA was a significant undertaking. He concluded that Taylor's FA was a good tool to assist homeowners in deciding whether to seek loan modifications. The State Bar presented no expert evidence to rebut Andelman's testimony.

Once Taylor reviewed the FA, using his knowledge of various lenders, he would determine whether the potential client was a good candidate for a loan modification. If Taylor accepted the client, he set the fee based on the difficulty or novelty of the case. The case manager would notify the client that TML had accepted representation and that a credit card charge would be made for the FA. TML declined representation if the homeowner was not eligible for a loan modification and did not charge for the FA.

If a client verbally accepted representation, the case manager would take the client's credit card information and Taylor or another attorney would charge for the FA. Most often, before the card was charged, the case managers e-mailed the clients a copy of their FA with a retainer agreement and third party authorization form (TPA) to sign and return. Although the retainer agreement stated that representation would not start until both the client and Taylor had signed it, TML sometimes would prepare the modification package before the client returned the signed retainer. In isolated instances, TML prepared but did not e-mail the FA until shortly after the credit card was charged. After the initial charge, clients received a printed copy of the FA in the mail with a welcome packet.

II. FACTUAL FINDINGS - INDIVIDUAL CLIENT MATTERS

A. The Castro Matter (Case No. 10-O-05585)

Rosane Castro sought loan modifications on two mortgages totaling over \$500,000. She was delinquent on at least one. Castro's contact information was sent to TML as a foreclosure inquiry from the Wisdom Company.⁵

TML case manager Luis Urgiles obtained information for the FA from a series of telephone calls with Castro. On October 23, 2009, Urgiles presented Castro's information to Taylor, who performed the FA and agreed to take the case. That day, Urgiles e-mailed Castro that TML would represent her for \$3,500, to be collected in four installments. Urgiles attached a retainer agreement to an e-mail, which contained the following payment schedule:

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

On October 25, 2009, Castro signed the retainer and consented to the \$1,750 charge, which was posted by Castro's bank on October 26, 2009. By early November, TML sent demand letters to Castro's lenders, EMC and GMAC Mortgage Corporations.

On November 21 and 23, 2009, TML charged additional fees totaling \$750 against Castro's credit card for preparing her lender packages. In December 2009, EMC informed Castro that TML had not submitted legible copies of her pay stubs. On December 3 and 24, 2009, EMC told TML that the Castro file was complete and still under review but, unbeknownst to Taylor, EMC had closed Castro's file on December 31. On January 4, 2010, TML charged \$500 to Castro's credit card for "Negotiator/Committee Review" services. In early February

⁵ TML received contact information in the remaining seven client matters from LowerMyBills.com.

2010, after several communications, Castro became frustrated with Taylor's services and demanded her money back. Taylor refunded only \$500.

B. The Sukin Matter (Case No. 10-O-10241)

Alan Sukin's family home had two mortgages totaling over \$900,000. He was not behind on his payments but was seeking refinancing or modification of the two loans. On December 10, 2009, TML attorney David Morrison called Sukin and discussed the loan modification process with him over a series of telephone calls. Morrison advised Sukin he would be out of the office for the holidays but would check his e-mails. Morrison sent Sukin an e-mail attaching a copy of the Loan Modification Retainer Agreement, which unbundled the retainer fee as follows:

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

Morrison then processed Sukin's FA and determined he was a candidate for modification. On December 26, 2009, Sukin faxed the signed retainer agreement to TML and provided his credit card information, which Morrison forwarded to Taylor. On December 28, 2009, Taylor charged \$1,600 to Sukin's credit card. Morrison e-mailed Sukin the FA on January 4, 2010, when he returned to the office. Thereafter, Sukin and TML corresponded about detailed information TML needed for the two lender packages. On February 8, 2010, Taylor charged \$1,000 to Sukin's credit card for "Preparation of Lender Package." In May 2010, Taylor submitted the modification demand packages to the lenders.

TML corresponded with the lenders through the summer and on June 30, 2010, Taylor charged \$500 to Sukin's credit card for "Negotiator/Committee Review." In July, the first mortgage holder told TML it would deny Sukin's request for modification. A TML case

manager relayed this decision to Sukin on September 1, 2010, and discussed possible litigation against the lender. On September 30, 2010, Taylor charged the final \$500 to Sukin's credit card for the "Lender Plan."

In October 2010, Taylor quoted a flat fee of \$3,000 to file a complaint against the lender, and Sukin agreed to this course of action. Taylor did not prepare a written fee agreement, but charged Sukin's credit card \$3,000 on October 14, 2010. A TML attorney drafted a civil complaint and prepared exhibits totaling over 100 pages, which were forwarded to Sukin in December 2010. Sukin received these documents but was dissatisfied with TML's services and decided not to go forward with the lawsuit. Taylor did not return any money, despite Sukin's request for a full refund.

C. The Ramirez Matter (Case No. 10-O-05171)

On March 15, 2010, Maria Ramirez and her daughter Bianca Quiroz met with TML case manager Sean Markie at TML's offices. Ramirez and Quiroz discussed their case, went over the FA, and signed a retainer agreement that provided for unbundled services as follows:

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

Ramirez gave Markie her credit card information and authorized him to charge \$1,000 (a portion of the FA fee), which was completed the following afternoon on March 16, 2010. After the meeting, Ramirez had misgivings about retaining TML and asked her daughter to terminate TML's representation. On March 16, 2010, in the early evening, Quiroz sent an e-mail to Markie informing him to stop the process. Later that month, Ramirez spoke with Markie about the \$1,000 charge to her credit card, and Markie told her that TML would not charge the additional \$900 owed for the FA. Ramirez disputed the \$1,000 payment to TML with her bank, which credited the money back to her.

D. The Croxton Matter (Case No. 10-O-06472)

James Croxton had two mortgages on his family home and was behind on his payments. On April 21, 2010, TML case manager Karitza Kihm spoke with Croxton about his financial and credit card information. Kihm reviewed the information with Taylor, who prepared the FA and agreed to take the case. That day, Kihm forwarded the FA, a copy of the TPA, and the Legal Services Retainer for Croxton and his wife. The retainer agreement divided the total fee into two charges:

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

Taylor charged \$500 to the credit card on April 21, 2010, and an additional \$1,300 the next day. On April 22, 2010, the Croxtons signed and returned the retainer agreement and TPA. Taylor forwarded the TPA to the Croxtons' lender on April 26, 2010. Croxton became concerned when he continued to receive calls from his lender, and questioned Taylor about his representation. In early May 2010, Croxton faxed and mailed Taylor a letter terminating his services, and demanding a refund of 90% of his \$1,800. In response, Taylor mailed a letter to Croxton withdrawing from representation and included a \$500 refund check.

E. The Sears Matter (Case No. 10-O-07710)

On March 25, 2010, TML case manager Richard Kurzer sent Thomas Sears an introductory e-mail that contained links to websites for TML and the Better Business Bureau. On Friday, April 23, 2010, Kurzer obtained Sears's financial information and explained TML's retainer. Taylor processed Sears's FA and agreed to take the case. Kurzer then took Sears's credit card information over the telephone after Sears agreed to TML's representation. That evening, Kurzer sent Taylor an e-mail with Sears's credit card information and a request to process the card. Taylor charged \$1,950 to Sears's credit card over the weekend.

The next Monday, April 26, 2010, Kurzer e-mailed Sears his FA with copies of the Loan Modification Retainer and TPA for Sears to complete and return. The retainer agreement unbundled the total fee into two payments:

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

Over the weekend, Sears changed his mind and tried unsuccessfully to cancel his credit card as well as the TML transaction. He did not complete the retainer agreement or the TPA. Sears disputed the \$1,950 charge with his bank, which ultimately credited it back to him.

F. The Harris/Torres Matter (Case No. 10-O-08922)

Eloisa Torres, a licensed real estate agent, and Wesley Harris hired TML to prepare a loan modification package. Torres and Harris were 16 months delinquent on their home mortgage and facing a trustee sale. Torres and Harris talked to case manager Jason Holland about their eligibility for a loan modification. On April 30, 2010, they signed TML's Loan Modification Retainer, complete with credit card authorization information. The retainer unbundled Taylor's \$4,000 fee into two payments:

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

Taylor charged \$2,250 to Torres's bank card in two transactions (April 30 and May 2, 2010) that cleared her account on May 3, 2010. Harris and Torres never received the FA. On May 18, 2010, TML sent a demand package to the lender and made a follow-up contact because the home was scheduled to be sold at a trustee sale on June 7, 2012. On May 24, 2010, TML electronically collected an additional \$1,750. The lender proposed a payment plan for the delinquent months, but it was unaffordable. Harris filed for bankruptcy on June 2, 2010. Harris

and Torres terminated TML on June 5, 2010, and requested a full refund. Taylor returned only \$250.

G. The Kapadia Matter (Case No. 10-O-11186)

Harshadrai Kapadia, an accountant, was not in default, but wanted to modify his loan on one of his two properties. Taylor assigned Kurzer as case manager. In March 2010, Kurzer explained the services TML offered to Kapadia over the telephone and sent an introductory e-mail. On April 2, 2010, Kurzer collected Kapadia's information and consulted with Taylor, who performed the FA and determined Kapadia was eligible for a modification. Kurzer conveyed this to Kapadia and explained that TML would handle the matter for a \$3,800 fee payable in two \$1,900 installments. Kapadia accepted representation and gave Kurzer his credit card information, authorizing a charge of \$1,400. As it was late Friday afternoon, Kurzer told Kapadia he would send the necessary information on Monday.

Taylor charged \$1,400 to Kapadia's credit card on Sunday, April 4, 2010. On Monday, April 5, 2010, Kurzer e-mailed Kapadia the FA, TPA, and Legal Services Retainer Agreement, which unbundled the total fee as follows:

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

Kapadia decided he did not want to proceed, and unsuccessfully attempted to cancel the \$1,400 transaction with his credit card company. Taylor waived the remaining \$500 for the FA.

H. The Bonneville Matter (Case No. 11-O-10610)

On April 19, 2010, TML case manager Bayo Ajigbotafe talked to Rick Bonneville about the possibility of obtaining a better rate on a mortgage held by Bonneville's wife on their home. The Bonneviles were not in default on their mortgage. Ajigbotafe sent an e-mail explaining that Bonneville might qualify for a modification, and that a TML analyst and attorney would look at

his situation. In a later conversation, Bonneville gave Ajigbotafe his financial and mortgage information. Ajigbotafe reported Bonneville's information to Taylor, who prepared the FA and determined he would be a candidate for modification. Ajigbotafe quoted \$3,600 as the service fee to apply for a loan modification, which sounded "all right" to Bonneville. Ajigbotafe recorded Bonneville's credit card information.

That night, Ajigbotafe sent Bonneville an e-mail welcoming him as a client. He attached Bonneville's FA, TPA, and Legal Services Retainer which broke down the quoted fee:

FA:	\$1,800
<u>Preparation of Lender Package:</u>	<u>\$1,800</u>
Total:	\$3,600

The next day, April 20, 2010, an \$1,800 transaction was charged to Bonneville's credit card. At approximately noon, Bonneville sent Ajigbotafe an e-mail stating: "We are not satisfied with the paper work you sent us by email" and "want to cancel any services yet to be rendered." The Bonneville's never signed the retainer, and Taylor did not refund the \$1,800.

III. CULPABILITY

A. Summary

The State Bar charged Taylor with 26 counts of misconduct in eight client matters. The hearing judge found Taylor culpable of 17 counts, including ten violations of section 6106.3, which provides: "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of section 2944.6 or 2944.7 of the Civil Code." (Italics added.) Specifically, the hearing judge found eight violations of Civil Code section 2944.7 (charging pre-performance fees) plus two violations of Civil Code section 2944.6 (failing to provide a separate statement disclosing that a third-party representative was unnecessary for loan modifications). We agree with nine of those ten

culpability findings: eight for charging a pre-performance fee in each of the client matters, but only one for failing to provide a separate statement.

The hearing judge also found that Taylor charged an unconscionable fee in seven client matters.⁶ While the record supports that Taylor's fee for the FA was an illegal pre-performance fee for loan modification services, no credible evidence establishes that the amount of the fee was unconscionable.

Finally, we agree with the hearing judge that Taylor did not commit any acts of moral turpitude as charged in each client matter. We begin our analysis with the nine counts for which we find culpability.⁷

B. Section 6106.3: Charging Fees Before Completing All Loan Modification Services (Civ. Code, § 2944.7, subd. (a)) [Counts 2, 6, 10, 13, 17, 20, 23, and 26]

These eight counts allege violations of section 6106.3 in each client matter for charging pre-performance fees for loan modifications. Civil Code section 2944.7, subdivision (a), prohibited Taylor from charging for the FA before all loan modification services had been completed. The services subject to this advance fee prohibition are those where one “negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance” (Civ. Code, § 2944.7, subd. (a).) Taylor's first two versions of his retainer contract were titled “Loan Modification Retainer,” and clearly represented that his services, including the FA, were for loan modifications. (*Mahoney v. Sharff* (1961) 191 Cal.App.2d 191, 196 [ambiguity construed against attorney who drafted contract].) Thus, under Civil Code section 2944.7, subdivision (a)(1), Taylor could not “claim, demand, charge, collect, or receive any compensation” until he

⁶ The NDC does not allege an unconscionable fee in the Harris/Torres matter.

⁷ Since the NDC alleges similar misconduct in each client matter, we have grouped the counts by charged misconduct rather than by client matter or numerical order to assist the reader.

had “fully performed each and every service [he] contracted to perform or represented that he . . . would perform.”

Although Taylor eventually re-named his retainer agreement “Legal Services Retainer” rather than “Loan Modification Retainer,” the introductory e-mails sent to the clients who received that version of the retainer agreement still characterized Taylor’s firm, TML, as a loan modification service provider. Further, the agreement stated that the fees charged included the FA and “Preparation of a Lender Package,” both of which are clearly part of a loan modification. We conclude that Taylor violated Civil Code section 2944.7, subdivision (a), in eight client matters by charging for the FA before all loan modification services were complete.

Taylor presents a primary argument against his culpability: that the new statutes are ambiguous and should be interpreted to allow attorneys to charge unbundled fees for services as they are completed. We disagree.

The language of Civil Code section 2944.7, subdivision (a), plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. (*In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, 59 [plain language of statute controlled where meaning lacked ambiguity, doubt, or uncertainty].)⁸ We find nothing ambiguous about the statute’s language, or the legislative history, which provides that “legal professionals” are one of the groups the bill was designed to reach.⁹ (See 4 Miller & Starr, Cal. Real Estate (3d ed. 2011)

⁸ No published case law interprets Civil Code section 2944.7, subdivision (a).

⁹ The legislative history provides in relevant part: “California does have a law regulating the activities of foreclosure consultants, but that law contains numerous exemptions from its requirements, including exemptions for legal professionals Under the provisions of the bill, persons exempt from the foreclosure consultant law would be allowed to help negotiate loan modifications on a borrower’s behalf for a fee, paid after services were rendered.” (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.)

§ 10:145.10 [statute directed at brokers and attorneys who, as self-styled consultants, were holding themselves out as able to facilitate loan modifications, “but usually produced no worthwhile results after collecting substantial advance fees from desperate homeowners”].)

We also reject Taylor’s argument that he is not culpable because he acted in good faith by consulting others before he decided to unbundle services within loan modifications and charge separately for them. Taylor acknowledged he was surprised about the State Bar ethics alert warning that an attorney may not collect any payment for loan modification services until fully completed. Although Taylor claims his colleagues disputed the accuracy of the ethics alert, he may not rely on the opinion of another attorney as a defense to violating the rules or sections governing attorney ethics. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of “fellow attorney” no defense to wrongdoing].) In sum, Taylor chose an interpretation of Civil Code section 2944.7, subdivision (a), that ignored the statute’s plain language, the legislative history and, most importantly, his own knowledge of the State Bar’s October 2009 ethics alert. Accordingly, we find that he did not act in good faith.

C. Section 6106.3: Failing to Provide Required Separate Statement (Civ. Code, § 2944.6, subd. (a)) [Counts 9 and 16]

The NDC charged only two violations of Civil Code section 2944.6, subdivision (a), failing to provide a separate statement about the lack of necessity for a third-party negotiator. Those violations are alleged in the Sears matter (Count 16) and in the Ramirez matter (Count 9).

In the Sears matter, Taylor’s assistant, Kurzer, did not send the retainer agreement to Sears until two days after TML had accepted representation and had charged him \$1,950. Although Kurzer sent Sears an e-mail with a link to TML’s website, which displayed the separate statement, there is no evidence Sears viewed the site. Since Taylor charged Sears for loan modification services without first providing the separate statement, he is culpable of Count 16.

In the Ramirez matter, Taylor did not fail to provide the separate statement. Ramirez signed the retainer agreement the day she received the FA and authorized TML to charge \$1,000. The agreement contained the mandatory language at page two, which Ramirez acknowledged by initialing next to it. The statute requires that the information be provided “as a separate statement” but does not mandate that it be in a separate document, as the State Bar asserts. We dismiss Count 9 with prejudice.

D. Section 6106: Moral Turpitude [Counts 1, 5, 8, 12, 15, 19, 21, and 24]

The NDC charged moral turpitude in all eight client matters based on several actions, including that Taylor: (1) misrepresented that installment payments would be collected only after the service was complete, but instead collected a fee for the FA prior to performing any service in each client matter; (2) appropriated funds under false pretenses by requiring that the potential client give credit card information to begin services, advised that fees would not be withdrawn before the service was completed and, thereafter, withdrew fees prior to performing any service in each client matter; (3) misappropriated client funds by collecting fees when the clients had not signed the retainer agreement in the Kapadia and Bonneville matters; (4) informed the client that the loan modification application was pending when he knew it was not in the Castro matter; and (5) threatened to withdraw unearned fees from the client’s bank account if his services were terminated in the Ramirez matter.

The hearing judge did not find clear and convincing evidence¹⁰ that Taylor committed any acts of moral turpitude. Instead, the hearing judge concluded that, at best, Taylor negligently breached his agreements but did not make intentional misrepresentations or misappropriate client funds when he charged the illegal fees. We defer to the hearing judge’s findings of fact which

¹⁰ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

clearly rested, in part, on credibility assessments of each client and Taylor, all of whom testified at trial. (Rules Proc. of State Bar, rule 5.155(A) [factual findings entitled to great weight]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [hearing judge’s credibility findings entitled to great weight].) Resolving all evidentiary conflicts in Taylor’s favor, we agree with the hearing judge that the State Bar did not clearly and convincingly prove moral turpitude. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 324 [“inferences leading to a conclusion of innocence must be drawn if equally reasonable”].)

E. Rule 4-200(B) of the State Bar Rules of Professional Conduct:¹¹ Unconscionable Fee [Counts 3, 7, 11, 14, 18, 22, and 25]

The NDC alleges that Taylor collected unconscionable fees in seven client matters (excluding the Harris/Torres matter). The hearing judge found Taylor culpable, reasoning that the one-page FA was of little value to the clients as a mere summary of financial information without meaningful analysis. We conclude that while the FA fees may have been high, the State Bar did not prove that they were truly unconscionable.

Rule 4-200(A) specifically prohibits an attorney from entering into an agreement for, charging, or collecting an illegal or unconscionable fee. It is settled that a gross overcharge by an attorney may warrant discipline. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.) But a “fee that ‘seems high’ or even one that is in fact high is not the same as an unconscionable fee.” (*Aronin v. State Bar* (1990) 52 Cal. 3d 276, 285.) A fee is unconscionable when it is so exorbitant and disproportionate to the services performed as to “shock the conscience” and often involves an element of fraud or overreaching that practically constitutes an appropriation of client funds under the guise of fees. (*In re Goldstone* (1931) 214 Cal. 490, 499.)

To determine whether a fee meets the test of unconscionability, rule 4-200(B) provides

¹¹ Unless otherwise noted, all further references to “rule(s)” are to this source.

the guidance of 11 nonexclusive factors,¹² several of which are relevant here. First, the level of client sophistication varied among Taylor's clients. Some were familiar with the mortgage industry, while others had more than one property or were not in default or behind on their payments. Still, others were unsophisticated and financially distressed. Each of Taylor's clients authorized the FA charge, provided payment information and, in most cases, signed the retainer agreement. Taylor had some expertise in mortgage law and was experienced in negotiating with banking institutions. He testified that creating the proprietary FA took many hours and it contained valuable information for clients because they could use it to pursue a loan modification without his assistance. Most importantly, Taylor presented the unrebutted expert testimony of Andelman, who explained that the FA was a valuable tool for a client in deciding whether to pursue a loan modification. Andelman also confirmed that gathering the information from distressed homeowners was time-consuming, and the software Taylor used to create the FA was not readily available to the public.

Under these circumstances, Taylor's fees for the FAs did not represent the type of truly shocking fees that the courts have found to be unconscionable.¹³ We dismiss with prejudice all

¹² (1) The amount of the fee in proportion to the value of the services performed.
(2) The relative sophistication of the member and the client.
(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
(5) The amount involved and the results obtained.
(6) The time limitations imposed by the client or by the circumstances.
(7) The nature and length of the professional relationship with the client.
(8) The experience, reputation, and ability of the member or members performing the services.
(9) Whether the fee is fixed or contingent.
(10) The time and labor required.
(11) The informed consent of the client to the fee.

¹³ See, e.g., *In the Matter of Harney*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 273, 284 (medical malpractice fee of \$266,850 in excess of statutory limit is illegal but not unconscionable because proportional to value of services rendered); *In the Matter of Wells*

charges alleging unconscionable fees.¹⁴

F. Section 6068, subdivision (m): Failure to Inform Client of Significant Development [Count 4]

Count Four alleges Taylor failed to inform Castro of a significant development – that the lender, EMC, had denied her modification packet. We agree with the hearing judge that no credible evidence establishes that EMC notified TML about the denial. We dismiss this count with prejudice.

IV. MITIGATION AND AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Taylor must establish mitigation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)),¹⁵ while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(e).)

A. One Factor in Mitigation: Good Character (Std. 1.2(e)(vi))

To qualify for mitigation credit, standard 1.2(e)(vi) calls for “an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member’s misconduct.” Taylor presented 11 witnesses including his wife and brother, a client, several friends and four attorneys who uniformly testified to his professionalism, honesty, integrity, and

(Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 905 (unconscionable fee where three times the amount client agreed to pay).

¹⁴ In Count Seven (the Sukin matter), the State Bar also alleged that the \$3,000 Taylor charged Sukin for litigation after the loan modification failed was unconscionable. We do not agree. TML prepared and sent Sukin a complaint and accompanying exhibits totaling over 100 pages. The State Bar presented no credible evidence that the fee for this service was unconscionable.

¹⁵ Unless otherwise noted, all references to “standard(s)” are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

tireless work ethic. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have “strong interest in maintaining the honest administration of justice”].) These witnesses constitute a wide range of references in the legal and general communities.

However, most of the witnesses did not have a lengthy relationship or much recent contact with Taylor. Further, several stated they had little understanding about the discipline charges. These factors undermine the value of Taylor’s character evidence. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 538.) Accordingly, we assign only modest mitigating credit for good character. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [seven witnesses and 20 support letters not “significant” mitigation because witnesses unfamiliar with details of misconduct].)

B. Three Factors in Aggravation

The hearing judge found three factors in aggravation: multiple acts of misconduct, significant harm, and indifference/lack of remorse. We agree.

1. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

For six months, Taylor committed multiple acts of misconduct in eight client matters by collecting fees in violation of a clear statutory prohibition. His many acts of wrongdoing substantially aggravate this case.

2. Significant Harm (Std. 1.2(b)(iv))

Taylor took advantage of several clients’ financial desperation and exploited his fiduciary position by repeatedly charging up-front fees for loan modification services that the new laws prohibited. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [parties in a fiduciary or confidential relationship do not deal on equal terms because trusted person is in superior position to exert unique influence over dependent party].) Taylor’s actions significantly harmed these clients

financially, particularly because he has for years failed to provide full refunds of these much needed funds.

3. Indifference/Lack of Remorse (Std. 1.2(b)(v))

The hearing judge found that Taylor “expressed no remorse for his misconduct and continues to deny any wrongdoing.” Lack of remorse and failure to acknowledge misconduct are “properly considered as . . . aggravating factor[s] in deciding the appropriate discipline for an attorney. [Citations.]” (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Taylor has failed to acknowledge that he may not charge any fees in loan modification cases until all services have been completed, as the statute and ethics alert clearly provide. Instead, he continues to assert that he can unbundle services and charge for them separately. While Taylor may freely urge any creative legal theory in good faith, he must “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.) He has not done this – he claims that he should not be disciplined for violating “a debatable point of law regarding SB-94” The statutory prohibition against collecting up-front fees in loan modification cases is not debatable – it is the law. We assign significant weight to Taylor’s lack of insight because it suggests that his misconduct may reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.)¹⁶

¹⁶ The State Bar asks us to find additional aggravation for the following uncharged misconduct that it alleges Taylor committed: (1) communicating about a free consultation and charging advanced fees in violation of rule 1-400(D); (2) using false, deceptive and confusing solicitations and fee agreements; (3) using runners and cappers for referrals from LowerMyBills.com in violation of sections 6151 and 6152; and (4) paying a \$3,000 fee to prepare Sukin’s complaint without a written agreement in violation of section 6148, subdivision (a). Evidence of uncharged misconduct can be considered in aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) But here, the State Bar had notice of all these acts and failed to charge them as misconduct either in the NDC or at trial as conforming to proof. We find that the State Bar’s late request on review denies Taylor a fair opportunity to defend against these newly alleged charges and therefore decline to find additional aggravation for uncharged misconduct.

V. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.3.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) As always, we look to the standards and decisional law to recommend the fairest discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 91; *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Since we have found Taylor culpable of collecting illegal fees in violation of section 6106.3, the applicable standard is 2.10. It calls for reproof or suspension, depending on the gravity of the offense or harm to the victim, for violations of the Business and Professions Code not otherwise specified in another standard. We reject the State Bar's request that Taylor be disbarred as it is beyond what the standard suggests and because he did not engage in acts of moral turpitude, dishonesty, or corruption. Instead, we begin our analysis, as the standard directs, by looking to: (1) the seriousness of Taylor's misconduct; and (2) any consequential client harm.

Taylor's conduct is serious and the harm to his clients is significant. He repeatedly violated loan modification statutes designed to protect the consumer. The plain language of these statutes and a State Bar ethics alert provided fair notice to Taylor that he must not collect any up-front fees for loan modification services. Yet Taylor used a "payment schedule" in his retainer agreements to circumvent the protections of SB 94. He has harmed his clients by collecting illegal fees from them and, in most instances, has failed to provide full refunds.

Because standard 2.10 suggests a broad range of discipline (reproof to suspension), we turn to case precedent and find instructive the case of *In the Matter of Harney, supra*, 3 Cal. State Bar Ct. Rptr. 266. In *Harney*, we used standard 2.7 (minimum six-month suspension for

collecting unconscionable fee irrespective of mitigation), as a guideline for discipline, even though the fee was illegal and not unconscionable. (*Id.* at pp. 284-285.) The attorney in *Harney*, who had a prior public reproof, collected \$266,850 in excess of the statutory limits in one medical malpractice case, making it an illegal fee. (*Id.* at p. 277.) We imposed discipline including a six-month suspension. (*Id.* at p. 285.) Here, Taylor collected significantly less in illegal fees and has no prior discipline, but harmed several vulnerable clients over a six-month period. Like the attorney in *Harney*, who was fully aware of the law prohibiting the excess fees, Taylor knew about the plain language of the statute and the State Bar ethics alert before he collected the illegal fees.¹⁷

Guided by standard 2.10, *Harney*, and the aggravating evidence, we affirm the hearing judge's recommended discipline, which includes a six-month actual suspension, but we reduce the probationary period from three years to two years. In addition, we recommend that Taylor remain suspended until he makes restitution for all the fees he illegally collected. Our recommendation will permit Taylor time to gain insight into his misconduct, while at the same time protect the public and the courts, and maintain the integrity of the legal profession.

¹⁷ Other unconscionable fee cases present such a broad range of discipline that they do not offer helpful guidance, particularly because they were decided before the standards or involve other serious misconduct. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 995, 999 [thorough discussion of broad range of discipline in unconscionable fee cases]; see, e.g., *In re Goldstone*, *supra*, 214 Cal. 490 [three-month suspension for unconscionable fee court viewed as dishonest for providing no service of value]; *Barnum v. State Bar* (1990) 52 Cal.3d 104 [disbarment for charging unconscionable fees plus violation of four court orders and extensive history of prior discipline]; *In the Matter of Wells*, *supra*, 4 Cal. State Bar Ct. Rptr. 896 [six-month suspension for illegal and unconscionable fee plus unlawful practice of law, overreaching, false information to officials, and failing to return unearned fees but substantial mitigation]; *In the Matter of Scapa and Brown* (Review. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [18-month actual suspension for unconscionable fee plus violations for moral turpitude and fee-splitting].)

VI. RECOMMENDATION

We recommend that Swazi Elkanzi Taylor be suspended from the practice of law for two years, execution stayed, and that he be placed on probation for two years on the following conditions:

1. He is suspended from the practice of law for a minimum of the first six months of probation, and he will remain suspended until the following requirements are satisfied:
 - (a) He makes restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles:
 - (1) Rosane Castro in the amount of \$2,500 plus 10 percent interest per year from November 23, 2009;
 - (2) Alan Sukin in the amount of \$3,600 plus 10 percent interest per year from September 30, 2010;
 - (3) James Croxton in the amount of \$1,300 plus 10 percent interest per year from April 22, 2010;
 - (4) Wesley Harris and Eloisa Torres in the amount of \$3,750 plus 10 percent interest per year from May 24, 2010;
 - (5) Harshdrai Kapadia in the amount of \$1,400 plus 10 percent interest per year from April 4, 2010; and
 - (6) Rick Bonneville in the amount of \$1,800 plus 10 percent interest per year from April 20, 2010.
 - (b) If he remains suspended for two years or more as a result of not satisfying the preceding condition, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 30 days after the effective date of the Supreme Court order in this proceeding, he must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with his assigned probation deputy to discuss the 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. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School.
8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Swazi Elkanzi Taylor be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b)(2).)

RULE 9.20

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

COSTS

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, J.

WE CONCUR:

REMKE, P.J.
EPSTEIN, J.