

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case No.: **11-O-10051-PEM**
) **(11-O-10319;11-O-10607)**
DAVID LAURENCE NAPLES,) **11-O-10814; 11-O-10488)**
) **DECISION**
Member No. 233928,)
)
A Member of the State Bar.)

Introduction¹

In this contested hearing respondent **David Laurence Naples** is charged in five client matters with violating Business and Professions Code section 6106.3(a)/Civil Code section 2944.7 by negotiating, arranging and otherwise offering to perform mortgage modifications for a fee by the borrower, and demanding, charging, collecting or receiving such a fee prior to fully performing each and every service respondent had contracted to perform or represented he would perform.

For the reasons stated below, this court finds, among other things, that 120 days' actual suspension is sufficient to protect the public in this instance, with credit for the 60-day period that he was on inactive status while the issue of his eligibility for the Alternative Discipline Program (ADP) was pending.

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

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 9, 2011. On December 22, 2011, respondent filed a response to the NDC. On December 27, 2011, the court referred the matter to the State Bar Court's ADP.

During the course of the ADP proceedings, the court recommended 60 days' actual suspension, among other things, upon successful completion of that program. Pursuant to section 6233, he served that time between December 15, 2012 and February 13, 2013.

On January 7, 2013, the State Bar filed a petition for interlocutory review of the hearing judge's order admitting respondent into the ADP and the judge's statement of alternative dispositions filed on December 17, 2012. On February 22, 2013, after respondent had finished serving the 60 days' actual suspension recommended in the ADP proceedings, the Review Department reversed the December 17 order, finding respondent eligible and admitting him into ADP. The case was remanded to the Hearing Department for processing as a standard disciplinary proceeding.

On July 31, 2013, the parties filed stipulation as to undisputed facts.

A three-day trial was held on August 14, 15 and 16, 2013. The State Bar was represented by Deputy Trial Counsel Anand Kumar. Respondent was represented by Scott J. Drexel. On August 26, 2013, following closing briefs, the court took this matter under submission.

Findings of Fact and Conclusion of Law

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

Case No. 11-O-10051 – The Spinelli Matter

Facts

On May 19, 2010, Dennis Spinelli hired respondent to represent him in a residential mortgage loan modification on real property Spinelli owned in California. On that same date, Spinelli used his credit card to pay respondent a total of \$3,525.00 in advanced fees.

Prior to contacting respondent, Petra and Dennis Spinelli² had been offered an unfavorable loan modification by the bank. They then thought they needed legal representation to get a favorable modification. They found respondent through his website, which stated that one should not work with a loan modification company that is not working with an attorney.

Petra Spinelli credibly testified that she had no contact with respondent until September 2010, and, prior to that, her contacts were with respondent's staff.

In November 2010, Spinelli terminated respondent's services after their bank informed them that respondent had submitted the wrong paperwork.

Respondent admits he did not complete all of the loan modification services Spinelli hired him to perform when they paid him the \$3,525.00. To date, respondent has not refunded any portion of the advanced fees the Spinellis paid him. Respondent has not refunded any portion of the advanced fees because he does not have the financial means of doing so.³

Conclusion

Count 1 - (§ 6106.3(a) [A violation of California Civil Code§ 2944.7(a)]

Section 6106.3(a) provides that it shall constitute cause for the imposition of discipline of an attorney to engage in conduct in violation of section 2944.7(a) of the Civil Code. The latter plainly prohibits any person, including a legal professional from collecting any fee related to a

² Dennis Spinelli did not testify at trial but his wife, Petra, did.

³ This applies to the remaining client matters as well.

loan modification until each and every service contracted for has been completed. Under this statute, an attorney is not allowed to charge unbundled fees for individual financial analysis until he/she has completed all loan modification services listed in the agreement.

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid and demanding, charging, collecting and receiving at least \$3,525.00 from the Spinellis prior to fully performing each and every service respondent had contracted to perform or represented that he would perform, in violation of subsection (a) (1) of section 2944.7 of the Civil Code, respondent willfully violated section 6106.3(a).

Case No. 11-O-10319 – The Marin Matter

Facts

After hearing an advertisement on television, Josephine Marin hired respondent on July 17, 2010, to represent her in a residential mortgage loan modification on her California real property. Between February 17 and May 2, 2010, Marin took money out of her meager savings and paid respondent \$3,500.00 in advanced fees. Marin credibly testified that respondent completely dropped the ball in dealing with her loan modification and, as a result, she did her own short sale. Respondent admits he had not completed all of the loan modification services Marin hired him to perform when she paid him the \$3,500.00. He has not refunded any portion of the advanced fees collected from Marin.

Conclusion

Count 2 - (§ 6106.3(a) [A violation of California Civil Code§ 2944.7(a)]

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid and demanding, charging, collecting and receiving at least \$3,500.00 from Marin prior to fully performing each and every service respondent had contracted to perform or represented that

he would perform, in violation of subsection (a)(1) of section 2944.7 of the Civil Code, respondent willfully violated section 6106.3(a).

Case No. 11-O-10607 – The Francisco Matter

Facts

On August 23, 2010, Marie Francisco hired respondent to represent her in a residential mortgage loan modification on real property she owned in California. On August 25, 2010, she paid him a total of \$3,500.00 in advanced fees. Francisco credibly testified that, after she paid respondent, he never called her back. Respondent specifically admits that he did not do any work on Francisco's case before spending her money. He has not refunded any portion of the advanced fees collected from Francisco.

Conclusion

Count 3 - (§ 6106.3(a) [A violation of California Civil Code§ 2944.7(a)]

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid and demanding, charging, collecting and receiving at least \$3,500.00 from Francisco prior to fully performing each and every service respondent had contracted to perform or represented that he would perform, in violation of subsection (a)(1) of section 2944.7 of the Civil Code, respondent willfully violated section 6106.3(a).

Case No. 11-O-10814 – The Castillo Matter

Facts

On March 4, 2010, Paul Castillo hired respondent to represent him in a residential mortgage loan modification on Castillo's California real property. However, Castillo never met respondent until he walked into court during this disciplinary hearing. When he hired respondent, he did not have the entire \$3,500.00. The person he met at respondent's office told him that the only way they would take his case is for him to write predicated checks totaling

\$3,500.00. Between March 4 and August 4, 2010, Castillo borrowed the money and paid respondent a total of \$3,500.00 in advanced fees.

Castillo credibly testified that he sent documents to respondent's office and had three or four contacts with an employee of respondent's office. By April 2010, after his second predicated check was cashed, he was already frustrated with the lack of follow-through with respondent's office. Finally, in January 2011, Castillo wrote respondent a letter and warned him that, if he did not hear from him, he was contacting the Better Business Bureau, the State Attorney General's office as well as filing a complaint with the State Bar. The letter was returned and Castillo never heard from respondent.

Respondent admits he had not completed all of the loan modification services Castillo hired him to perform when Castillo paid him the \$3,500.00. Respondent has not refunded any portion of the advanced fees collected from Castillo.

Conclusion

Count 4 - (§ 6106.3(a) [A violation of California Civil Code§ 2944.7(a)]

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid and demanding, charging, collecting and receiving at least \$3,500.00 from Castillo prior to fully performing each and every service respondent had contracted to perform or represented that he would perform, in violation of subsection (a)(1) of section 2944.7 of the Civil Code, respondent willfully violated section 6106.3(a).

Case No. 11-O-10488- The Fuentes Matter

Facts

On March 16, 2010, Alfred Fuentes, Jr., hired respondent to represent him in a residential mortgage loan modification on his California real property. Between April 8 and June 4, 2010,

Fuentes paid respondent a total of \$3,500.00 in advanced fees. At the time, Fuentes was living on disability income of \$2,300.00 per month.

While respondent represented Fuentes, his house was sold out from under him.

Respondent did not do any legal work to prevent this action by the bank.

Respondent admits that he had not completed all of the loan modification services Fuentes hired him to perform at the time respondent received the \$3,500.00 in advanced fees from Fuentes. Respondent did not respond to Fuentes' request for a refund. Respondent has not refunded any portion of the \$3,500.00.

Conclusion

Count 5 - (§ 6106.3(a) [A violation of California Civil Code§ 2944.7(a)]

By negotiating, arranging or offering to perform a mortgage loan modification for a fee paid and demanding, charging, collecting and receiving at least \$3,500.00 from Fuentes prior to fully performing each and every service respondent had contracted to perform or represented that he would perform, in violation of subsection (a)(1) of section 2944.7 of the Civil Code, respondent willfully violated section 6106.3(a).

Aggravation⁴

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

Respondent engaged in multiple acts of misconduct.

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

All of the clients in these matters were desperate. In most instances, respondent did little, if any, work for them. He took advantage of their financial desperation and exploited his fiduciary position by repeatedly charging up-front fees for loan modification prohibited by law.

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

Moreover, clients suffered significant harm due to respondent's failure to return their advanced legal fees.

Mitigation

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

Respondent presented the testimony of several witnesses, including Christopher O'Leary, Thomas Elenbaas, Scott Viguie, Albert Navarra, Jamie Gottschalk-Hill, Stephen Key, Derrick Taberski, Tim Fay and Ivan Illes. Several of the witnesses are California lawyers. ("Letters of recommendation and the favorable testimony, especially that of employers and attorneys, are entitled to considerable weight. [Citations.]" (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) All of these witnesses know respondent well and were aware of the disciplinary charges. They uniformly testified to his good character for honesty, integrity and trustworthiness. The court found all of the witnesses credible and gives their testimony great weight. A few examples are discussed below.

Albert A. Navarra, a California attorney since 1999, has known respondent for 35 years. They are life-long friends who lived on the same side of the street. Navarra was best man at respondent's wedding. He is aware of the misconduct and believes it was aberrational and out of character for respondent. He believes respondent is a man of integrity. Respondent understands now that what he did was wrong. Respondent's wife's illness, multiple sclerosis (MS), affected his practice.

Thomas E. Elenbaas, a California attorney since 1977, has known respondent since mid-2006. Respondent rented office space from him between 2006 and 2012. Elenbaas acted as a mentor to respondent since he had been in practice for 25 years. For the first part of 2006, Elenbaas saw respondent three to five times a week. They spoke frequently about cases. Elenbaas gave respondent some overflow work and has referred cases to him. He was very

happy with respondent's work and found him to be very competent. Elenbaas found respondent to be very honest, including being candid with him when he fell behind in his office rent. He did not make promises he could not keep. He was honest and ethical. He is aware of the issues with respondent's wife's health and with the disciplinary charges. The charges do not go to respondent's underlying moral character. Respondent understands that what he did was wrong.

Jamie Gottschalk-Hill has been a California attorney since 2004. She has known respondent since 2000 and has had a lot of contact with him, two or three times a week. They are devoted friends but also had a working relationship. She believes respondent to be one of the most honest people she knows. He has handled the disciplinary matter without making excuses or minimizing his responsibility. He has taken it very seriously. Her opinion of him has increased. Gottschalk-Hill is aware of the misconduct. It was a misinterpretation of the law. He admits his mistake and it is causing him angst. The misconduct is not in his character. She would change her opinion if she believed someone engaged in this misconduct blatantly.

Derrick J. Taberski has been a California attorney since 2004. He and respondent met while on a jury panel in 2004. They are friends and are in contact at least every couple of weeks. He has done some work for respondent in the past. Taberski knows respondent well and has a high opinion of his integrity and honesty. Respondent has never given him any reason to think he does anything unethical. Respondent told him about the disciplinary matter as soon as he found out. It does not change his opinion of respondent. He does not believe that respondent intentionally violated the law. Respondent is remorseful. He understands that respondent's wife has MS; that they live on one income; and that respondent does not have permanent employment.

Moreover, one of the witnesses, Tim Fay, was a recent client who had only known respondent a few months, noted respondent's candor in disclosing the State Bar disciplinary proceeding at the time Fay retained respondent.

**Candor/Cooperation to Victims/State Bar (Std. 1.2(e)(v).)
Remorse/Recognition of Wrongdoing (Std. 1.2(e)(vii).)**

Respondent has acknowledged his good-faith, but mistaken, interpretation of the applicable mortgage loan modification statutes and stipulated to facts in this proceeding once he realized his error. He has demonstrated candor and cooperation as well as insight and remorse for his misconduct, qualities to which his character witnesses attested. His candor, insight and remorse indicate recidivism is unlikely.

Other

Some of the character witnesses also attested to the respondent's increasing responsibility and stress of caring for his spouse who has MS. The court does not question respondent's depression due to his wife's MS diagnosis and worsening prognosis and his mother's lymphoma, however, there is no evidence depression caused him to develop a fee structure to circumvent Civil Code section 2994.7. However, it may serve as explanation as to why it appears he did little, if any, work on his clients' behalf and is afforded some mitigating effect.

Discussion

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

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

sanctions. (Std. 1.6(a).) Discipline is progressive. The standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standard 2.10 applies in this matter. It suggests reproof or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline as set forth in standard 1.3 for culpability of a violation of the Business and Professions Code or the Rules of Professional Conduct not otherwise specified in the standards.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar recommends, among other things, six months’ actual suspension and until he makes restitution and until he complies with standard 1.4(c)(ii). Respondent seeks 60 days’ actual suspension and, in any case, no more than 90 days’ actual suspension. The court believes that, among other things, 120 days’ actual suspension is sufficient to protect the public in this instance, with credit for the 60-day period that he completed on inactive status while the issue of his eligibility for the ADP was pending, is appropriate given the nature and extent of the misconduct and the mitigating and aggravating factors.

Respondent has been found culpable in five client matters of violating section 6106.3. Mitigating factors were good character evidence, remorse and recognition of wrongdoing, candor and cooperation and some consideration for stress due to loved one’s severe health conditions. In aggravation, the court considered multiple acts of misconduct and harm.

This case is distinguishable from another loan modification case, *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, in that the instant case presents less misconduct as well as much more mitigation and much less aggravation. In *Taylor*, the attorney was placed on actual suspension for six months and until restitution was made for charging illegal fees in eight client matters during a six-month period. Aggravating factors included multiple acts of misconduct, harm and indifference. His lack of insight was a significant aggravating factor because it suggested that the misconduct would reoccur. The sole mitigating factor was evidence of good character, the weight of which was discounted because, unlike in the present case, the witnesses did not know Respondent Taylor very long or had not had recent contact with him or were not familiar with the charges. As previously discussed, respondent's candor, insight and remorse in the present case are significant mitigating factors that indicate less likelihood of recidivism than in *Taylor*. Accordingly, the instant matter merits less discipline than *Taylor*.

Having considered the parties' contentions, the court believes that, in this instance, 120 days' actual suspension with credit for the 60 days respondent was on inactive status while he participated in ADP is sufficient to protect the public and so recommends.⁵

Recommendations

It is recommended that respondent DAVID LAURENCE NAPLES, State Bar Number 233928, be suspended from the practice of law in California for two years, that execution of that

⁵ The court believes it is fair to grant respondent credit for the 60 days he was inactively enrolled pursuant to ADP orders. He complied in good faith and his inability to complete the ADP was not his fault. Similarly, if this discipline recommendation is adopted, respondent will actually serve an additional 60 days of suspension, so it is not recommended that he be ordered to comply with rule 9.20 of the California Rules of Court.

period of suspension be stayed, and that respondent be placed on probation⁶ for a period of two years subject to the following conditions:

1. Respondent DAVID LAURENCE NAPLES is suspended from the practice of law for the first 120 days of probation (with credit given for inactive enrollment, which commenced on December 15, 2012, and ended on February 14, 2013.)
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
5. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
7. Respondent must pay restitution to the payees listed below in the amounts listed below plus 10 percent interest per year from the dates listed below. If the Client Security Fund (CSF) has reimbursed a payee for all or any portion of the principal

⁶The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

amount, respondent must pay restitution to CSF of the amount paid plus applicable interest and costs in accordance with Business and Professions Code section 6140.5.

<u>Payee</u>	<u>Principal Amount</u>	<u>Interest Accrues From</u>
Dennis and Petra Spinelli	\$3,525.00	May 19, 2010
Josephine Marin	\$3,500.00	March 1, 2010
Marie Francisco	\$3,500.00	August 25, 2010
Paul Castillo	\$3,500.00	May 20, 2010
Alfred Fuentes, Jr.	\$3,500.00	May 4, 2010

8. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
9. At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Examination

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

Costs

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

Dated: December _____, 2013

PAT E. McELROY
Judge of the State Bar Court