

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 12-O-12490-RAH
)	
JOEL MARK FEINSTEIN,)	
)	DECISION
Member No. 177546,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction and Significant Procedural History¹

The Notice of Disciplinary Charges in this matter was filed on July 20, 2012.

Respondent Joel Mark Feinstein filed a response on August 6, 2012. On January 7, 2013, the parties filed trial briefs. The parties filed a factual stipulation with attached exhibits on January 8, 2013.² That same day, the matter was submitted for decision. Timothy G. Byer represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar), and respondent was represented by Edward O. Lear.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on August 14, 1995, and has been a member of the State Bar of California at all times since that date.

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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.

² The exhibits attached to this stipulation are admitted into evidence.

Case No. 12-O-12490 – The Fortuno Matter

Facts

Prior to January 2012, Paul and Arlyn Fortuno (the Fortunos) had sought and been denied a loan modification. On January 2, 2012, the Fortunos employed respondent to provide the legal services described in their retainer agreement, as illustrated below. On January 5, 2012, the Fortunos paid respondent an initial advanced fee of \$1,500. On February 21, 2012, the Fortunos paid respondent a second installment toward his advanced fee, in the sum of \$500.

Respondent's retainer agreement stated that the scope of representation would be limited to the following:

- I. A case review
- II. Consultation and preparation of your case
- III. Correspondence with your financial institution to informally resolve your dispute
- IV. Notification to your financial institution of an intent to file a suit if resolution is not reached giving them a final opportunity to resolve the dispute short of litigation
- V. Preparation of a Summons and Complaint including filing fees and process server fees
- VI. Preparation of a Temporary Restraining Order (TRO) Package to seek foreclosure injunction to stop any foreclosure actions taken by your Lender
- VII. Attending a Temporary Restraining Order (TRO) hearing
- VIII. Preparation of one Case Management Statement including filing fees
- IX. Attending a Mandatory Case Management Settlement Conference
- X. Reaching a case resolution as defined below under "Loan Work-out Resolution" section³

The case resolutions referred to in section "X." were defined in the "Loan Work-out Resolution" portion of the retainer agreement as one or more of the following:

- I. HAMP (Home Affordable Modification Program)
- II. Lower the existing fixed rate
- III. Principal Reduction
- IV. Change adjustable interest rate to a fixed interest rate
- V. Reduce adjustable interest rate / reduce CAPS of adjustable interest rate
- VI. Stop upward adjustment of adjustable interest rate

³ The scope of respondent's representation does not include litigation.

- VII. Arrange for the delinquent payment amounts to be added to the end of loan
- VIII. Arrange for the delinquent payment amounts to be added to a longer loan period
- IX. Arrange for the delinquent payment amounts to be accepted in an alternative payment plan
- X. Eliminate or reduce the delinquent payment amounts

Each and every item listed in the Loan Work-out Resolution section is a form of loan modification.

The retainer agreement also stated that the Fortunos would pay respondent “an up-front, non-refundable, non-creditable and fully earned fee of \$3,995.00 upon receipt.” Said fee was to cover the work outlined within the scope of representation.

On or about February 10, 2012, respondent sent a letter to the Fortunos’ mortgage lender on their behalf. In this letter, respondent stated that he had been retained to file a lawsuit against the lender based on the denial of the Fortunos’ loan modification. Along with the letter, respondent included an updated submission package associated with a loan modification application and demanded that the lender review the package in good faith.

In June 2012, the Fortunos obtained a loan modification. There is no indication in the record that respondent ever filed a lawsuit on behalf of the Fortunos.

On July 20, 2012, respondent fully refunded the Fortunos’ fees.

Conclusions

Count One - (Section 6106.3, subd. (a) [Failure to Comply with Civil Code Section 2944.7, subd. (a)]

Section 6106.3 provides that an attorney must not engage in any conduct in violation of section 2944.7 of the Civil Code. Section 2944.7 of the Civil Code provides, in pertinent part, that 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 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.

The scope of representation in respondent's retainer agreement with the Fortunos included loan modification services for an advanced fee. By charging and receiving advanced fees in exchange for agreeing to perform loan modification services in violation of California Civil Code section 2944.7, subdivision (a)(1), respondent willfully violated Business and Professions Code section 6106.3.

Count Two - (Section 6106.3, subd. (a) [Failure to Comply with Civil Code Section 2944.6, subd. (a)])

Section 6106.3 provides that an attorney must not engage in any conduct in violation of section 2944.6 of the Civil Code. Section 2944.6 of the Civil Code provides, in pertinent part, that notwithstanding any other provision of law, any person who negotiates, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification for a fee paid by the borrower, shall provide warning language to the borrower. Said language is to be printed in not less than 14-point bold type, and shall include the following text:

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.

There is no clear and convincing evidence in the record that respondent failed to provide the Fortunos with the aforementioned warning language. Consequently, Count Two is dismissed with prejudice.

Aggravation⁴

There is no clear and convincing evidence of any factors in aggravation.

Mitigation

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

Respondent has no prior record of discipline over many years of practice. Respondent had been admitted to practice law in California for over 16 years before the misconduct in this matter. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over ten years of practice before first act of misconduct given significant weight].)

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

Respondent agreed to enter into a stipulation of facts, which saved court resources. As such, he is entitled to some mitigation for cooperation with the State Bar.

Respondent also refunded the entire retainer amount in the Fortuno matter, albeit after commencement of State Bar proceedings. Payment of restitution following the onset of disciplinary proceedings warrants little to no consideration in mitigation. (See *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [restitution paid under the force or threat of disciplinary proceedings does not have any mitigating effect].) That being said, respondent's payment of full restitution gives the court reason to believe that he has already begun his process of rehabilitation. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1093 [restitution is an indicator of rehabilitation].)

Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 provides that the primary

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.

purposes of disciplinary proceedings “are 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.”

The standard 2.10 is applicable to the misconduct in this matter. Standard 2.10 provides that culpability of a member of a violation of section 6106.3 shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim.

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.) As 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.)

Respondent has been found culpable of a single violation of section 6106.3. In mitigation, respondent had been admitted to practice law in California for more than 16 years before the misconduct and he cooperated with the State Bar by entering into a stipulation of facts. No aggravating factors were involved.

The State Bar, recognizing that respondent did perform for the Fortunos and refunded the entire fee, recommends that respondent receive a private reproof. Respondent is seeking a dismissal or an agreement in lieu of discipline.

The court looked to the case law for guidance. While no case law is directly on point, the court found *In the Matter of Taylor* (Review Dept. November 9, 2012, No. 10-O-05171, et al., as modified January 9, 2013) 5 Cal. State Bar Ct. Rptr. ____ [2012 WL 5489045], to be somewhat helpful.

In *Taylor*, the attorney, in eight client matters, was found culpable of charging illegal fees in violation of section 6106.3. No moral turpitude was involved. In aggravation, the attorney committed multiple acts of misconduct, caused significant harm, and demonstrated indifference. In mitigation, the attorney presented good character evidence. The Review Department recommended that the attorney be suspended for a period of two years, with the execution stayed, and that he be placed on probation for two years including a six-month period of actual suspension and/until full payment of restitution.

The present case is similar to *Taylor* in that it involves a violation of section 6106.3. There, however, is where the similarities end. *Taylor* involves considerably more extensive misconduct and aggravation than the present matter. The court finds that a single violation of section 6106.3, with significant mitigation and no factors in aggravation, warrants the lowest level of discipline advocated by standard 2.10.

Therefore, having considered the evidence, the standards, and the case law, the court concludes that a private reproof is sufficient to protect the public, the courts, and the legal profession.

Discipline Order

It is ordered that respondent **Joel Mark Feinstein**, State Bar Number 177546, is privately reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproof will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interests of respondent and the protection of the public will be served by the following specified conditions being attached to the private reproof imposed in this matter. Failure to comply with any condition(s) attached to the private reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional

Conduct. Respondent is ordered to comply with the following conditions attached to his private reproof for one year following the effective date of the private reproof:

1. During the one-year period in which these conditions are in effect, respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
2. Within 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.
3. 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 attached to his private reproof. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the one-year period in which these conditions are in effect, respondent must promptly meet with the probation deputy as directed and upon request.
4. During the period in which these conditions are in effect, 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 period in which these conditions are in effect. 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 conditions attached to his reproof 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 the reproof 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 period in which these conditions are in effect and no later than the last day of that period.
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions attached to this reproof.
6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

7. The period during which these conditions are in effect will commence upon the date this decision imposing the private reproof becomes final.

In light of the level of discipline imposed, it is not ordered that respondent take and pass the Multistate Professional Responsibility Examination.

Dated: March _____, 2013

RICHARD A. HONN
Judge of the State Bar Court