

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

FILED

SEP 23 2016

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

In the Matter of

STEPHEN RAWLIEGH GOLDEN,

Member No. 163366,

A Member of the State Bar.

) Case No.: **16-TE-14488-WKM**

) **ORDER DENYING APPLICATION FOR**
) **INVOLUNTARY INACTIVE ENROLLMENT**
) **(Bus. & Prof. Code, § 6007, subd. (c)(1)-(3).)**



INTRODUCTION

This matter is before the court on the verified application of the Office of Chief Trial Counsel of the State Bar of California (OCTC), seeking to enroll respondent Stephen Rawliegh Golden involuntarily as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (c)(1)-(3)¹ and Rules of Procedure of the State Bar of California, rule 225 et seq. OCTC seeks respondent's involuntary inactive enrollment even though it admittedly does not question his competence or professionalism, and it acknowledges that he has obtained valuable results for his homeowner clients in some cases.

Section 6007, subdivision (c)(1)-(3), authorizes the State Bar Court to order an attorney's involuntary inactive enrollment upon a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public. In order to find that an attorney's conduct poses such a threat, OCTC must establish, by clear and convincing evidence:

¹ Except as otherwise noted, future references to section(s) are to this source.

(1) that the attorney has caused or is causing substantial harm to his clients or the public; (2) that the attorney's clients or the public are likely to suffer greater injury from the denial of the application than the attorney is likely to suffer if it is granted or there is a reasonable likelihood that the harm will reoccur and continue; and (3) that there is a reasonable probability that OCTC will prevail on the merits in the underlying or related original disciplinary proceeding. (§ 6007, subd. (c)(2)(A)-(C); *Conway v. State Bar* (1989) 47 Cal.3d 1107; *In the Matter of Mesce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 658, 661.) In addition, where the evidence establishes a pattern of behavior, including acts likely to cause substantial harm, the burden of proof shifts to the attorney to show that there is no reasonable likelihood that the harm will reoccur or continue. (§ 6007, subd. (c)(2)(B).)

As set forth *post*, the court finds that the three prerequisites to involuntary inactive enrollment under section 6007, subdivision (c)(2) have not been met by clear and convincing evidence. In other words, OCTC has not clearly established "exigent circumstances" sufficient to ensure that respondent's inactive enrollment would not contravene the Supreme Court's inherent prerogatives over attorney discipline. Further, OCTC has not clearly established "exigent circumstances" sufficient to justify enrolling respondent inactive before respondent has been given a formal disciplinary proceeding in which he "is entitled to the full range of discovery procedures and has [a] greater opportunity to prepare a substantive defense to the charges." (*Conway v. State Bar, supra*, 47 Cal.3d at pp. 1119 & 1120, fn. 7.) Accordingly, the court will deny OCTC's application.

PROCEDURAL HISTORY

OCTC filed and served on respondent its verified application for respondent's involuntary inactive enrollment on July 14, 2016. The court initially scheduled a hearing on this matter for August 10, 2016, pending receipt of a request for a hearing by respondent. At a status

conference held on July 19, 2016, respondent indicated through counsel that he would be requesting a hearing with the filing of his response. Also at that status conference, OCTC requested a continuance of the scheduled hearing date due to a pre-existing vacation scheduled for one of the trial counsel assigned to the matter. The request for a continuance was not opposed by respondent, and a stipulation for new hearing dates was filed by the parties on July 20, 2016, at the request of the court. While the court initially denied the continuance on July 27, 2016, it subsequently granted the request and the hearing was rescheduled for August 17 and 18, 2016.

On July 28, 2016, respondent timely filed a verified response to the application. In his response, respondent made a proper request for a hearing on the application. On August 4, 2016, respondent filed a verified supplemental response to the application, and OCTC filed a reply to respondent's verified response. That same day, respondent also filed a motion to dismiss the application and a request to present oral testimony of respondent at the hearing. On August 5, 2016, OCTC filed its opposition to the motion to dismiss and the request to present oral testimony.

On August 16, 2016, OCTC requested a continuance of the scheduled hearing dates due to a family emergency of one of the trial counsel assigned to the matter. Finding good cause at a status conference the following day, the court rescheduled the hearing dates to August 25 and 26, 2016. It also granted respondent's motion to present oral testimony, and it also granted OCTC's request to present oral rebuttal testimony.

The matter was heard on August 25 and 26, 2016, as scheduled. The court denied respondent's motion to dismiss the application prior to the hearing. At the conclusion of the hearing the matter was submitted; however, the parties were given until September 6, 2016, to file closing briefs. (Rules Proc. of State Bar, rule 5.229.) OCTC was represented by Senior Trial

Counsel Murray B. Greenberg and Deputy Trial Counsel Timothy G. Byer. Respondent was represented by Attorney David A. Clare.

JURISDICTION

Respondent was admitted to the practice of law in California on January 4, 1993. He has continuously been a member of the State Bar since that time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In *Conway v. State Bar, supra*, the five-justice majority rejected the dissent's position that section 6007, subdivision (c), was unconstitutional as an invalid delegation of judicial power to the State Bar by the Legislature and held that "the statutory authorization for the [State Bar Court] to order involuntary inactive enrollment in *exigent* circumstances, subject to our immediate and plenary review, cannot reasonably be said to 'defeat or materially impair' the inherent prerogatives of this court. [Citation.]"² (47 Cal.3d at p. 1120, fn. 7, italics added.) Further, the Review Department has aptly noted that a section 6007, subdivision (c)(1)-(3), inactive enrollment proceeding "may be very roughly analogized to a preliminary injunction proceeding in a civil matter." (*In the Matter of Phillips* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 47, 49.) This point is an important one because "[a]n attorney enrolled inactive is barred from the practice of law as much as a disbarred attorney. Indeed, involuntary inactive enrollments [under section 6007, subdivision (c)(1)-(3),] may become effective just three days from the order as contrasted to a Supreme Court order of disbarment which traditionally affords thirty days before becoming effective. [Citations.]" (*Id.* at p. 50; e.g., *In re Silvertan* (2005) 36 Cal.4th 81 [where the attorney's disbarment was not effective until 30 days after the Supreme Court's disbarment order].) To be sure, it is improper for the State Bar Court to order an

² This holding was made *after* section 6007, subdivision (c), had been amended in 1986 to delete the requirements that there be proof of "irreparable harm" and that the attorney pose "an imminent threat of harm."

attorney's inactive enrollment under section 6007, subdivision (c)(1)-(3) unless OCTC clearly establishes that there is a "need for immediate public protection to protect existing or future clients from additional risk of harm." (*Ibid.*; cf. *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 531-532.) To conclude otherwise would result in orders of involuntary inactive enrollment that "defeat or materially impair the Supreme Court's inherent prerogatives" in attorney disciplinary matters (*In the Matter of Tiernan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 532) and that effectively make disciplinary recommendations of actual suspension at least partially unreviewable by the Supreme Court.

Substantial Harm to Clients or Public

To establish that respondent has caused or is causing substantial harm to his clients or the public (§ 6007, subd. (c)(2)(A)), OCTC attached declarations from 11 of respondent's former clients.³ According to OCTC, those 11 declarations establish that respondent collected a total of

³ The court for purposes of this proceeding rejects, for want of credibility, almost all of the testimony in the 11 former-client declarations attached to OCTC's application. Of course, when determining the credibility of declaration testimony, which is one of a trial court's duties, the trial court is not required to believe a statement of fact in the declaration even if there is no evidence contradicting it. (*Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1017, fn. 7.) This is particularly true when the statement is physically impossible or inherently improbable (*People v. Scott* (1978) 21 Cal.3d 284, 296) or the declarant has an obvious bias or self-interest (*Leonard v. Watsonville Community Hospital* (1956) 47 Cal.2d 509, 518). The court finds that much of the testimony in the 11 former-client declarations is rebutted by the more credible declaration testimony in the declarations that are attached to respondent's July 28, 2016, response to the application and August 4, 2016, supplemental response to the application and by respondent's credible in-court testimony during the hearing on the application.

The 11 former-client declarations contain conclusory statements, many of which are inconsistent with the documentary evidence (e.g., the fee agreements signed by the clients). Some of the declarations contain very similar conclusory statements. A number of the declarations contain statements or conclusions of law as though they were statements of fact.

Moreover, two of the 11 former-client declarants also presented in-court testimony during the hearing on the application. The in-court testimony of both of those witnesses was at least partially inconsistent with their declaration testimony. Such inconsistencies, even if on non-key issues, strongly indicate that the witnesses' declaration testimony lacks credibility and accuracy. The inconsistencies also suggest that the declaration testimony of the other 9 former clients also

more than \$272,800 in advanced fees from the 11 former clients *solely* for mortgage-loan-modification or mortgage-loan-forbearance services before respondent had performed each and every service he had contracted to perform in violation of Civil Code section 2944.7, subdivision (a). Civil Code section 2944.7, subdivision (a), provides that it is 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 . . . [¶] . . . [c]laim, 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.” Section 6106.3, subdivision (a), provides that an attorney who violates Civil Code section 2944.7 is subject to discipline.

Respondent adamantly denies that he has violated Civil Code section 2944.7. Specifically, respondent asserts that he did not and does not perform mortgage-loan-modification or mortgage-loan-forbearance services or any other service within Civil Code section 2944.7’s purview. Respondent maintains that he contracted to perform and performed litigation and foreclosure-prevention services by, inter alia, asserting claims against mortgage lenders and servicers under California’s “Home Owners Bill of Rights and other laws including a possible

lacks credibility and accuracy since the declarations were also presumably drafted by OCTC for the other 9 former clients to sign.

Moreover, the court rejects for want of credibility virtually all of former client Cherie Adams’s in-court testimony. Her testimony was confusing, and she lacked factual recall. She was frustrated and confused about the facts of her case. Notably, Adams and the other former client who presented in-court testimony at the hearing effectively admitted that they did not know or understand all of the legal services that respondent and his firm performed on their behalf. Moreover, Adams admits that she failed to timely inform respondent or his firm of a very significant event affecting her case, which a reasonable person would have immediately told to their attorney (i.e., that her lender intended to foreclose on her home). She also gave another attorney credit for getting her lender to set aside its wrongful foreclosure on her home when it appears that respondent’s firm did so.

Real Estate Settlement Procedures Act claim,” which did not fall within Civil Code section 2944.7’s purview. Respondent appropriately supports his position with the following statements from a December 2012 State Bar publication providing the profession with guidance on Civil Code section 2944.7, which was enacted as Senate Bill 94, in question-answer format:

Does [Civil Code section 2944.7] apply to circumstances where an attorney who represents a borrower in a civil action against a lending institution (for example, alleging that the lender engaged in predatory or unlawful loan practices) receives an offer from the defendant to settle the civil action by granting the borrower a loan modification?

No. [Civil Code section 2944.7] applies only to employment contracts which are entered into for the purpose of obtaining a loan modification or forbearance for a borrower. If the *genuine purpose and goal of an employment contract is to pursue remedies other than a loan modification or forbearance*, [Civil Code section 2944.7] does not apply.

(Respondent’s July 28, 2016, response to application, exhibit 1001, page 3, italics added.)

OCTC apparently agreed with respondent’s contention from about 2013 when OCTC attorneys closed their first investigations into his alleged violations of Civil Code section 2944.7⁴ until sometime this past summer after the Review Department filed its opinion in *In the Matter of DeClue*, case number 14-O-00482 on May 10, 2016 (*DeClue*).⁵ In fact, in January 2016, respondent filed a motion to abate case number 14-O-06366-WKM in which respondent is charged with collecting advanced fees in violation of Civil Code section 2944.7 from six of the

⁴ Before closing its first investigations, OCTC required that respondent include, in his fee agreements, as a separate statement in 14-point font, the statement required under Civil Code section 2944.6 to notify the clients that they are not required to hire a third party to obtain a loan modification. OCTC’s assertion that respondent’s inclusion of that statement in his fee agreements is evidence that he was retained to obtain loan modification is disingenuous at best.

⁵ The court takes judicial notice that neither party filed a petition for writ of review in *DeClue* and that the Supreme Court adopted and imposed the Review Department’s discipline recommendation in *DeClue* in an order filed on September 21, 2016, in case number S235949. Accordingly, *DeClue* remains citable as precedent under Rules of Procedure of the State Bar, rule 5.159(C) even though the Supreme Court’s order will not be final until 30 days after it was filed (Cal. Rules of Court, rule 9.18(a)).

11 former clients who executed declarations in support of the application and with failing to account to those same six former clients. In accordance with respondent's motion, which was not opposed by OCTC, the court abated case number 14-O-06366-WKM to await the Review Department's opinion in *In the Matter of Jorgensen*. In *Jorgensen*, the attorney also argued that his lender litigation services did not fall within Civil Code section 2944.7's purview.

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);⁶ and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all loan modification services are completed (codified as Civ. Code, § 2944.7). The 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.)

OCTC contends that respondent's assertion that his litigation and foreclosure-prevention services are not within Civil Code section 2944.7's purview is meritless under *DeClue*. OCTC opines that *DeClue* "has definitively settled the issue as to whether a 'lender litigation' practice

⁶ 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.

such as Golden's is subject to the prohibition on advanced fees for loan modification or mortgage forbearance" under Civil Code section 2944.7 adversely to respondent. (OCTC's July 14, 2016, application, page 6, lines 3 through 5.) The court cannot agree.

In *DeClue*, the court concluded, based on the documentary and testimonial evidence admitted and subject to cross-examination at trial (and not based on 11 conclusory declarations, of which only 2 of the 11 declarants were subject to cross-examination), that the nominal litigation services performed by unsupervised nonattorneys were subject to Civil Code section 2944.7's proscription of advanced fees because the services "served only as a pretext" for a loan modification. The litigation services were found to be pretextual because the record in that proceeding clearly established that the client retained Attorney DeClue⁷ for the *sole* purpose of securing a loan modification and that the client *repeatedly* communicated that sole purpose to Attorney DeClue and one of his employees.

Unlike Attorney DeClue, respondent has not employed a company owned and operated by nonattorneys to solicit clients seeking home loan modifications and to then provide those clients with loan modification services without supervision. In addition, unlike Attorney DeClue, respondent is actively litigating his homeowner clients' cases in superior court and federal district court and, as OCTC admits, obtaining valuable results for those clients.

OCTC's contention that the 11 former clients testify in their declarations "(as did the clients in *DeClue*) that they employed respondent for loan modification only, with litigation employed ... as merely a tactic to that end" is belied by the 11 former-client declarations

⁷ Attorney DeClue recklessly employed a company owned and operated by two nonattorneys to expand and operate his law practice from criminal defense to one including foreclosure defense and failed to supervise that company, its owners, and its employees as they operated a very large part of his practice. Attorney DeClue's situation, as described in that case, is clearly not the same as respondent's, where 60 percent of his practice and a staff of six attorneys and three paralegals engage in active litigation against lenders.

themselves. These declarations do not state that respondent was retained solely or exclusively to obtain a loan modification. Furthermore, even if the 11 declarants had in fact testified as OCTC contends, their testimony would have been belied by the written fee agreements. Moreover, there is no evidence that any of the 11 former clients ever expressly communicated to respondent he was retained exclusively to obtain a loan modification much less repeatedly communicated that fact to him or his employees. One of the former clients who testified in court openly admitted that he knew respondent would be and was pursuing more than just a loan modification.

When OCTC attorneys first began investigating respondent's alleged violations of Civil Code section 2944.7 in about 2011 or 2012, the OCTC attorneys insisted that respondent was illegally charging each of his homeowner clients a monthly flat fee of about \$1,500. However, the OCTC attorneys changed their minds after they closed their first investigations in 2013. OCTC asserts that respondent's conduct caused the 11 former clients significant harm and continues to cause his present clients significant harm by charging and collecting fees for home loan modification services in violation of Civil Code section 2944.7. OCTC, however, has not proved that respondent is collecting fees in violation of Civil Code section 2944.7. Further, OCTC has not proved that respondent is collecting fees and then not performing any legal services for them. To the extent that OCTC asserts that respondent's conduct has harmed a former or is harming a present client because the legal services he performed were of no value to the client, the court rejects the assertion. OCTC has not established that respondent has performed meritless or frivolous legal services, and the record strongly suggest the contrary. Whether an attorney's services are ultimately of no value to the client, either objectively or subjectively, is almost always immaterial to determining whether the attorney has earned all or part of his or her fees. (See, e.g., *Berk v. Twenty-Nine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625, 637 [A "client cannot escape full payment [in accordance with the terms of a

fee agreement] merely because the attorney's services prove to be less valuable than the parties had in mind when they entered into the [fee agreement].")

Even though OCTC also asserts that respondent is culpable of other acts of misconduct that caused substantial harm to the 11 former clients, OCTC failed to prove respondent's culpability of those acts by clear and convincing evidence. Moreover, even if respondent is culpable of the other alleged misconduct, there is no evidence that any such misconduct caused any past or present client substantial harm. In sum, OCTC failed to establish, by clear and convincing evidence, that respondent has caused or is causing substantial harm to his clients or to the public. (§ 6007, subd. (c)(2)(A).)

Respondent's Clients Are Likely To Suffer Greater Injury

The record establishes that, if respondent is involuntarily enrolled inactive, virtually no other attorney would agree to represent any of his present homeowner clients and that almost all of those clients, of which there are about 60, would lose their homes to foreclosure and be evicted. Thus, the denial of inactive enrollment will benefit respondent's present clients. Even though the record in this proceeding establishes that respondent will be seriously harmed if inactive enrollment is ordered, the record fails to establish that the public will be harmed by the denial of inactive enrollment. Finally, because the record does not establish any substantial harm to respondent's clients or the public, respondent has effectively shown that there is no reasonable likelihood that any such harm will reoccur or continue. (§ 6007, subd. (c)(2)(B).)

There Is A Reasonable Probability That OCTC Will Prevail

The present record fails to establish that there is a reasonable probability that OCTC will prevail on the merits of the underlying disciplinary matter. (§ 6007, subd. (c)(2)(C).)

Nonetheless, after all the relevant evidence is presented at trial and the unresolved questions of

law are adequately briefed, OCTC might prevail on the merits of the underlying disciplinary matter.

ORDER

The court orders that the Office of Chief Trial Counsel's July 14, 2016, application for involuntary inactive enrollment is **DENIED** with prejudice as to the misconduct alleged in the application, as the record fails to establish that STEPHEN RAWLIEGH GOLDEN'S conduct poses a substantial threat of harm to the interests of his clients or to the public.

Dated: September 23, 2016

A handwritten signature in black ink, reading "W. Kearse McGill". The signature is written in a cursive style with a horizontal line underneath the name.

W. KEARSE MCGILL
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on September 23, 2016, I deposited a true copy of the following document(s):

ORDER DENYING APPLICATION FOR INVOLUNTARY INACTIVE
ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

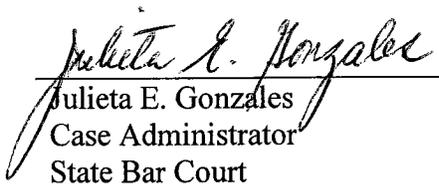
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DAVID ALAN CLARE
DAVID A CLARE, ATTORNEY AT LAW
444 W OCEAN BLVD STE 800
LONG BEACH, CA 90802

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Timothy G. Byer, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on September 23, 2016.



Julieta E. Gonzales
Case Administrator
State Bar Court